BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

MARY MATHARU,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1424369
	)	
LITTLE SISTERS OF THE POOR,	)	
	)	
Employer.	)	

DECISION ON PETITION TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on November 4, 2015, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

LOWELL L. GROUNDLAND

JOHN D. DANIELLO

Kimberly A. Wilson, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Richard T. Wilson, Attorney for the Employee

Christian G. McGarry, Attorney for the Employer/Carrier

NATURE AND STAGE OF THE PROCEEDINGS

Mary Matharu ("Claimant") injured her cervical spine (also "neck") while working for Little Sisters of the Poor ("Employer" or "Little Sisters") on July 23, 2012. The injury was recognized as compensable and Claimant has received certain workers' compensation benefits. Claimant has been receiving total disability benefits since her accident at the rate of $260.29 per week, based on her wage at the time of injury of $390.43 per week.

On June 2, 2015, Employer filed a Petition to Terminate Benefits seeking to terminate Claimant's receipt of total disability benefits. Employer argues that Claimant is capable of returning to work in some capacity and that there is evidence of work available in the general labor market within her restrictions. Claimant concedes that she is capable of working but argues that she is a displaced worker. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision.

A hearing was held on Employer's petition on November 4, 2015. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant was called as the first witness for Employer. Claimant was totally disabled following a neck injury, but her surgeon, Dr. Rudin, recently told her that she is capable of returning to sedentary work. He restricted her from lifting anything beyond ten to fifteen pounds and told her that she should not work on her feet a lot. He also advised her that she needs a job that is mostly sitting in nature. Claimant had a functional capacity evaluation ("FCE") in May of 2015, which also indicated that she was capable of working.

When Claimant worked for Employer, she was a CNA. She provided personal care to patients and assisted the nurse in charge. A CNA requires specialized training, and Claimant

trained at the Delaware Skills Center every day, all day, for eight weeks in order to be trained as a CNA. This involved homework, but not really any computer work. Claimant does not own a computer at home.

Claimant was questioned about her current condition. Claimant's neck is still painful. As a result, Claimant has to constantly readjust while sitting to be more comfortable. Claimant drives, but not often. Her driving is limited because it can get painful. Claimant's husband does most of the cooking and cleaning at home. Claimant does go grocery shopping with him when she is up to it, but her husband does most of the shopping. Claimant does not do much during the typical day. She reads the paper, does puzzles, watches television and job searches.

Claimant discussed her background. She received a high school diploma in 1975. She briefly attended Delaware Technical & Community College in 1984, but withdrew due to her son's medical condition.[1] Before she worked for Little Sisters, Claimant worked for Comfort Keepers as a caregiver, assisting residents with activities of daily living, hygiene and other duties as needed. Prior to that, Claimant worked for Chimes, caring for handicapped and disabled patients. Before Chimes, Claimant performed housekeeping work for Newark Manor Nursing Home as well as Gardens of White Chapel. Further, Claimant worked at Woodside Elementary School as a tutor for special education children. The work was on a volunteer basis and Claimant would provide any help that the children needed. The work would also include helping the children in and out of wheelchairs, at times. In the past, Claimant also worked as a banquet server at North East River Yacht Club.

After Dr. Rudin released Claimant to return to work, Claimant updated her resume. Her current resume is handwritten, as Claimant does not have a computer at home.[2] Claimant does

[1] Claimant testified that her son is now 33 years old, and no longer lives with her.
[2] Claimant's most recent handwritten resume was marked into evidence as Employer's Exhibit #1.

have a Yahoo email account, however. She also conceded that the resume she submitted to Little Sisters before she began working there was typewritten.[3] Claimant explained that she had not typed the resume herself; she had another person type it for her years ago. Claimant had handwritten her own resume and then had a Division of Vocational Rehabilitation ("DVR") worker type it up for her. That was the resume that she had submitted to Little Sisters. Unfortunately, the only copy that Claimant had of that resume got ruined and was no longer legible. Claimant agreed that when she attended the Delaware Skills Center, the importance of a quality resume was stressed.

Claimant was next questioned about the content contained on her updated handwritten resume versus the typewritten resume. Claimant agreed that she had put on the resume that she had left Chimes due to "Injury on job site to spine" and that she had left Little Sisters due to "Injury on job site; Required spinal surgeries (3) and 3 years recovery time. Left me with physical limitations of sedentary work only." She admitted that she had mentioned the Chimes spinal injury on her newest handwritten resume, though she had not mentioned it on the typewritten resume that she had submitted to Little Sisters. Claimant explained that the DVR person that typed up her resume had told her that the information about her leaving Chimes due to a spinal injury should not be added because it might hurt her ability to get work.

Claimant confirmed that she has documented all of her job searching since her release to return to work. Though she does not have a computer at home, Claimant did some of her job searching using computers at a public library. She is only able to access those computers for up to two hours per day, however. Claimant testified that many of the potential employers she identified seemed to prefer online applications. Claimant identified online job openings via the

[3] The typewritten resume that Claimant had provided to Little Sisters when she sought employment from the company was marked into evidence as Employer's Exhibit #2.

websites ziprecruiter.com, careerbuilder.com, jobsbrassring.com and jobdiagnostics.com. Claimant confirmed that her job search records indicate that she applied online for various cashier, hostess, receptionist, customer service or clerk-type positions.[4] Claimant also saw job opening signs on doors and walked into various locations and also applied for work. Though some of the identified jobs do not specify identification dates, Claimant explained that she began applying for work as soon as Dr. Rudin released her to return to work.

Claimant did agree that there were various other jobs that she applied for or identified that required lifting higher than the restriction that Dr. Rudin had given her. Claimant explained that she had just gone to apply to a lot of places and was unaware that she had a lifting restriction at that time. Some of the employers that she tried to place applications with had told her not to bother filling out an application because she would not be a fit. Rite Aid was one of those places. Claimant recalled filling out an application at Rite Aid, and then the store manager being called over to meet her. Claimant was pulled aside and asked about what "was going on with her" and what her physical limitations were. Claimant told the manager about her work injury and her sedentary work limitations and the manager tore her application in half in front of her. She was told that she could not be considered for the job. This really made Claimant feel bad.

Claimant agreed that she had applied at places like Lowes that tend to have heavy merchandise. She explained that she was just trying to apply for work anywhere and everywhere. Claimant also admitted that while she testified that she cannot do housework in her own home, she had applied for two housekeeping jobs. She explained that she thought she was actually applying for customer service positions. Claimant also agreed that she had applied for jobs that appeared to be waitressing, which would require her to be on her feet a lot. She clarified that she thought the jobs were hostess positions. She thought that with a hostess

[4] Claimant's "Job Search Records" log was marked into evidence as Claimant's Exhibit #1.

position, she might be able to sit down when a restaurant was not as busy. Claimant agreed that she had also applied to the Culinary Arts Group, although she testified that she cannot cook. Claimant explained that she thought that maybe she could cook while sitting down.

Claimant agreed that she had also applied to the labor market survey ("LMS") jobs. She sent her resume to the LMS employers and applied to most of them online. Claimant then called them, but was told that they would instead contact her. She was also told that they only hold applications for 30 to 60 days, and that if she did not hear from them, she would not likely be hired. Claimant agreed that she did not call them back after that point; since she was told she would hear within 30-60 days, she felt that there was no point in calling back after that time period passed.

Claimant was questioned about whether she tried to apply for any jobs around the Christiana Mall area. She said that she tried to walk around the mall a little, but was in too much pain. The cement floors were very difficult for her back, so she did not get much accomplished. Claimant felt that it was also too hard for her to drive there from Wilmington because she is limited in how much she can drive. While Claimant injured her neck in this work accident, Claimant has had other injuries to her back, shoulder and arm also.

Claimant was next questioned by her own counsel. She agreed that the public libraries allow a maximum of two hours per day of online use per person.

Claimant also agreed that she feels that it is more prudent to tell potential employers about her physical restrictions because it is not acceptable to accept a job that she cannot perform. If a job caused further harm to Claimant, it would also not make sense.

Claimant testified that she had also suffered a back injury at one point while lifting a resident. She had an onset of pain and then went to Occupational Health. Claimant received

medications, physical therapy and medications for treatment. Claimant acknowledged that she had a prior neck injury in 2005 as well; however, between 2006 and this work accident, she really did not have any issues with her neck.

Claimant agreed that, after this work accident, she was referred to Dr. Rudin in December of 2012. She had known him from before from prior injuries. Claimant has had three or four total surgeries to date. While Claimant had other surgeries prior to her work accident, she was able to perform all of her CNA work duties before this incident.

Dr. Rudin released Claimant to full time sedentary work on July 1, 2015, after he reviewed the results of the FCE with her. She began looking for a job after that. Claimant agreed that there are about 45 handwritten job search contacts that she left undated. She explained that she identified these contacts by branching out to different businesses in close relation to her home and went in and verbally asked about work. These were "cold calls" in that Claimant did not know whether or not any positions were actually available before she inquired or applied. She did inform these employers of her physical limitations. A lot of them would not even accept applications from Claimant. This included the incident at Rite Aid. Some had accepted applications from her, however.

Claimant testified that she was able to apply to every job on the LMS except for the Appletree job, though she went online to try to place an application.[5] Appletree indicated online that there were no jobs at the company that fit her search criteria, though Claimant could not remember what terms she had used to search. Claimant had also informed each LMS employer of her physical restrictions. These applications were placed the last week of August 2015. This includes the Central Parking position; Claimant applied online and thought that she had gotten an

[5] An additional packet containing Claimant's job search efforts, including the LMS employers, was marked into evidence as Claimant's Exhibit #2.

acknowledgement that the application had been received. Claimant tried to apply online for the LabCorp position, but she was not able to because the job was listed as "closed."

Claimant particularly remembered applying for the Be Truly Well Chiropractic position that Employer identified on the LMS. She called and was told to submit a resume by mail, so Claimant did so. She used the address provided on the LMS. Claimant could recall waiting in a long line at the post office to mail her resume to this employer. Claimant also recalled applying for the Simon Eye, Dental Spa and 7-Eleven jobs. She has yet to hear any response in regard to any of these applications.

Claimant also tried to apply for a customer service job at Christiana Hospital; because the job was no longer open, she was not able to even apply for it. Claimant was then enrolled in something, however, in which Christiana Hospital began sending her emails regarding other job opportunities. Unfortunately, all of the jobs sent to her were nursing and physician positions that she did not qualify for.

Claimant also looked into employment with the Costco food court area. She did not apply at Costco for two reasons: first, an employee named "Debbie" told her that they only hire in the spring. Second, Debbie said that employees must be able to do every job in the store in order to be hired. She was told this includes "stocking," which is a very physical job.

Claimant had a similar experience with Chipotle. She inquired in the store about what she thought was a cashier position, but was told by "Rue" that no positions existed within her restrictions. Claimant was told that the job would be physical. She did not place an application as a result. Claimant also looked into Bon Appetit, but the job she was inquiring about was already filled before she got there.

Claimant placed various applications for receptionist, customer service or cashier jobs that she believed were within her work restrictions. These included Cardia Rehabilitation, Toll Brothers, Delaware Park, Hertrich, YMCA, Z-Market, US Security, Raymour and Flanigan, Amtrak, Michaels, Safeway, Waste Management, Sports Authority, Pizza Hut, Pathmark, Creamery Tire, Wegmans, Cracker Barrel, Albertson's and AEX Group. Claimant received confirmations that her applications were received, but she did not otherwise hear back from most of these potential employers. Claimant had received emails from Delaware Park and Hertrich indicating basically that the employers were not interested in hiring her at the present time.

Claimant also contacted DVR at the Delaware Department of Labor for help with job placement. Claimant was interviewed, and asked about what she thought she was able to do. Claimant had indicated "cashier" and "hostess," though she stated that she had not had any luck acquiring those types of positions. Claimant then asked for guidance on what type of job she might be able to do, given her restrictions; however, it did not seem that the DVR representative was able to provide much help in this regard.

Claimant further returned to the Delaware Skills Center to apply for a medical assistant's class. Claimant applied, took a test and had an interview with a nurse that trains assistants. However, during the interview, Claimant was told that a medical assistant job would require her to be on her feet a lot as well as the ability to lift forty pounds.

Claimant testified that she agrees with Dr. Rudin that she cannot perform work outside of a sedentary limitation. She wants to return to work and has no intent to retire at 58 years of age. If an employer offered her a job or job placement, she would accept the position. Claimant believes that she has made the best efforts that she can to find work within her restrictions.

Dr. John Townsend, III, a neurologist, testified by deposition on behalf of Employer.[6] Dr. Townsend evaluated Claimant on two occasions and supplied reports of his conclusions in this case on April 2, 2015 and August 21, 2015. He further reviewed Claimant's pertinent medical records in performing his evaluation.[7]

Dr. Townsend noted that Claimant's most recent surgery was for removal of spinal instrumentation at C4-5. Afterward, she complained of pain of 7 on a scale from 1 to 10 and returned to Dr. Rudin in January 2015. At that point, Claimant reported pain in her neck that she rated as an 8 out of 10. She was using oxycodone and Neurontin at the time.

In April 2015, Dr. Townsend first examined Claimant. At that time, Claimant advised Dr. Townsend that she was injured while moving a resident while working as a CNA. She was reportedly moving the resident while the wheels on a lift locked and pulled—as did the resident—and Claimant subsequently developed neck pain as a result. Claimant had physical therapy, an MRI, and ultimately surgery from Dr. Rudin.

Dr. Townsend discussed Claimant's April 2015 subjective complaints. She noted that she had neck pain that would go into both sides of the neck with numbness in the left shoulder blade, left thumb, index and little finger. Claimant also complained of some right shoulder pain. She described her average pain level as a 7 on a scale from 1 to 10 without medication.

[6] Dr. Townsend's deposition was marked into evidence as Employer's Exhibit #3.

[7] Dr. Townsend testified that Claimant suffered a right shoulder and neck injury in 2005 while lifting a heavy patient. Claimant had nerve root blocks, followed by an anterior cervical discectomy and fusion at C5-6 and C6-7. A subsequent EMG suggested chronic right-sided C6 radiculopathy. She had a permanency evaluation. Claimant had no obvious complaints of neck or arm pain in her 2010-2012 medical records, however.

Claimant did return for treatment in July 2012 for complaints of right shoulder pain after pulling a patient. She had tenderness over the right paracervical region that she rated as a 7 out of 10. She was released to light duty work and had a course of physical therapy. Claimant ultimately had another surgery in January 2013, in which Dr. Rudin removed the old spinal instrumentation and did a discectomy and fusion at C4-5, the level above the prior fusion. Claimant continued with neck and arm complaints, though she stated she had a 50% improvement following surgery. Claimant then had a CT scan of the cervical spine in June of 2013, which suggested a nonunion, and Claimant ultimately had a posterior fusion in August of 2013.

On examination, Claimant had decreased cervical range of motion. Dr. Townsend did not find any muscle spasm, but she did have tenderness in the neck. Neurologically, she had normal strength in the upper and lower extremities as well as normal reflexes. Her gait was normal and she had a normal sensory exam to temperature and vibration. She made no complaint in regard to her use of oxycodone and Neurontin. Dr. Townsend's impression was of chronic neck and arm complaints, though she had a normal neurological exam, following an anterior cervical fusion at C4-5.[8]

As of April 2015, Dr. Townsend felt that Claimant was capable of working. He suggested a sedentary job with no more than 10 pounds of lifting occasionally. His recommendations were that Claimant could sit five hours per day, stand two to three hours a day and walk one to two hours a day. Dr. Townsend testified that these recommendations were based on Claimant's subjective complaints.

Claimant had had an FCE on May 2, 2015. The FCE examiners felt that Claimant gave variable levels of physical effort, based on self-limiting behaviors. This meant that the patient said that she could not complete certain panels of lifting because of neck pain. Claimant was said to have given low effort on the grip testing studies and was noted to have few examples of competitive test performance during the exam. They felt that, based on her lifting, she could lift up to 12.5 pounds occasionally, though noted that there was some inconsistency in her pain and disability reports; namely, Claimant saw herself as being severely disabled, though she did not appear severely disabled in terms of her neck function during the observational portion of the study. Further, while Claimant demonstrated standing tolerance for 42 minutes and an hour's worth of sitting tolerance during the FCE, this was four to six times more than what Claimant

[8] Dr. Townsend confirmed that Dr. Evan Crain had evaluated Claimant's right shoulder in April of 2014, and he had released her to return to full duty work as to the shoulder only at that time.

stated that she could do. Claimant also reported that she perceived herself as being capable of doing less than sedentary work, though the study showed that she was capable of doing so. Dr. Townsend confirmed that the FCE findings suggested that Claimant was embellishing her symptoms.

Overall, the FCE found that Claimant was capable of full-time sedentary to light duty work, with no lifting of more than 12.5 pounds, and that material handling below twelve inches was not recommended. Dr. Townsend explained that this meant that they probably did not want her bending at the waist.

When Dr. Townsend evaluated Claimant again in August of 2015, he first reviewed Claimant's updated medical records from Dr. Rudin. Dr. Rudin had reviewed the FCE results and released Claimant to work in accordance with the FCE findings. Further, Claimant had an EMG on April 2, 2015. Dr. Townsend testified that the results of the EMG were normal. He explained that although the 2005 EMG found a radiculopathy at the C6 level, the normal 2015 study suggested that there were no ongoing findings consistent with the prior findings.

Dr. Townsend testified that Claimant's physical examination and presentation in August 2015 were much the same as they had been in April 2015. Claimant still reported that her pain was about a 7 out of 10, and that was without medication. She did report that she felt that if she took her medication, she could not drive, though Dr. Townsend saw no indication that any of her physicians had documented problems with her medications.[9] Claimant also reported that her husband was doing the cooking and cleaning at home and that she could not lift anything. Claimant still complained of neck pain and some numbness in the shoulder blade, which were similar to her April 2015 complaints. Dr. Townsend confirmed that Claimant showed nothing on

[9] Dr. Townsend suggested other medications be substituted if Claimant is having a problem with drowsiness. He went on to state, however, that if Claimant has been taking these medications for years, she should not be having new complaints such as drowsiness in this regard.

clinical examination to warrant a suspicion of an active radiculopathy. Dr. Townsend's impression of Claimant remained the same. He did update Claimant's restrictions to avoid lifting more than 15 pounds occasionally; otherwise, the rest of his recommendations remained the same. Again, he based these restrictions on her subjective complaints.

Dr. Townsend testified that he reviewed the LMS and felt that a majority of the jobs were within Claimant's restrictions. He noted that the Hess sales associate job suggested that an employee had to lift up to 20 pounds, which would be outside of the 15 pound lifting restriction he recommended; however, as long as Claimant were able to lift 15 pounds or less, there would be no problem. In fact, he testified that there would be no problem with her performing any of the LMS jobs, which are essentially cashier/receptionist-type of jobs and greeter jobs. One job is a security guard job, though it appears to be more of a front-desk type of job rather than one that would involve Claimant being confrontational or needing to act like a police officer

On cross-examination, Dr. Townsend agreed that Claimant's inconsistency was documented to be minor on the FCE in regards to Claimant's pain and disability reports. He further agreed that the report documents, "In describing such findings, this evaluator is by no means implying intent."

Dr. Townsend acknowledged that Dr. Rudin had released Claimant to full-time sedentary work. He agreed that this was because Dr. Rudin had felt that 12.5 pounds was closer to sedentary duty than to the 20 pounds reflective of light duty.

On redirect examination, Dr. Townsend agreed that the LMS jobs are reasonable from a sedentary perspective, in which Claimant could lift no more than 10 pounds; this is with the exception of the Hess job, unless the lifting requirement were lowered.

Andy Rodriguez, Human Resources Director of Little Sisters, testified on behalf of Employer. He has worked in this capacity for Little Sisters since 1997. His job entails recruitment, retention, payroll/benefits and consultation with other Little Sisters facilities.

Mr. Rodriguez hired Claimant personally through the Delaware Skills Center program. In 2000, there was a huge shortage of CNA workers. As a result, Mr. Mr. Rodriguez sought to link with the Delaware Skills Center program because he was impressed with their ability to train adults in certain fields. The Delaware Skills Center interview process was very selective; out of about 120 applicants, they usually only selected 15 to 20 students for their program. The students have to pass a math and a reading exam. Once selected, the students are not only prepared as medical assistants, they are also prepared on becoming job-ready. This includes the proper preparation of a resume, how to interview and how to be marketable in the employment market. Mr. Rodriguez also conducted a question and answer session of things to say and not to say during an interview. This included things that can sabotage one's ability to get a job.

Mr. Rodriguez was personally involved in hiring Claimant and interviewed her based on her resume.[10] He met her during a job fair tour that Little Sisters does once a quarter. Claimant had done very well through the CNA program at the Delaware Skills Center. He noted that, over the years, CNA positions have become increasingly comprehensive positions. They involve morning and afternoon care of patients, activities of daily living, and infection control. Further, there is a lot of documentation and record keeping involved.[11] In fact, Little Sisters is State-

[10] Mr. Rodriguez was shown Employer's Exhibit #2 (Claimant's handwritten resume). He confirmed that he was surprised that she had submitted such a resume, given her training in completing a resume during her studies at the Delaware Skills Center. He also testified that he would not personally consider a candidate with the resume. Claimant objected to this questioning on the basis that Mr. Rodriguez was not an expert; Employer proffered that as Mr. Rodriguez has worked for a long time in the area of human resources, he is capable of testifying in this regard. The Board overruled the objection. Mr. Rodriguez testified on cross-examination that he has been certified by the Society of Human Resource Professionals.

[11] Mr. Rodriguez testified that the use of computers was not really required when Claimant worked for Little Sisters. It was a manual and tedious record keeping process at that time. He testified that now that Little Sisters is audited by

surveyed once a year. In turn, the CNAs are also observed once a year to insure that they are upholding State standards.

Mr. Rodriguez testified about Claimant as a Little Sisters employee. He found Claimant to have great customer service skills with the residents. She had a great rapport with them. Claimant was responsible for about 7 to 8 residents on her floor. Claimant's 90-day appraisals were graded as satisfactory or above; Sr. Gloria had reviewed Claimant and felt that Claimant worked very well with an entire floor of residents.

Mr. Rodriguez noted that a CNA position is medical in nature but is also more than that. These employees essentially keep the residents happy. They get them up in the morning and serve them to the best of their ability, while also dealing with situations such as dementia/Alzheimer's as well as loss of other residents and the residents' loss of their own physical abilities. Claimant was responsible for blood, weight and pulse checks, reporting to a head nurse, making sure residents arrived on time to their medical or physical therapy appointments as well as interacting with the residents during social activities. There is a lot involved with the job and it is a very important job.

On cross examination, Mr. Rodriguez testified that Little Sisters has about 125 employees at the Newark location; there are about 1000 employees between all locations. The closest Little Sisters location to Newark is the Baltimore campus.

Mr. Rodriguez confirmed that, based on her sedentary duty restrictions, Claimant most likely cannot work as a CNA. He testified that, as of the date of the hearing, there were no positions available at Little Sisters location in Newark within Claimant's restrictions. Mr. Rodriguez further testified that there are light duty jobs at times, such as front desk/receptionist

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the State, everything is electronic. However, Mr. Rodriguez noted that Claimant did perform online training using a computer at the time that she worked for Little Sisters.

positions. Claimant would qualify for one of those positions, though there is a low turnover rate for those jobs. He has not had to hire that position in four to five years. Mr. Rodriguez agreed that Claimant was discharged because she had a sedentary duty restriction and there were no jobs available at Little Sisters within that restriction. He agreed that if it were not for her physical restrictions, she would still be employed there. Mr. Rodriguez further testified that Claimant was a good employee and Little Sisters had no issues with her work.

Mr. Rodriguez was questioned about whether someone with physical restrictions would have less opportunities in the open labor market than someone else who is unrestricted. He did not agree that this is the case. Even within the long term care facilities, there are jobs available just doing social activities with residents. Further, she could work front desk/administrative type of jobs within facilities. Mr. Rodriguez reiterated that Claimant had good customer service skills when working with Little Sisters.

The Board next questioned Mr. Rodriguez. Mr. Rodriguez testified that, in a given day, about 20% of a CNAs job is physical, while the other 80% is administrative in nature. The job is likely classified as medium duty.

Mr. Rodriguez further estimated that about 10 to 15% of the jobs at Little Sisters are light duty or sedentary in nature, though he reiterated that due to low turnover, those positions become available only very rarely.

Barbara Stevenson, a vocational rehabilitation expert with Coventry, testified on behalf of Employer. She prepared the LMS in this case in accordance with Claimant's vocational background and physical restrictions. Ms. Stevenson testified that the FCE, Dr. Rudin and Dr. Townsend all had Claimant within a sedentary to light duty capacity, lifting ten pounds

occasionally, sitting up to 5 hours in an 8-hour day, standing up to 2 to 3 hours in an 8-hour day and walking between 1 to 2 hours per day.

Ms. Stevenson also relied on the fact that Claimant is a high school graduate, attended two years of college, attended the Delaware Skills Center and received a CNA certification. She further reviewed Claimant's resume and was aware that she worked in housekeeping, as a CNA, a tutor, as a personal caregiver and as a banquet server in the past.

In Ms. Stevenson's view, Claimant has many transferable skills. She is able to communicate in writing and in speech, both provide and receive information, take care of the elderly, young and sick, talk easily to put others at ease, react quickly to emergency situations, conduct investigations, perform recordkeeping and documentation, just to name a few.

Ms. Stevenson identified 12 jobs on the LMS between May 27th and August 14, 2015 within 30 miles of Claimant's home address.[12] The jobs average between a low of $300 weekly and a high of $578.85 weekly. She verified that each job was available at the time it was identified. Ms. Stevenson also verified that each employer would consider an application from someone with Claimant's background and with her limitations. She testified that the identified jobs are within the restrictions set by both Dr. Rudin and Dr. Townsend.

Ms. Stevenson addressed the Hess job, in light of Dr. Townsend's testimony. The job is basically a self-serve gas attendant. The employee sits in a small store, where items such as sodas, snacks and cigarettes are sold. The employee will take cash and credit card payments as well as give directions. There are two separate Hess locations within 30 miles of Claimant's home. Ms. Stevenson confirmed that the employee would possibly have to lift twenty pounds very rarely, though this could be easily accommodated. This would be a scenario where a

[12] The LMS was marked as Employer's Exhibit #4.

customer bought a whole case of sodas. The employee could just lift one soda at a time instead of lifting the whole case.

As for the Z-Mart job, Dr. Rudin also took issue with the repetitive nature of the job. This store is similar to the Hess store, with sodas, snacks and cigarettes being sold. Ms. Stevenson testified that again, an easy accommodation could be made in which the employee would pick up a can of soda at a time instead of the entire case at once. Even though the job description says heavier lifting, it is only because it presumes that an entire case would be picked up at a time.

Ms. Stevenson next testified about the Appletree job. It is a customer service position providing an answering service. Ms. Stevenson was told that the desk could easily be cranked up or down so that the employee could stand or sit as needed.

As for the Central Parking job, the employee typically sits in a cashier booth taking parking fees. However, the employee can get out, walk around, do squats or leg stretches when not waiting on customers.

Ms. Stevenson was questioned about Claimant's own job search, including the LMS. As a vocational expert, she would classify applying for at least five jobs per day as a good faith effort. There are a lot of job search engines out there online. Based on Claimant's job search log, taking into consideration the letters beginning August 28th through October 23rd, it appeared that Claimant applied for 24 jobs in 10 weeks, or 2.4 jobs per week. Ms. Stevenson also testified that Central Parking had told her that no applications were received from Claimant; in fact, she was also told that anyone who applies for a position from Indeed.com and is rejected will get a letter that he or she had not gotten the job. Additionally, a representative of Be Truly Well Chiropractic had reviewed all of the applications and also stated that she had no application

for Claimant. She indicated that she had a similar position open on October 16th as the front office assistant position identified, though not the same one.

As for the LabCorp position, Melissa Connor advised Ms. Stevenson on October 16, 2015 that they currently had positions open. She was unsure what the status was on August 27th when Claimant stated she had spoken with LabCorp, though they do have positions now.

Ms. Stevenson confirmed that it is good that Claimant went out and "cold called" a lot of jobs, though unfortunately most only accept applications online. Ms. Stevenson did note that a lot of the jobs Claimant applied for exceed her restrictions. Ms. Stevenson testified that the volume of applications is there, but in her personal view, Claimant did not perform a good faith, quality search. Fourteen of the twenty places that Claimant cold-called were outside of her restrictions. Ms. Stevenson opined that job searching requires some common sense. If Claimant has a restriction against standing too much, she should not apply at Burger King, for example, because workers will have to stand the entire shift. Claimant knows that she needs to sit between 5 and 8 hours per shift, so it is not reasonable to apply to that type of job. Also, if she needs to lift less than 10 or 20 pounds, she should not be applying to places like Lowes. Ms. Stevenson noted that Claimant had applied for a lot of fast food and housekeeping type of positions and that these were not sedentary in nature.

As for her computer skills, the fact that Claimant identified job seeking sites that not even Ms. Stevenson knew about speaks to some sophistication online. This shows that Claimant has more than just basic computer skills. Claimant would need to be able to type into a search engine and find what she is looking for. Claimant also has to type her applications online, which further shows that she has some computer skills. These are the same type of skills used by a

front desk person or receptionist. The fact that Claimant claims to have no computer skills but has completed such a job search, is inconsistent, in Ms. Stevenson's view.

Ms. Stevenson confirmed that while she identified twelve positions for the LMS, these are not the only jobs available in the open labor market. She is online everyday, looking for positions. In fact, on November 2, 2015 alone, Ms. Stevenson identified five sedentary "sitting" jobs with Discover, HCAC, AAA, BJ's Warehouse, Endoscopy Center, and Westside Medical. The following day, November 3rd, she identified five more sedentary "sitting" positions with Valley Chiropractor, Halpern Eye, Delaware Hospice, Hertrich and Sheraton.[13]

Ms. Stevenson further testified that Claimant's training with Delaware Skills Center is viewed highly by potential employers. Employers love candidates coming from there, largely because there is such a strict interviewing process. The "cream of the crop" are selected in the screening process and trained, and employers really think highly of these candidates. Ms. Stevenson confirmed that Delaware Skills Center also "goes overboard" in stressing the importance of interviewing and resume writing. She does not believe that Claimant's handwritten resume is to be expected from a person trained by Delaware Skills Center. The resume also does not highlight her skills; it is a negative resume. Ms. Stevenson pointed out that there are many resume templates available online that Claimant could have used.

In sum, in Ms. Stevenson's opinion, Claimant's job search was not a good faith, reasonable search.

On cross examination, Ms. Stevenson confirmed that she believed that cashier, clerk and customer service type of jobs are appropriate for Claimant. She also confirmed that she only had "Claimant's Job Search Record" (Claimant's Exhibit #1) to review until the day prior to the hearing, at which time she had received Claimant's handwritten job search notes (Claimant's

[13] This search was marked as Employer's Exhibit #5.

Exhibit #2). Having just received it, Ms. Stevenson had not had an opportunity to fully review the new job search record. She agreed that the new record appears to contain about forty new contacts. Ms. Stevenson testified that, prior to her receipt of the new job search record, she had only been privy to 24 contacts Claimant had made in the ten weeks beginning August 28, 2015. Ms. Stevenson opined, however, that Claimant's job search should not have slowed down just because she identified many jobs in the first two weeks. She admitted that Claimant appears to have applied for eleven of the twelve LMS jobs, however.

Ms. Stevenson agreed that if Claimant does not have a computer at home, she'd likely be limited for job seeking purposes to a maximum of two hours per day at the public library. She admitted that she looks for jobs for a living and is very good at it; Claimant would likely not be as adept at identifying as many jobs as quickly as Ms. Stevenson does.

Ms. Stevenson would not agree that, to her knowledge, Delaware Skills Center would not help Claimant. Ms. Stevenson testified that she is confused as to Claimant's testimony in this regard. Ms. Stevenson saw a letter in which Delaware Skills Center had simply indicated that there was overwhelming interest in the program Claimant was applying for and that the class was full. The letter also indicated that Claimant should reapply later. The classes last sixteen weeks, and the letter was dated July 28, 2015, so another should be opening soon. Ms. Stevenson would expect Claimant to have a leg up on the other applicants also, since she already completed a program there. To Ms. Stevenson, she was not denied; the class was just full when she applied.

The Board next questioned Ms. Stevenson. She conceded that she would think that Claimant would have a leg up on the newer applicants from Delaware Skills Center, but does not know this for sure.

As for job searching, Ms. Stevenson confirmed that the process has changed dramatically recently; everything is basically online now. Even when a candidate presents directly to a location, often he or she is directed to a machine in the store in which to place an application. A lot of the human aspect of job seeking has gone out of the process. Much of job seeking involves search engines online, though the sites do give screen pops to help the applicant apply or receive help with a resume, for example.

In terms of whether an applicant typically hears back after an application is placed, Ms. Stevenson testified that most search engines will send a confirmation email that an application has been received. The confirmation email often says that the company will review the application and that the applicant should hear back within 30 days or should apply back again. Many employers destroy applications after 60 days or so, usually because they are unsure if applicants are still interested after that time. With some, a "rejection letter" is sent when another applicant has received the job.

Dr. Bruce Rudin, an orthopedic surgeon, testified by deposition on behalf of Claimant.[14] Prior to Claimant's July 23, 2012 work accident, Dr. Rudin performed a cervical surgery on Claimant in September of 2005. At that time, Claimant had pathology at C5-6 and C6-7 that was unresponsive to conservative care. She had an anterior discectomy and fusion at both of those levels and did not require any care of Dr. Rudin until after her July 2012 work accident.

After this accident, Dr. Rudin first treated Claimant in December of 2012. She did poorly in conservative care and had a very large disk herniation at C4-5, the level above her prior fusion. Dr. Rudin ultimately performed a discectomy and fusion surgery with an application of an anterior plate in January of 2013. Unfortunately, Claimant did not heal well and had a lot of stress across the disk space. She required another surgery for a posterior spinal fusion with

[14] Dr. Rudin's deposition was marked into evidence as Claimant's Exhibit #3.

added instrumentation to stabilize her spine in August 2013. Claimant never really got better and continued with discomfort. She was brought back in for another surgery for instrumentation removal and an additional bone graft on October 8, 2014.

After the last surgery, Claimant had physical therapy and then was given a home exercise program. Dr. Rudin sent Claimant for an FCE. Part of the lifting portion of the test indicated that Claimant could work with up to ten pounds (sedentary) and the other part allowed her to lift up to 12.5 pounds. Dr. Rudin felt that 12.5 pounds is a lot closer to 10 pounds than it is to 20 pounds (light duty). This took into consideration that she has had four spinal surgeries and that half of her testing indicated she was capable of only sedentary work, at best, anyway. Therefore, Dr. Rudin concluded that Claimant could work full time in a sedentary position. Dr. Rudin feels that it is risky to send Claimant back to lift 20 pounds on a regular basis, which is what a light duty job would require. Instead, he believes sedentary work is the right choice for her to perform on a long-term basis.

Dr. Rudin addressed the fact that the FCE results indicated that Claimant had not given maximum effort on some of the tests. He testified that this is how people limit their function on the FCE. Patients do what they can comfortably do during the test. The examiner had also stated that this does not imply that she did not try hard. Patients who have hurt themselves multiple times are typically afraid of hurting themselves again, especially as they might be asked to do more than they are physically capable of doing during the FCE.

On cross examination, Dr. Rudin was first asked to address the LMS. He testified that he would not approve of the Hess job on the LMS job, because it is a light duty job. Dr. Rudin approved the Be Truly Well, LabCorp, Cadia Rehabilitation, YMCA, Delaware Park, Hertrich, Toll Brothers and US Security jobs because they are sedentary in nature and all require

maximum lifting of 10 pounds. Dr. Rudin took issue with the Central Parking job, because he was unclear whether Claimant would have to sit too long in a booth. He agreed that the report stated that the "most essential functions can be performed while sitting or standing," but still rejected the job because the standing, sitting and walking durations were not filled out.

Dr. Rudin was unsure about the Z-Mart job. He agreed that it states that Claimant would never have to lift more than 10 pounds, but he was concerned that she would have to stock the store. If she had to lift two pounds 150 times, for example, that would not be necessarily be okay for her.

Dr. Rudin next addressed the Appletree Answering Service job. It does mention that the employee can sit or stand. He felt that an answering service is usually a sitting-type of job; therefore, he finds that job to be suspect.

Dr. Rudin agreed that he has encouraged Claimant to remain as active as possible. He admitted that he has not restricted her from going to the grocery store, driving or going up or down stairs. He acknowledged that he has released her to her family doctor, who will prescribe her medication. Claimant now needs only follow up with Dr. Rudin annually. He agreed that Claimant is currently stabilized and has reached maximum medical improvement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

Normally, in a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973). In response, the claimant may rebut that showing, show that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actual displacement). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities. *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1. In this case, the Board finds that Claimant's total disability status has terminated, but that she remains entitled to full compensation as she has proven, that at least temporarily, she is a displaced worker.

There was no medical dispute in this case that Claimant is physically capable of working. Both medical experts testified that Claimant is capable of working somewhere between a sedentary and light duty level. Dr. Rudin placed Claimant at a sedentary level with a lifting restriction of ten pounds, while Dr. Townsend placed Claimant slightly higher; he testified that she could work safely somewhere between sedentary and light duty, with a lifting restriction of fifteen pounds. Although the medical experts' opinions in regard to Claimant's work capabilities do not differ by much, the Board does find Dr. Rudin's rationale in placing Claimant at a sedentary restriction to be most persuasive. Dr. Rudin reflected on the fact that half of the lifting portion of the FCE placed Claimant within a sedentary range. He further found it significant that the ultimate conclusion that she could lift no more than 12.5 pounds was closer to a sedentary limit of 10 pounds than it was to a light duty limit of 20 pounds. Dr. Rudin further noted that

Claimant has had four surgeries in concluding that she is best suited for sedentary work at present. The Board found his rationale to be sound.

That being said, the parties in general agreed that, with a sedentary lifting restriction, Claimant cannot return to her former occupation with Employer as a CNA. Mr. Rodriguez confirmed that a CNA position is not sedentary in nature. In fact, Claimant's actual mechanism of injury—in that she at least partially "lifted" a resident—certainly was enough to suggest that this is the case. Mr. Rodriguez further testified that although sedentary jobs do exist within the Little Sisters facility, there are currently no sedentary openings at the Newark location.[15] There also was very little hope that one of these positions would open up any time soon. Mr. Rodriguez confirmed that sedentary positions, such as receptionist, seldom turn over at Little Sisters. In fact, he testified that he had not had to hire such a position in approximately four years. Thus, as Dr. Rudin seems inclined to maintain Claimant with sedentary work restrictions, it is not reasonable to believe that Claimant will be able to return to work for Little Sisters at any time in the near future.

However, it has long been established that "total disability" does *not* mean the "inability to continue in the same employment or the same line of work." *Federal Bake Shops, Inc. v. Maczynski*, 180 A.2d 615, 616 (Del. Super. 1962). Rather, it is the inability to perform *any* services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967). From a medical perspective, while she cannot return to her former CNA work for Employer, the fact remains that Claimant is capable of working in some capacity from a physical standpoint. Therefore, the next issue the Board must consider is whether Claimant qualifies as a

[15] Mr. Rodriguez testified that the next closest Little Sisters facility is in Baltimore, which is far more than 30 miles away from Claimant's home address. Thus, whether or not there are sedentary openings in other Little Sisters locations is not as relevant. As such, there was no testimony in this regard.

displaced worker. "A displaced worker is a partially disabled claimant who is deemed to be totally disabled because he is unable to work in the competitive labor market as a result of a work-related injury." *Watson v. Wal-Mart Associates*, Del. Supr., No. 442, 2010, op. at 2 (October 21, 2011). An injured worker can be considered displaced either on a *prima facie* basis or through showing "actual" displacement. The employer can then rebut this showing by presenting evidence of the availability of regular employment within the claimant's capabilities. *See Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

With respect to the issue of *prima facie* displacement, generally elements such as the degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age are considered. *Duff*, 314 A.2d at 916-17. As a practical matter, to qualify as a *prima facie* displaced worker, one must normally have only worked as an unskilled laborer in the general labor field. *See Vasquez v. Abex Corp.*, Del. Supr., No. 49, 1992, at ¶ 9 (November 5, 1992); *Guy v. State*, Del. Super., C.A. No. 95A-08-012, Barron, J., 1996 WL 111116 at *6 (March 6, 1996); *Bailey v. Milford Memorial Hospital*, Del. Super., C.A. No. 94A-03-001, Graves, J., 1995 WL 790986 at * 7 (November 30, 1995). In Claimant's case, she has conceded that she is not *prima facie* displaced. Claimant is fifty-eight years old, and so is about ten years away from reaching a normal retirement age. While she is limited to sedentary work, she has been trained in skilled work, such as a CNA and patient caregiver type of work. She is not limited to only performing unskilled labor; she has transferable skills. There is no suggestion that her mental capacity is anything but normal. Having trained at the Delaware Skills Center, Claimant clearly is trainable. The Board believes that Claimant's presentation is not consistent with a *prima facie* displaced worker.

However, Claimant argues that although she is not *prima facie* displaced, she is "actually" displaced. The general rule in workers' compensation is that when a claimant is physically capable of working to some degree, the claimant (not the employer) has the *primary* burden to show that reasonable efforts were made to secure suitable employment within the claimant's restrictions. *Hoey v. Chrysler Motors Corp.*, Del. Supr., No. 85, 1994, Hartnett, J., at ¶ 7 (December 28, 1994). Thus, a "claimant who is not *prima facie* displaced has the burden to prove that he made a reasonable job search, but was unable to obtain employment because of his disability." *Watson*, op. at 2. The inability to find work must be a direct result of an injury and not just the result of general economic conditions. *Federal Bake Shops, Inc. v. Maczynsky*, 180 A.2d 615, 616 (Del. Super. 1962). *See also Doe v. General Foods Corp.*, Del. Super., C.A. No. 83A-AU-4, Ridgely, J., 1986 WL 6589 at *3 (May 21, 1986).

In conducting a reasonable job search, the claimant must make a "diligent, good faith effort to locate suitable employment in the vicinity." *Bernier v. Forbes Steel Ensign Wire Corp.*, Del. Super., C.A. No. 85A-FE-17, Taylor, J., 1986 WL 3980 at *2 (March 5, 1986), *aff'd*, 515 A.2d 188 (Del. 1986). This same language can also be found in *Joynes v. Peninsula Oil Co.*, Del. Super., C.A. No. 00A-06-001, Witham, J., 2001 WL 392242 at *4 (March 14, 2001). For example, making four job applications in over a year would not constitute a diligent or reasonable effort. *See Zdziech v. Delaware Authority for Specialized Transportation*, Del. Super., C.A. No. 87A-AU-10, Gebelein, J., 1988 WL 109338 at *5 (October 13, 1988). In determining the reasonableness of a claimant's job search, "[t]he Board cannot find against the claimant simply because the claimant did not do everything he could have done. Its task is to determine whether the claimant's efforts were reasonable, not whether they were perfect." *Watson*, op. at 6. Nevertheless, if a claimant fails to take certain obvious, common-sense (*i.e.*,

reasonable) efforts to find work, that failure should be considered as evidence against the reasonableness of the search.

In this case, the Board felt that while Claimant did fail on some levels in performing a "perfect" search such as cited in *Watson*, she still showed what the Board felt to be a good faith effort to find work.[16] *Watson, id.* The totality of her search did not appear to be in bad faith or lackadaisical in nature. There was no doubt after reviewing Claimant's job search submissions that she certainly identified a large number of potential employers. It was true that a large number of her total search did include "cold" discovery of potential employers, mostly resulting in the identification of positions that appeared to be outside of her restrictions. This was evident by the fact that Claimant documented why each job was problematic, whether it was due to a need to stand for too long or due to higher lifting requirements. Claimant explained this, however, to the Board's satisfaction. Claimant testified that once she was released to work, she simply identified jobs anywhere and everywhere in close proximity to her home with the hope of finding work. While these positions were admittedly outside of Claimant's sedentary work

[16] The Board recognizes that Claimant's attempts to find work were not always without issue. For example, it appeared to the Board that Claimant had recognized in the past the importance of a professional-appearing typed resume and that, for this reason, she had taken the extra step to have her resume typewritten prior to her work for Little Sisters. In this same vein, it would have been more ideal if she had again pursued having someone from DVR type her updated resume with a focus on highlighting her skillset. Additionally, while Claimant placed many applications, she did place applications for some jobs that were outside of her restrictions. At times, she also was somewhat old-fashioned in her job seeking, in that she "cold called" potential employers; this means that she presented at locations unaware of whether there were actually *any* positions open with the company.

The Board also notes that, as soon as Claimant was physically released to work, her "job" essentially became to find employment. While Claimant certainly identified a high number of potential employers and submitted many applications, the Board feels that she perhaps could have averaged more meaningful applications each day. By this, the Board means that Claimant could have specifically placed more applications within her sedentary work restrictions. Most of the applications also appeared to be clustered into certain weeks, with other weeks seemingly without any job searching. Additionally, the Board observed a large number of potential employers identified, one right after the other, in which it appeared that Claimant noted all of the reasons why each "identified" job would be outside of her work restrictions, which was a concern. These jobs were handwritten and the date each was identified was left undated by Claimant; they were contained at the back of Claimant's Exhibit #1. However, Claimant testified that these jobs were identified early on during her job quest, and that as time went on, it did appear that Claimant's search became more focused and meaningful in nature. With these failings aside, Claimant clearly did identify and apply for more than thirty positions within her restrictions, including all of those she was able to apply for that were identified on the LMS.

restrictions, this still showed a great amount of effort in trying to find work. And, while hindsight shows that no jobs were ultimately identified, Claimant could not be sure that she would not find a job within her restrictions when inquiring of these employers. Thus, the Board cannot fault her for making this effort.

However, even setting those "cold call" jobs aside, the Board notes that Claimant still applied for many jobs within her restrictions. These jobs included customer service positions, cashiers, receptionists, clerks, and the like. Claimant identified and/or applied for at least thirty of these type of positions. Claimant also applied for eleven of the twelve positions from the LMS that were presented to her by Employer as being within her restrictions, though she was unable to apply for the twelfth position that was closed and would not allow for application with the company. In sum, although unsuccessful, the Board does find that overall Claimant made a reasonable, good faith effort to find work. The Board also notes that it did find Claimant to be credible that she genuinely wanted to find work.

The Board next turns to the issue of whether Claimant's difficulty in finding work was due to her work-related disability. Claimant testified that she advised the potential employers of her sedentary work restrictions. There is no argument that Claimant placed many, many applications and had disclosed her sedentary restrictions to each employer. She testified that most of her applications apparently resulted in no response from the potential employer. The Board notes that it has been stated by the Court that if "the claimant advises prospective employers that he has a physical limitation, and he does not get the job, there is an inference that employer turned the claimant down because of the partial disability." *Watson*, op. at 6 n.4 (citing *Keeler v. Metal Masters Foodservice Equipment Co.*, 712 A.2d 1004, 1005 (Del. 1998)). Here, not only was there some tacit suggestion that Claimant had likely not heard back on any number

of applications due to her restrictions, there was actually some more direct indication that this was the situation. For example, Claimant testified that she had presented to Rite Aid and questioned about openings. She was told that there was an opening and she filled out an application on site. There was apparently no obvious indication that the position she applied for would have been outside of her work restrictions. Once Claimant finished filling out the application, the manager was apparently called over to review it and to meet Claimant. Claimant testified that, after reading over her application, the manager then questioned her about "what was going on with her" and about her sedentary restrictions. After she disclosed more detail about her restrictions, she was told that she could not be a candidate and the application was then immediately ripped in half by the manager. To the Board, this is direct evidence that Claimant's partial disability played a role in her not being considered for the job.[17]

There was even more evidence of this revealed during the hearing. Claimant testified that two of the LMS employers, Delaware Park and Hertrich, had sent her emails basically indicating that they were not interested in hiring her at present. Again, she was seemingly summarily rejected from a cashier and a receptionist position without an interview following applications placed in which she made disclosure of her sedentary restrictions. Notably, these were two of the very employers that Ms. Stevenson testified would have considered Claimant equally as a candidate despite her sedentary restrictions.

Additionally, Claimant further testified that when she had advised other potential employers of her work restrictions, many would not even allow her to fill out an application. She testified that some would, but many would not. However, it was notable that Claimant never heard back from the vast majority of the employers that allowed her to apply despite her

[17] The Board further notes that in Claimant's job log, in regard to the Rite Aid job, she documented that she was told that "Rite Aid cannot risk the liability." She was also apparently informed that the work included many duties that exceeded her capabilities.

restrictions. Claimant testified that some of the cashier positions that, at first glance, would seem to fall within a sedentary restriction and also appeared to provide an easy accommodation for her condition with a stool, ultimately had not panned out for her. Claimant testified that she was informed at Chipotle, for example, that a cashier job would be "too physical" for her and that nothing was available "within her restrictions." Likewise, when she attempted to apply for a job working in the fast food area at Costco and disclosed her restrictions, she was then told that employees needed to be able to do every job within the store, including stocking, in order to be hired at all. She was then told that Costco also only hires in the spring. Both of these rejections appeared suspect to the Board. If true, this is of grave concern, as it appears that this employer would never hire anyone with any disability. It does seem to the Board that Claimant was at times turned away specifically due to her sedentary restriction, which directly relates back to her work injury.

As a practical matter, in terms of a good faith job search the Board also notes that a claimant has complete control over how she presents herself to potential employers. There is, therefore, an inherent obligation of good faith on the part of a searching claimant. Here, Claimant testified that she felt it prudent to inform potential employers of her sedentary restrictions, and thus, had placed this information on the resume that she provided or directly on her applications. Otherwise, she verbally informed potential employers of her work restrictions. Claimant explained to the Board that she felt that it was unwise to hide the fact that she had a sedentary restriction because it made no sense to accept a job that she would be unable to perform. She was also understandably concerned with further injuring herself by accepting employment with requirements outside of her restrictions. The Board did not find evidence, beyond simply informing potential employers of these restrictions, that Claimant purposely

presented herself in a negative fashion to discourage employment. In this way, the Board thus concludes that Claimant has shown that she performed a reasonable, good faith job search that was unsuccessful, at least partially, due to her work related restrictions.

In sum, having direct evidence of rejection and of having not heard back on virtually any of her many applications in which she disclosed her physical limitations, as *Watson* recognized, there is said to be a presumption that her disability played a role in her lack of success.[18] Claimant testified, and Ms. Stevenson confirmed, that the employers (including the LMS employers) would hold applications for a period of 30-60 days. Claimant was further advised that if after that amount of time she had still not heard anything, she should presume that she had not received the job and then consider reapplying. It was clear that Claimant was well beyond this timeframe on most, if not all, of the applications she had placed. All of these factors considered, the Board concludes that Claimant's physical limitations had played a role in her not having received employment. Thus, the Board finds that Claimant has shown that she performed a reasonable, good faith job search that was unsuccessful, at least in part, due to her physical disability.

Thus, the burden shifts back to Employer to rebut this showing. Employer relies on the LMS as proof that there are jobs available within the general labor market within Claimant's sedentary restrictions. However, the Board first notes that in finding Dr. Rudin's opinion to be persuasive, the Board agrees that some of the LMS jobs are potentially problematic. The Hess job was problematic, as it was light duty (not sedentary) in nature. Ms. Stevenson was also not

[18] Claimant apparently applied for more than seventy jobs in total after her release by Dr. Rudin; however, the Board focuses more on the more than thirty she had applied to that fell more squarely within her work restrictions as opposed to those where the openings were outside of her restrictions. That being said, there was some consideration given regarding the effort taken by Claimant in presenting to potential employers "cold" just to see if there were any openings within her restrictions, despite the fact that she was told that there were none. These "cold" contacts amounted to about 46; at the same time, however, Claimant also applied for over thirty positions that were within her restrictions.

convincing that the jobs that required lifting heavier than ten pounds at convenience stores could be modified by Claimant's simply lifting one soda at a time for a customer instead of an entire case of soda, for example. This did not make sense to the Board. A customer will almost definitely prefer to have soda contained within an enclosed box for transportation purposes as opposed to having individual bottles or cans removed one by one. The Board did not find this accommodation to be realistic. Further, like Dr. Rudin, the Board had concerns that these positions would require some level of stocking within the stores that would be outside of Claimant's lifting restrictions.

Also like Dr. Rudin, the Board further took issue with the Central Parking job identified on the LMS. Dr. Rudin was concerned that the job would require too much sitting of too long of a duration within a booth. He testified that the job's required durations of sitting, standing and walking were not filled out, making this unclear. Ms. Stevenson's testimony did little to help settle these concerns. She testified that, when the parking facility was not busy, Claimant would be free to leave the booth, walk around, and stretch. However, there was no information on whether Claimant would be hired to work during periods when the parking facility remained particularly busy or how often--or for how long--the facility is not busy. Certainly, she would not be able to leave the booth during periods when cars are lined up waiting to enter and/or exit. The Board had concerns that there was not more specific information in regard to how often she would be able to take such a break from the booth.

The Board also found Claimant's note taking in regard to her LMS job search to be telling. She indicated that one LMS employer told her that her limitations "are incompatible with the job." She further documented that a representative of U.S. Security told her that the security guard position required that she "must be able to stand for eight hours."

Claimant also noted that a representative of Be Truly Well told her that she needed "extensive experience in computers" for a front office assistant position. While Claimant clearly has some skill in navigating computers, the Board certainly has seen no evidence to categorize her as having "extensive experience." In fact, Mr. Rodriguez confirmed that Claimant's job at Little Sisters was fairly rudimentary in this regard in that at the time that she worked there, all of the medical documentation had to be painstakingly handwritten. Beyond these jobs, Claimant either did not receive any response, received rejection emails and/or was told that there were no current openings.

In any case, even setting these concerns aside, the Board was concerned that there was seemingly no testimony in regard to whether the vast majority of the jobs identified on the LMS were still available at the time of the hearing. The Board was left questioning this issue, especially as Claimant testified that she had applied for eleven of the twelve jobs on the LMS that she was able to apply for. Claimant also testified that, much like her own job search, either the LMS positions were not actually open or, following her placement of an application, she never heard back about an interview or otherwise.[19] Ms. Stevenson's testimony confirmed that if an applicant has not heard back on a job application within about 30 to 60 days, the indication is that the applicant has been rejected.

As the Supreme Court pointed out in *Watson*, the labor market surveys "do not purport to establish that such jobs are available, only that they exist and were available at some point." The

[19] Claimant testified that she was unable to apply for the twelfth job, as it was apparently "closed" when she sought to apply. She also indicated on her job search form that in regard to the 12 jobs, she was told there was no longer an opening, that they were not interested in hiring her or that the job actually would actually be problematic given her restrictions. Otherwise, Claimant received no response on her other LMS applications. Further, Claimant was apparently advised by one of the LMS employers that there were "many applicants" for the position. Not surprisingly, she did not hear anything further after she placed her application for that job. As recognized in *Watson*, "[a] job opening that generates a long line of applicants…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." *Watson, id.* op. at 9 n.7.

Court also cited *Adams*, noting that "[a] proper application of the displaced worker doctrine can only be made by considering the contemporaneous availability of employment."[20] Like *Watson*, the Board is concerned that Claimant applied for almost every job identified on the LMS, without any sign of success. For the Board, this really does "significantly diminish" the evidentiary value of the LMS itself.[21] As such, the Court noted that "[w]ithout more, such a survey establishes only that the claimant might be able to find work, not that appropriate jobs are actually available." This Board finds that the LMS in this case, like *Watson*, was insufficient to overcome Claimant's showing that she was unable to find work within her work-related restrictions. Therefore, the Board finds that she has met her burden to show that, at least temporarily, she is displaced.

While the Board concludes that Claimant has met her burden to show that she is currently actually displaced, the Board wishes to stress that the totality of the evidence strongly suggests that this is likely only a temporary condition. Claimant does not fit the typical presentation of a displaced worker, such as an unskilled laborer who is never again able to perform heavy duty work due to sedentary work restrictions and, that due to a lack of transferable skills, is essentially incapable of performing any other work. Conversely, the Board was convinced by Ms. Stevenson and Mr. Rodriguez's testimony that Claimant has many assets and various transferable skills to offer potential employers. She is trainable, educated and has also proved herself to be a valuable employee. She has also done very well in a "customer satisfaction" type of context, such as that similar to what she performed as a caregiver of residents and a CNA.

[20] *Adams v. Shore Disposal, Inc.*, 720 A.2d 272, 273 (Del. 1998) *cited in Watson, id.* op. at 7.
[21] *Watson, id.* Claimant's log of her applications to the LMS jobs indicates that either she was told that there were no openings at present or she was told that she would hear back for an interview if there was any interest by the employer. These applications were apparently placed on the last week of August and Claimant testified that she has not yet heard back. Again, Ms. Stevenson confirmed that if an applicant does not hear back between 30 to 60 days after an application was placed, it is almost definite that the position was filled with another applicant. Claimant further testified that two of the LMS employers, Delaware Park and Hertrich, emailed her that they were not interested in hiring her at the present time.

The Board also found Claimant to be pleasant and well-spoken and felt that she would be an asset for any employer.

The Board feels that it is very possible that some of Claimant's lack of success is simply due to the short timeframe between Claimant's release to work and the pendency of the instant petition. So, while Claimant's job search has so far been unsuccessful, the Board remains very hopeful that this situation will not continue for long. The Board wishes to stress the importance that Claimant continues to job seek as often as possible, with a primary focus on the identification of work specifically within her sedentary restrictions.

For all these reasons, the Board finds that Claimant's job search efforts constituted a reasonable and good faith search and that there was sufficient evidence that her efforts failed, at least in some regard, due to her work-related restrictions. Therefore, Claimant has established, at least temporarily, that she is actually displaced. As such, the Board finds that at present Claimant is entitled to continued benefits in this regard at her established total disability compensation rate.

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $10,194.40. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate

case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney's fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. DEL. CODE ANN. tit. 19, § 2320(10)a.

Claimant has achieved a finding that she is entitled to continuing total disability benefits on the basis of actual displacement. Claimant's counsel submitted an affidavit stating that 15 hours were spent preparing for the hearing. The hearing itself lasted for approximately 3 hours. Claimant's counsel was admitted to the Delaware Bar in 1989 and he is very familiar with workers' compensation litigation, a specialized area of law. His initial contact with Claimant with respect to this matter was in July of 2013, so the period of representation has been for well over two years. This case involved no difficult or unusual questions of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that counsel was actually precluded from accepting other employment because of his representation of Claimant, although naturally he could not work on other matters at the exact same time that he was working on this one. Counsel's fee arrangement with Claimant is on a contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of $5,500.00, or thirty percent of the award pursuant to this decision, whichever is less, is appropriate. The Board does not find this fee to be excessive, in light of the factors discussed above.

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

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that while Employer has shown that Claimant is physically capable of working in a sedentary capacity, Claimant has proven actual displacement. Thus, at present, she continues to be entitled to benefits at her established total disability compensation rate. Therefore, Employer shall make appropriate reimbursement to the Workers' Compensation Fund, in accordance with title 19, section 2347 of the Delaware Code. Claimant is awarded an attorney's fee in the amount of $5,500.00, or thirty percent of the award pursuant to this decision, whichever is less, and payment of her medical witness fees.

IT IS SO ORDERED THIS 18th DAY OF NOVEMBER, 2015.

INDUSTRIAL ACCIDENT BOARD

Lowell L. Groundland/cm

LOWELL L. GROUNDLAND

John D. Daniello/cm

JOHN D. DANIELLO

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

Mailed Date: 11-20-15

bc

OWC Staff