BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MAGDALENA GUARDADO,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1405006
	)	
ROOS FOODS,	)	
	)	
Employer.	)	

DECISION ON REMAND

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 April 27, 2017, in the Hearing Room of the Board, in Dover, Delaware. Final deliberations concluded on May 9, 2017.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

Heather Williams, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt Schmittinger, Esq., Attorney for the Employee

Andrew Carmine, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Magdalena Guardado ("Claimant") was injured in a compensable work accident on June 22, 2010, while she was working for Roos Foods ("Employer"). The injury has been accepted as compensable and Claimant has been receiving compensation for total disability at the compensation rate of $204.00 per week, based on an average weekly wage at the time of injury of $306.00.

On November 7, 2014, Employer filed a Petition for Review alleging that Claimant was no longer totally disabled and was physically able to return to work. Claimant disputes Employer's claim and alleges that she remains totally disabled; or, in the alternative, is a displaced worker. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since November 12, 2014. Employer's Petition was originally heard on March 24, 2015, after which the Board issued a decision, dated April 7, 2015, denying Employer's Petition, based primarily on the Board's understanding of the Supreme Court's holding in *Campos v. Daisy Construction Co.*, 107 A.3d 570 (Del. 2014), and finding that Claimant remained legally totally disabled, although physically capable of working. *See Guardado v. Roos Foods*, I.A.B. Hearing No. 1405006 (April 7, 2015)("*Board Decision*"). Employer appealed the *Board Decision* to Superior Court, which affirmed the *Board Decision. Roos Foods v. Guardado*, 2016 WL 355002 (Del. Super. Jan. 26, 2016). On November 29, 2016 the Supreme Court of Delaware issued an Order remanding the matter to the Board. *Roos Foods v. Guardado*, 152 A.3d 114 (Del. 2016).

A hearing on this remand was held on April 27, 2017. Pursuant to Title 19, section 2348(f) of the Delaware Code, all evidence taken at the original hearing is considered part of the evidence of this remand hearing. In addition, "the statutory scheme for conducting a hearing on remand is unambiguous. The Board is to decide the matter, after the remand hearing, on the

basis of the evidence from the prior hearing plus any new evidence and legal arguments the parties decide to present." *State v. Steen*, 719 A.2d 930, 934 (Del. 1998). At the remand hearing, further testimony was provided on the issues of: Claimant's displaced worker status, an updated labor market survey, and job availability for undocumented workers. This is the Board's decision on the merits.[1]

SUMMARY OF THE EVIDENCE

Evidence from the original hearing (as set forth in the *Board Decision*) is incorporated by reference. At this remand hearing, the parties stipulated that Claimant's average weekly wage at the time of injury was $306.00 per week, with a compensation rate of $204.00. The parties stipulate further that the medical testimony from the previous hearing, and the Board's findings regarding Claimant's medical/physical ability to work, remain unchanged from the prior hearing. Therefore, no new medical evidence was presented at the remand hearing.

Dr. Desmond Toohey, Assistant Professor of Economics at University of Delaware, testified on Employer's behalf. Dr. Toohey testified that his primary fields of research include labor economics and economic demography. Dr. Toohey prepared a report regarding the jobs that exist for undocumented workers. Dr. Toohey had reviewed both studies cited in the Supreme Court's Opinion[2] and then had performed independent research studies. Dr. Toohey started with the recommended studies and then gathered more information specific to Delaware. He established how many undocumented workers are in Delaware and then determined what types of jobs those workers hold. Dr. Toohey acknowledged that there are inherent problems in determining the exact number of undocumented workers present in the state.

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[1] Normally, decisions are to be issued within fourteen days of a hearing. *See* 19 *Del. C.* § 2348(k). Because of workload demands and other time constraints, deliberations were not concluded until May 9, 2017 and it was necessary to take an extension of time to issue this decision in accordance with 19 *Del. C.* § 2348(k).

[2] *Roos Foods v. Guardado*, 152 A.3d 114, 121-122 (Del. 2016).

Dr. Toohey prepared a report entitled, "Report on the Distribution of Unauthorized Immigrants Across Jobs in the Delaware Labor Market." ("*Report*")(Employer's Exhibit #2). Dr. Toohey explained that the numbers documented in the tables in the report were rounded up to reflect numbers that are closely related to numbers documented in other reports. Dr. Toohey's report indicates that there are approximately 11.8 million unauthorized immigrants in the nation, and approximately 28,000 in Delaware. *Report* at 5. Dr. Toohey's report indicates that, of the 28,000 unauthorized immigrants in Delaware, approximately 80% of those are employed in the state. *Id.*

When evaluating the specific jobs in the labor market survey, Dr. Toohey evaluated which occupation was represented and which industry was represented. Dr. Toohey concluded that the undocumented labor force was well represented by his report. In his report, Dr. Toohey concluded that, "many unauthorized immigrants are employed in the occupations and industries of the surveyed jobs. In general, there are several thousand unauthorized immigrants in each." *Id.* at 8. Table I of Dr. Toohey's report indicates that the listed occupations have the following distribution of unauthorized immigrants: management, business, science and arts has 4,000; service has 5,000; sales and office has 1,000; natural resources, construction and maintenance has 4,000; and, production, transportation and material moving has 8,000. *Id.* at 14. Table II of Dr. Toohey's report indicates that the listed industries having the following distribution of unauthorized immigrants: construction has 4,000; manufacturing has 5,000; retail trade has 4,000; finance, insurance, real estate, rental, leasing has less than 1,000; professional, scientific, management, administrative and waste management has 2,000; educational services, health care social assistance has 2,000; and, arts, entertainment, recreation, accommodation, food services has 4,000. Table III of Dr. Toohey's report correlates the jobs listed on the labor market survey

with the number of unauthorized immigrants in each of the corresponding occupations and industries. *Id.* at 15.

For each of the jobs listed on the labor market survey, Dr. Toohey determined the number of unauthorized immigrants working in the corresponding occupation, as well as the corresponding industry. Specifically, Dr. Toohey's research indicated that the kitchen crew jobs at Margarita's Restaurant, Ioannoni's Bullroaster's , and Taqueria Los Primos describe a food preparation occupation in a food service industry, which account for 5,000 unauthorized immigrant jobs in that occupation and 4,000 in that industry. *Id.* at 9-10. Dr. Toohey's research indicated that the clerk job at Mi Ranchito Mexican Grocery describes a sales occupation in the retail trade industry, for which there are 1,000 employed unauthorized immigrants and 4,000 employed unauthorized immigrants, respectively. *Id.* at 10. Dr. Toohey's research indicated that the clerk job at Newark Farmer's Market describes a sales occupation in the retail trade industry, for which there are 1,000 employed unauthorized immigrants and 4,000 employed unauthorized immigrants, respectively. *Id.* at 10. Dr. Toohey's research indicated that the packer job at Giorgio Fresh describes a packer/packager occupation in the production/transportation/material moving industry, for which there are 8,000 employed unauthorized immigrants and 5,000 employed unauthorized immigrants, respectively. *Id.* at 11. Dr. Toohey's research indicated that the picker jobs at Modern Mushroom and Phillips Mushroom Farm describe a picking/packing occupation in a manufacturing industry, for which there are 8,000 employed unauthorized immigrants and 5,000 employed unauthorized immigrants, respectively. *Id.* Dr. Toohey explained that, while some of the picker positions were located across the Pennsylvania State line, the level of economic interaction and labor market integration made it reasonable to

conclude that the unauthorized immigrants were similarly represented there as they are in Delaware. *Id.*

Based upon his research, Dr. Toohey concluded that there are thousands of undocumented workers employed in Delaware (and southeastern Pennsylvania) in each of the occupations and industries corresponding to the jobs listed on the labor market survey. Dr. Toohey reported that the occupations listed in the survey included service, production and sales, all of which combined accounted for an estimated 14,000 unauthorized immigrants employed in Delaware. *Id.* at 12. The industries represented by the jobs listed in the labor market survey collectively employ approximately 15, 000 unauthorized immigrants. Based on these findings, Dr. Toohey concluded that "the unauthorized immigrant population is well-represented in the surveyed positions." *Id.*

On cross examination, Dr. Toohey acknowledged that the margin for error in his estimated numbers is less clear, but it could be as great as twenty percent (20%). Dr. Toohey testified that he is sure that there are thousands of jobs available in each of the occupation and industry categories. Dr. Toohey was unaware of the total number of documented (authorized) workers compared to the total number of undocumented worker ratios for each occupation. Dr. Toohey did not correlate workers with disabilities in his studies, although he could have extrapolated those numbers from the information he had available.

Dr. Toohey testified that he was reluctant to reduce the categories further for Delaware because it would limit the information too drastically, but he would be comfortable reducing the categories on a larger scale (across many states). Dr. Toohey explained that he would have been more comfortable reducing the categories by English language fluency and undocumented status, because it would not reduce the numbers too drastically. Dr. Toohey acknowledged that many of

his numbers include undocumented workers that are fluent English speakers. Dr. Toohey had no information on frequency of job availability, job turnover, etc. Dr. Toohey reported that, in Delaware, the total labor force is approximately 500,000 – 600,000 workers, and the undocumented worker population is approximately 20,000-25,000 workers. Dr. Toohey admitted that knowing the frequency of hiring and the proportion of the number of total numbers of jobs available to number of undocumented worker jobs available could be relevant, but he did not complete those calculations.

Ellen Lock, Vocational Case Manager for Coventry, testified on Employer's behalf. Ms. Lock testified that Claimant had graduated high school in her native country of El Salvador and was non-English speaking, but was able to read and write in her native language. Ms. Lock believed Claimant was capable of one handed work with her dominant hand. Ms. Lock identified jobs that were entry level, with on the job training, that met Claimant's physical restrictions, and that did not require English language fluency. Ms. Lock testified that she believes that the need for Spanish speaking Employees has risen recently. Ms. Lock discussed with prospective employers Claimant's work restrictions. Ms. Lock is confident that Claimant is capable of finding work in the current labor market because she has graduated high school in her home country, is Spanish speaking, and there are entry level jobs available.

Ms. Lock is aware that Claimant conducted a job search of her own, including six of the jobs on the labor market survey, but she is unaware of whether Claimant received responses from those jobs. Ms. Lock reported that she prefers that applicants apply to at least ten jobs per week when searching for jobs. Ms. Lock concluded that Claimant's average weekly wage from the jobs listed on the labor market survey would be $330.00. Ms. Lock reported that the physical requirements of some of the jobs would require limited use of her left hand, but no lifting or

heavy maneuvering. Ms. Lock testified that if there were many highly qualified applicants applying for each of the available jobs, then those jobs would not remain available for long. Ms. Lock confirmed that she was not asked to ask prospective employers if they hired undocumented workers.

On cross examination, Ms. Lock acknowledged that the restaurant jobs require dealing with large/commercial quantities of food. Ms. Lock admitted that she had not reported to the new employers in the new labor market survey that Claimant was undocumented. She did not discuss undocumented workers with any of the prospective employers. Ms. Lock acknowledged that some of the housekeeping positions require use of broom and a mop, which would require use of both hands and Dr. Schwartz had rejected those jobs in the last labor market survey. Ms. Lock acknowledged that a job that is more than an hour away would be too far for Claimant to drive. Ms. Lock did not prepare a *Maxey-Wade* calculation and her average weekly wage calculation is not a direct comparison to Claimant's wages at the time she was employed.[3] Ms. Lock testified that the jobs on the current labor market survey were researched in January, February or March of 2017. Eight of the positions remain open and three of those eight are in Pennsylvania, which could be too far for Claimant to drive. Ms. Lock acknowledged that there would be multiple applications for the jobs that remain available. Ms. Lock was unaware if

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[3] In general, under Delaware law, a claimant's return-to-work wage will be adjusted to the wage scale in effect at the time of the work injury. *See Maxey v. Major Mechanical*, 330 A.2d 156, 158 (Del. Super. 1974); *Greggo & Ferrara, Inc. v. Wade*, Del. Super., C.A. No. 84A-AU-6, O'Hara, J., at 3-4 (November 18, 1985). The point of *Maxey* and *Wade* is that it is inequitable to determine a claimant's earning capacity by comparing the claimant's wage at the time of injury (in this case, Claimant's weekly wage from June of 2010) with wages existing at some later time (in this case, spring of 2017). Because the term "earning capacity" is not the same as actual earnings, post-injury earnings should be adjusted to the wage scale in effect at the time of injury. *Maxey*, 330 A.2d at 157-58.

However, because establishing a lower return to work wage results in a higher partial disability benefit to the claimant, it is normally considered to be the claimant's burden to demonstrate the *Maxey-Wade* wage differential. *See Elswick v. B.F. Rich Co.*, Del. Super., C.A. No. 97A-07-15, Gebelein, J. (October 23, 1998); *Abbate v. M.A. Bongiovanni, Inc., Del. Super.*, C.A. No. 85A-DE-12, Babiarz, J., at 5 (October 13, 1987). Thus, it is to the claimant's benefit to establish a *Maxey-Wade* adjustment. In this case, there was no *Maxey-Wade* adjustment calculated or sought.

Claimant would be a viable candidate for any of the jobs compared to other applicants for those positions. Ms. Lock acknowledged that employers are more likely to hire applicants with experience than those without experience.

Claimant testified that her home in Crumpton, Maryland is approximately forty-five minutes from Middletown, Delaware.[4] Claimant testified that two months ago she began going to school two nights a week to learn English. Claimant remains undocumented to work in the United States. Claimant testified that there have been no changes in her inability to use her left arm since the last hearing. Claimant wears a brace on her left wrist because she went to the doctor one month ago and her wrist was inflamed and Dr. DuShuttle requires her to wear it all the time. Dr. DuShuttle has not made any changes to her medical restrictions.

Claimant testified that she has looked for work. She has seen the labor market survey and made notes regarding the jobs for which she applied. Claimant told prospective employers about her work restrictions when she contacted them about jobs. Claimant testified that it is difficult for her to find jobs because she cannot perform the duties because of her physical restrictions. Claimant has applied for some kitchen jobs. She asked one manager if she could prepare food, but that manager said it would be difficult for her to perform the job because she would need to lift heavy objects and there would not be people to help her all the time.

Claimant reported that she has no movement in her left wrist because it is fused. Claimant has considerable difficulty in some activities of daily living because of her wrist, including cooking, lifting cookware, and cutting vegetables. Claimant testified that she wants to work. Claimant reported that she was aware of other undocumented workers who were employed, but none with restrictions requiring one arm.

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[4] An interpreter was provided for Claimant's testimony – Interpreter #660841 Corina

On cross examination, Claimant testified that she moved to Maryland five months ago, but had not reported her new residence to Employer. When Claimant worked for Employer, she handled a machine and made cheese packets. Claimant did not use a computer in high school in El Salvador, but she is learning to use one now. Claimant has a social media account and a smartphone, on which she uses the internet. Claimant testified that she does drive. Claimant takes over the counter medication for pain (ibuprofen). Claimant came to the United States in 2004, but has not made any efforts to become a documented worker. Claimant testified that she does not intend to become a documented worker.

Claimant reported that she will try to do the jobs for which she applied because she wants to work. She only applied to restaurant jobs. Claimant testified that she applied to one restaurant job that involved packing glasses, but the manager said she would have difficulty because it required the job to be done quickly. Claimant has not heard back from that employer, however. Claimant reported she did not apply for any online positions.

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). Claimant is then required to rebut that showing, show that he or she is a *prima facie* displaced worker, or submit evidence of reasonable, yet unsuccessful, efforts to secure employment, which have been unsuccessful because of the injury (i.e., actual displacement). As a rebuttal, the employer may present evidence showing regular employment opportunities within claimant's capabilities. *Howell*, 340 A.2d at 835; Duff, 314

A.2d at 918n.1. In this case, at the original hearing, the Board determined that Employer met its initial requirement that Claimant is medically employable; and the parties have stipulated that the Board's finding regarding Claimant's medical/physical ability to work remains unchanged from the original hearing.

Having found that Claimant is physically capable of working, the next issue is whether she qualifies as a displaced worker. 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, the critical elements to be considered are claimant's degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age. *Duff*, 314 A.2d at 916-17. Under normal circumstances, to qualify as a *prima facie* displaced worker, one must 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).

> A claimant's status as an undocumented worker is not relevant to a determination of whether the claimant is a *prima facie* displaced worker. Where a claimant who is an undocumented worker seeks to show that she is an actually displaced worker, her status as an undocumented worker is a factor to be considered by the Board in deciding whether she has made reasonable efforts to secure suitable employment which have been unsuccessful. If a claimant is successful in establishing that she is a displaced worker, the employer's burden of showing availability to the claimant of regular employment within her capabilities must take into account her status as an undocumented worker.

Roos Foods v. Guardado, 152 A.3d 114, 122 (Del. 2016).

Thus, the Supreme Court has determined that a worker's undocumented status is a relevant consideration when deciding that worker's efforts to find employment and whether an employer has proven there are jobs available within the worker's capabilities, but not when deciding whether the worker is *prima facie* displaced. *Id.*

In this case, Claimant testified she came to the United States in 2004, but has only been employed, for five years, by Employer, since she came here. Claimant testified that her duties for Employer involved operating machinery and preparing food packets, which is not highly skilled labor. Claimant reported that she now wears a brace on her left wrist because it became inflamed and she continues to have no movement in her wrist due to the surgical fusion, which was the result of the work injury. Claimant is a high school graduate in her native country of El Salvador; however, she is only capable of reading and writing in her native language (Spanish) currently. Claimant did report that she has been taking courses to learn English for the past two months; however, she does not speak English yet and required an interpreter for both hearings. Claimant admitted that she has learned to use a smartphone, but is still learning to use a computer. While the Board finds Claimant has made some progress in her education (began an English course and use of a smart phone) since the last hearing, the Board finds that Claimant continues to be a *prima facie* displaced worker based on her limited education and minimal work experience as an unskilled laborer with a one hand work restriction.

Having found that Claimant is a *prima facie* displaced worker, a finding of actual displacement is unnecessary; however, the Board finds it warrants discussion. Claimant testified that she had only applied for a total of approximately eleven jobs, four of which were on the labor market survey and all of which were in restaurants/food service industry. The evidence indicates that Claimant contacted six employers on February 13, 2017, one employer on April 3,

2017, two employers on April 10, 2017, one employer on April 18, 2017 and one employer on April 24, 2017. While Claimant testified that one prospective employer indicated it would be difficult for Claimant to prepare food without assistance and another indicated she might have difficulty packing glasses, there was no other evidence that Claimant would not be hired because of her injury, work restrictions, or her undocumented status. The Board finds that Claimant's job search was minimal (only 11 applications: 6 in February of 2017 and 5 in April of 2017) and was unduly restricted to a single industry (restaurant/food services). While Claimant may prefer to work in such industry, for purposes of considering whether employment is available, it is unreasonable to restrict her search to a single industry/field. Based on this limited amount of evidence, if the Board had determined that Claimant was not *prima facie* displaced, the evidence would have been insufficient to warrant a finding of "actual" displacement.

Having found that Claimant is *prima facie* displaced, the Board must now decide whether Employer can rebut this finding by showing there are jobs available within Claimant's work capabilities. In this case, Employer prepared an updated Labor Market Survey of prospective jobs that could be available to Claimant with her physical restrictions.[5] Ms. Lock testified that she had discussed Claimant's work restrictions with the prospective employers and she believed Claimant would be capable of performing the jobs listed on the labor market survey. Furthermore, Ms. Lock testified that the jobs on the labor market survey were entry level jobs and/or provided on the job training, so Claimant's minimal work experience would not be a barrier to her obtaining those positions. Ms. Lock confirmed that the listed jobs only required limited use of Claimant's left hand and did not require heavy lifting or maneuvering of her

[5] Claimant testified that she had moved to the State of Maryland a few months prior to the remand hearing, but had not reported her relocation to Employer. Therefore, the Board finds Employer's job listings within a driving distance of Claimant's former residence (the only residence of which Employer was aware) to be sufficient for those purposes. A claimant cannot invalidate an otherwise proper labor market survey by changing his or her residential address shortly before the hearing, particularly when no notice was provided to the employer.

injured hand. Ms. Lock reported that she was confident that Claimant could find work because Claimant had a high school education, was literate in Spanish and there were entry level jobs available. Claimant herself testified that she had applied to approximately eleven jobs in the restaurant industry, some of which were listed on the labor market survey. While Claimant testified that she had only applied to restaurant jobs, the labor market survey includes jobs other than restaurant jobs, which are available and could accommodate Claimant's restrictions.

While Ms. Lock testified that she did not advise prospective employer's of Claimant's undocumented status, the Board notes that it is unrealistic to have expected the listed employers to admit that they may illegally hire undocumented workers. The Supreme Court anticipated this problem:

> Using reliable social sciences methods, there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions and combining that with more specific information about actual jobs in those categories.

Roos Foods, 152 A.3d at 121.

Thus, the Board finds that Employer's updated labor market survey provides reliable and sufficient information regarding actual jobs that are available within Claimant's capabilities.

Employer has presented evidence of the prevalence of undocumented workers in the categories where the labor market survey shows the availability of specific jobs. In addition to providing the updated labor market survey, Employer provided reliable market evidence (in the form of Dr. Toohey's testimony and report) indicating that there are thousands of jobs available in each of the occupations and industries listed available for undocumented workers in Delaware. Specifically, Dr. Toohey provided testimony and a written report indicating the approximate number of jobs available for undocumented workers in each of the occupations and industries included in the labor market survey. Specifically, three of the available jobs (Margarita's,

Taqueria Los Primos and Ioannoni's Bullroasters) fell into the service occupation and food service industry categories, which have 5,000 and 4,000 unauthorized workers, respectively. Three other jobs (Giorgio Fresh, Modern Mushrooms, and Phillips Mushroom Farm) fell into the production occupation and manufacturing industry categories, which have 8,000 and 5,000 unauthorized workers, respectively. Two of the available jobs (Mi Ranchito Mexican Grocery and Newark Farmer's Market) fell into the sales and office occupation and retail trade industry categories, which have 1,000 and 4,000 unauthorized workers respectively. These numbers indicate that there are thousands of jobs available to undocumented workers within the occupations and industries listed on labor market survey. Thus, the Board finds that Employer has provided reliable and relevant evidence of the prevalence of undocumented workers in the specific occupations and industries listed on the labor market survey.

Based on all of the above and relying on the guidance provided in *Roos Foods v. Guardado*,[6] the Board concludes that Employer was successful in establishing the appropriate nexus between actual jobs available on the labor market survey and the prevalence of undocumented workers in those job categories in Delaware (and the surrounding area). Therefore, the Board finds that Employer has successfully rebutted Claimant's showing that she is a *prima facie* displaced worker by presenting evidence of availability of jobs within Claimant's capabilities. Having found that Claimant is physically capable of working and that suitable employment is available, the Board finds that Claimant's total disability status is terminated. Claimant clearly was permitted to rely on the Board's earlier *Board Decision* that she remained totally disabled, so the period of total disability will end as of the date of this decision.

PARTIAL DISABILITY

[6] 152 A.3d 114 (Del. 2016).

In determining whether Claimant is entitled to compensation for partial disability, the initial question is whether Claimant continues to have work restrictions related to her work injury that could reasonably affect her earning capacity. See *Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983)(burden to prove claimant is not partially disabled is on employer when "there is evidence that in spite of improvement, there is a continued disability, and such disability could reasonably affect the employee's earning capacity"). In this case, Claimant has such restrictions, as the parties have stipulated that both Dr. DuShuttle (Claimant's surgeon) and Dr. Schwartz (Employer's physician) have reported that Claimant is physically capable of returning to work with restrictions.

Therefore, Claimant's current "earning power" must be calculated. Partial disability is based on the difference between one's wages before a work-related injury and one's "earning power" after a work-related injury. 19 *Del. C.* § 2325. When calculating earning power, the focus is not on actual earnings or wages received, but on one's ability to earn. *Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700, 703 (Del. 1968). Earning power is a function of the employee's "age, education, general background, occupational and general experience, the nature of the work performable with the physical impairment, the availability of such work and so on." *Chrysler Corp. v. Williams*, 282 A.2d 629, 631 (Del. Super. 1971), *aff'd*, 293 A.2d 802 (Del. 1972). If a claimant is capable of working full time, that claimant's partial disability compensation is calculated based on his or her *capacity* to work full time even if he or she never actually accepts such a job.

In this case, the labor market survey lists numerous jobs that only required activity within Claimant's work restrictions. While there was some dispute as to whether Claimant was qualified for every job listed on the survey, there was sufficient evidence offered to establish an

average wage among at least eight of the listed jobs. The eight available jobs include: Margarita's Restaurant, Mi Ranchito Mexican Grocery, Newark Farmers Market, Taqueria Los Primos Restaurant, Giorgio Fresh, Modern Mushrooms, Ioannoni's Bullroasters, and Phillips Mushroom Farms. The average weekly wage of those positions is $330.00 and the Board is satisfied that this is an accurate representation of what Claimant can realistically expect to earn in the competitive labor market. Claimant's weekly wage at the time of injury was $306.66 per week, so Claimant has no diminished earning capacity. Therefore, pursuant to Title 19, section 2325 of the Delaware Code, Claimant is not entitled to partial disability compensation.

Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the Petition, pending a hearing and decision. The Board has found that Claimant's total disability status has terminated as of the date of this decision and no partial disability benefits are awarded. Employer shall make appropriate reimbursement to the Workers' Compensation Fund.

ATTORNEY'S FEES AND MEDICAL WITNESS FEES

A claimant who is awarded compensation is generally entitled to payment of reasonable attorney's fees "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." 19 *Del. C.* § 2320. At the current time, the maximum amount based on Delaware's average weekly wage calculates to $10,341.80. 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). Less than the maximum fee may be awarded and consideration of the Cox factors does not prevent the granting of 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. 96-A-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 bears the burden of proof and must provide adequate information to make the required calculation. By operation of law, the amount of attorney's fees awarded by the Board applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's counsel. 19 *Del. C.* § 2320(10)a.

In this case, Claimant is no longer entitled to total or partial disability payments; therefore, she is not entitled to an attorney's fee.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's Petition for Review is granted. Claimant's total disability benefits shall terminate as of the date of this decision. Employer shall make appropriate reimbursement to the Workers' Compensation Fund.

IT IS SO ORDERED THIS 18th DAY OF MAY, 2017.

INDUSTRIAL ACCIDENT BOARD

John J Brady for
MARY DANTZLER

Patricia G. Maull
PATRICIA MAULL

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

H. D. Williams
HEATHER WILLIAMS

Mailed Date: 5-19-17

JB
OWC Staff