BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

MAGDALENA GUARDADO,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1405006
	)	
ROOS FOODS,	)	
	)	
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 March 24, 2015, in the Hearing Room of the Board, in Milford, Delaware.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

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

APPEARANCES:

Walt Schmittinger, Attorney for the Employee

Andrew Carmine, 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, pending a hearing and decision. A hearing was held on Employer's petition on March 24, 2015. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Eric Schwartz, a board certified orthopedic surgeon, testified by deposition on Employer's behalf. Dr. Schwartz had reviewed Claimant's pertinent medical records and had examined Claimant on December 16, 2014. Dr. Schwartz reported that Claimant had undergone a left wrist fusion by Dr. DuShuttle on June 18, 2014, as a result of her work injury. According to Dr. Schwartz, Dr. DuShuttle released Claimant to return to one-handed light duty work, effective August 7, 2014. Claimant reported to Dr. Schwartz that she was able to perform activities of daily living with some discomfort. Claimant could put dry clothes in the washer and take them out of the dryer, but could not remove wet clothes from the washer because of the weight. Claimant reported to Dr. Schwartz that her symptoms were tolerable and she did not wish to have any further medical treatment for her wrist injury.

Upon physical examination, Dr. Schwartz found Claimant to have: a well healed surgical scar across the dorsum of her wrist; a fixed flexion deformity of her small finger in the PIP joint, which predated the work injury; diffuse wrist pain both volarly and dorsally; no wrist swelling in flexion or extension; and a wrist fixed in an almost neutral position. Claimant was able to pronate, but was unable to supinate. Dr. Schwartz agreed with Dr. DuShuttle that Claimant could return to one-handed light duty work and that she was able to use the left hand as an assist hand. Dr. Schwartz confirmed that Claimant has a significant disability associated with the work injury and accompanying limitations. Dr. Schwartz explained that Claimant would have functional problems working because of her lack of any extension and the supination that she has.

Dr. Schwartz confirmed that he agreed with Dr. DuShuttle's recommendation that Claimant be restricted to one-handed light duty work since August, 2014. As for types of jobs that Claimant was capable of doing, Dr. Schwartz indicated that he believed Claimant could do desk work or any other type of light duty work that did not require manipulation with both her left and right hand. Finally, Dr. Schwartz confirmed that he believed the best jobs for Claimant from the Labor Market Survey were the Goodwill Industries, McDonald's and St. Francis Hospital positions.

Ellen Lock, a vocational case manager for Coventry, testified on Employer's behalf. Ms. Lock prepared a Labor Market Survey from November 2014 to February 2015. Ms. Lock's information was that Claimant had been employed as food operator and production, did not speak English, resided in Middletown and was 33 years old. Because Ms. Lock was unaware of Claimant's educational background, she assumed Claimant did not graduate from high school. Ms. Lock reported Claimant's transferrable skills were basically following directions and

production/ assembly work. From a physical standpoint, Ms. Lock understood that Dr. DuShuttle had relegated her to one handed duty as of August 2014 and Dr. Schwartz said she could use her left hand to assist. Based on the doctor's recommendations, Ms. Lock based the job search on Claimant's ability to use an assist hand.

Ms. Lock identified eight jobs for Claimant based on her ability to assist with one hand. Ms. Lock identified two car wash positions that entailed wiping down cars and cleaning windows on cars after they go through an automated car wash. The car wash jobs hire non-English speakers and there are Spanish speaking supervisors on site. The Goodwill Industries job would allow for the right hand assist and involves clothing sorting and pricing. The McDonald's and Taco Bell jobs are similar and involve light custodial type job duties and there are non-English speaking crew members present. The Uhaul and YMCA jobs involve sweeping and mopping, but Dr. Schwartz said these would not be suitable because Claimant would not be able to do those duties consistently. Ms. Lock believes the other jobs fit within Claimant's restrictions. Claimant's average weekly wage was $306.00 and each of these jobs exceeds that wage.

On cross examination, Ms. Lock testified that she discussed Claimant's specific restrictions, including that she had a left wrist injury and was non-English speaking to the Employers listed on the survey. She admitted that there would be a difference in jobs available in the general labor market and jobs available to this particular Claimant because of her language barrier. She testified that there were eight jobs available to her in a short time that were compatible with her physical restrictions and language barrier. Ms. Lock based her search on physical restriction, language barrier, geographical area and lack of high school diploma. Ms. Lock admitted that she was not aware if Claimant was legally allowed to work in the United

States. She testified that she did not ask whether the Employers listed on the survey would accept undocumented workers. Ms. Lock agreed that it would violate federal law for any employer to hire Claimant because she is an undocumented worker.

Dr. Richard DuShuttle, a board certified orthopedic surgeon, testified by deposition on Claimant's behalf. Claimant had been a patient of Dr. DuShuttle's since September 2013 and Dr. DuShuttle had performed wrist surgery on Claimant in June of 2014, as a result of the work injury. Dr. DuShuttle explained the surgery as a wrist fusion, which made it so that Claimant cannot move her wrist up and down because it is set in one position. The doctor described the surgery as "significant," causing patients to need at least three months to heal, followed up by physical therapy. After the surgery, Dr. DuShuttle saw Claimant for follow up treatment monthly and during those visits Claimant continued to complain of pain, but with improvements. Over the course of recovery, Dr. DuShuttle referred Claimant for physical therapy as well.

Dr. DuShuttle explained that he kept Claimant on one-handed light duty status through the fall of 2014. In October 2014, Claimant's physical examination revealed swelling, weakness compared to the unaffected right side and positive volar wrist pain and distal ulnar pain. To alleviate Claimant's pain, Dr. DuShuttle prescribed pain and anti-inflammatory medications. In November 2014, Dr. DuShuttle determined that Claimant had reached maximum medical improvement for purposes of the surgery, but would need periodic visits, medications and/or therapy. In addition, Dr. DuShuttle determined that Claimant would have a permanent impairment. Dr. DuShuttle explained that Claimant will continue to have weakness in her hand and fingers. In February 2015, when Dr. DuShuttle saw Claimant for the last time, Claimant reported a significant decrease in pain, but still had pain with lifting and a loss of moderate

supination. Dr. DuShuttle explained that Claimant's wrist is fused in extension, which means hers remains straight and does not move back for a proper "position of function."

Dr. DuShuttle testified that Claimant's light duty one-handed work restriction is permanent.

On cross examination, Dr. DuShuttle agreed that Claimant could perform some activities with her left hand, like grasping papers and other light objects, and could use her left hand as an assist hand regularly. Dr. DuShuttle believed Claimant could perform activities with her right hand without restrictions. Dr. DuShuttle confirmed that Claimant was right hand dominant.

Claimant testified that she is thirty-eight (38) years old and previously worked for Employer and was in charge of managing the machine for cream for about five (5) years. Prior to working for Employer, she had never worked before. She testified that she completed high school in El Salvador. She does not speak any English because in El Salvador they do not speak English and she cannot read or write in English. She came to the United States in 2004 and is not a United States citizen now. Claimant admitted that she does not have any documents that establish that she is legally able to work in this country. Despite the fact that she cannot legally work here, she has looked for work since she was released by Dr. DuShuttle. She has filled out applications, but has not been hired yet. Claimant reported that her physical restrictions at this time are no heavy lifting because her hand swells and is painful when she lifts.

On cross examination, Claimant testified that she is able to read and write in her native language. On a daily basis, Claimant reported that she normally stays home, but she goes out twice a week and looks for a job. On the days when she is at home, she will wash the dishes and sometimes cook, but she has to be careful with what she does. She reported that showering is

problematic because shampooing her hair and using bar soap is difficult for her. Claimant testified that she normally uses her right hand primarily because she cannot use her left hand to lift heavy things. Currently, she lives with her husband and a nephew. Before the surgery her pain was constant, but since the surgery she only has pain when she lifts heavy things. Dr. DuShuttle gave her ibuprofen to take for pain. Before surgery she was taking much more significant pain medications and she was working for Employer with the injured hand, doing the same job that she had been doing prior to the work injury.

Claimant indicated that she has applied to Taco Bell, Goodwill and McDonald's from the Labor Market Survey, but she never heard back from them. Claimant testified that she has been looking for work because she wants to return to work.

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, the Board finds that Employer has met its initial requirement that Claimant is medically employable; however, Claimant has rebutted that by providing reason to

believe she is displaced based upon her undocumented worker status. Therefore, Employer must present evidence of regular employment opportunities within all of Claimant's capabilities.

The first issue is whether Claimant is medically capable of working. Undeniably, Claimant has movement restrictions; however, the Board agrees with both doctors that Claimant is medically capable of working one-handed light duty jobs. While Claimant has some movement and lifting restrictions, she is not completely incapacitated. As both doctors and Ms. Lock indicated, there are jobs that allow for Claimant's physical restrictions, as listed in the Labor Market Survey. Claimant is capable of performing light duty tasks and of using her left hand as an assist to her right in performing tasks that require both hands. The Board agrees with both doctors that Claimant is physically capable of working a light duty job that allows for her one handed restriction.

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. In this case, Claimant testified that she had only applied to a few jobs; however, she had not heard back from any of those. Based on this little evidence, there is no basis to find "actual" displacement. The sole question is whether she should be considered displaced on a *prima facie* basis.

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).

"Federal restrictions that prevent employers from hiring undocumented workers may make it more difficult for [Employer] to prove job availability, but any difficulty is appropriately borne by it as the employer, who must take the employee [Claimant], as it hired him." *Campos v. Daisy Construction Co.*, 107 A.3d 570, 572 (Del. 2014). In *Campos*, Claimant was an undocumented worker who was injured on the job after working for Employer for over two years and the issue was whether the Board's denial of Claimant's partial disability benefits was consistent with the Workers' Compensation Act and supported by substantial evidence on the record below. *Campos* at 572, 575. After Employer filed a Petition to Terminate Claimant's partial disability benefits, Employer alleged that there were jobs available with Employer if Claimant could produce a valid social security card. *Id.* The Court determined that Employer's offer to rehire Claimant if not for his immigration status was insufficient to demonstrate job availability because the job was not, in fact, available for Claimant to take. *Campos* at 571-572.

"The employer who seeks to terminate benefits also bears the burden to prove that jobs are actually available – i.e., "within reach" – of the injured employee." *Campos* at 577. "We have previously found this type of "theoretically available" argument to be unavailing for employers seeking to meet their burden to terminate benefits under the Workers' Compensation Act." *Campos* at 576. The *Campos* Court did distinguish the case from *Torres v. Allen Family Foods*, 672 A.2d 26 (Del. 1995) wherein the employer retained a vocational rehabilitation specialist who provided the Claimant with unsuccessful job leads, and completed a Labor Market

Survey, which listed jobs available to someone with Claimant's qualifications and limitations. Ultimately, the *Campos* Court held that Employer must continue to pay partial disability benefits to Claimant, until or unless Employer can prove "by reliable evidence that jobs are in fact available to [Claimant] as an injured documented worker." *Campos* at 577-578. The *Campos* Court determined that requiring Employer to meet its statutory burden of proving Claimant had employment available to him was the outcome most consistent with the Workers' Compensation Act. *Campos* at 578, 580. In *Campos*, the Court also determined that the burden of proving job availability is best placed on employers of undocumented workers following a work injury and was most consistent with the federal Immigration Reform and Control Act ("IRCA.") *Campos* at 582. Finally, the *Campos* Court concluded that its holding was most consistent with the purposes of the Workers' Compensation Act, which was to "foster a workplace safe for all workers." *Campos* at 584.

In this case, Claimant testified she came to the United States in 2004, but she is not a United States citizen, nor does she have any documents that allow her to work in this country legally. Claimant reported that since coming to this country the only place she has ever been employed is for Employer for five years. Claimant explained that while she is capable of reading and writing in her native language (Spanish) and graduated from high school in El Salvador, she can neither read nor write in English. In fact, Claimant used an interpreter during the hearing.

Ms. Lock presented a Labor Market Survey; however, she admitted that she was unaware of Claimant's undocumented legal status when she prepared the Labor Market Survey. Furthermore, Ms. Lock admitted that she had not inquired as to availability for undocumented workers at the jobs listed on the Labor Market Survey. Ms. Lock reported that she had only

asked about availability for jobs for non-English speakers with Claimant's physical restrictions. The Board is satisfied that Claimant qualifies as a displaced worker based upon her undocumented legal status and Employer has failed to present a Labor Market Survey that shows regular employment opportunities within Claimant's capabilities as an undocumented injured worker. While Employer did prepare a Labor Market Survey of prospective jobs that could be available to Claimant with her physical restrictions, it did not address all of Claimant's restrictions; and therefore, cannot be considered reliable evidence of jobs actually available to Claimant. Because Ms. Lock was unaware of Claimant's undocumented legal status when she prepared the survey, the jobs on the Labor Market Survey cannot be considered reliable evidence of jobs that are actually "within reach" to Claimant as an undocumented injured worker as required by *Campos*. Therefore, Employer's Petition is denied.

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." DEL. CODE Ann. Tit. 19 § 2320. At the current time, the maximum amount based on Delaware's average weekly wage calculates to $9,983.50.

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. DEL. CODE ANN. Tit. 19 § 2320(10)a.

In this case, Claimant is entitled to total disability payments. Claimant's counsel submitted an affidavit stating that he spent approximately 24 hours in preparation time for this hearing, which itself lasted approximately one and a half hours. Claimant's counsel has a great deal of experience in workers' compensation law, which is a specialized area of litigation. His firm's initial contact with Claimant was in August 2013, so he has represented Claimant for approximately a year and a half. This case was of average factual complexity and involved no unique or unusual legal issues. Counsel does not appear to have been subject to any unusual time limitations imposed by the circumstances of the case or Claimant, although he was unable to work on other matters simultaneously with this one. There is no evidence that counsel's handling of this case prevented him from being able to accept other cases, other than from the Employer and the carrier. The fee arrangement between counsel and Claimant is a one-third contingency basis. Counsel does not expect a fee from any other sources and there is no evidence of Employer's inability to pay counsel's fee.

When considering the fees customarily charged in this area for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that a fee of $7,800.00 is reasonable in this case and is less than ten times the average weekly wage. This calculates to about $300.00 per hour for counsel's services, which is not excessive. In the Board's estimation, this amount is reasonable and does not exceed thirty percent of the value of

the award once the value of inchoate non-monetary benefits that may arise from this decision are taken into account. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are also 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, Employer's Petition for Review is Denied. Claimant's total disability status is continued and she shall be entitled to disability payments of $204.00 per week. Claimant shall be entitled to an attorney's fee and medical witness fees. Employer shall make appropriate reimbursement to the Worker's Compensation Fund.

IT IS SO ORDERED THIS 7th DAY OF APRIL, 2015.

INDUSTRIAL ACCIDENT BOARD

Mary Dantzler
MARY DANTZLER

John F. Brady for
PATRICIA MAULL

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

Heather Williams
HEATHER WILLIAMS

Mailed Date: 4-9-15

Karen Smiley
OWC Staff