BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

EDDIE WORTHY,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1377382
	)	
KENT SUSSEX INDUSTRIES,	)	
	)	
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 January 6, 2014, in the Hearing Room of the Board, in Milford, Delaware.

PRESENT:

VICTOR R. EPOLITO, JR.

MARY MCKENZIE DANTZLER

Angela M. Fowler, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Andrea Green, Attorney for the Employee

Andrew Carmine, Attorney for the Employer

Displaced worker -
Sixty two year old claimant
whose entire vocational history
is that of unskilled labor,
terminated by an employer
of the developmentally
disabled, is both prima
facia and actually
displaced

NATURE AND STAGE OF THE PROCEEDINGS

Eddie Worthy ("Claimant") was injured while working for Kent Sussex Industries ("Employer") on August 27, 2011. The injury was recognized as compensable and Claimant received certain workers' compensation benefits, including total disability benefits at the compensation rate of $255.69 per week, based on a weekly wage at the time of injury of $383.54 per week.

On August 16, 2013, Employer filed a Petition for Review seeking to terminate Claimant's receipt of total disability benefits. Claimant opposes Employer's request asserting that he remains totally disabled either on the basis of ongoing medical disability or alternatively as 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.[1]

A hearing was held on Employer's petition on January 6, 2014. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. John Townsend, M.D., a board certified neurologist, testified via deposition on behalf of Employer. Having assessed Claimant in addition to conducting a review of Claimant's relevant medical records, Dr. Townsend opined that Claimant is capable of a full-time, sedentary duty return to work.

Dr. Townsend testified that he has evaluated Claimant on several occasions including twice in 2012 and twice in 2013. Focusing on the 2013 assessments, Dr. Townsend indicated that he met with Claimant on May 16, 2013 at which time Claimant reported difficulty walking, pain in his hip down to his feet, as well as cramping and tingling in his right hand. At this point, Claimant had undergone a November 2012 anterior cervical disectomy and decompression at

[1] *See* Joint Exhibit 1 (Stipulation of Facts).

C4-5 and C5-6 including fusion with installation of hardware. He had also undertaken a January 29, 2013 right-sided ulnar nerve transposition but continued to have numbness in his last three fingers on his right hand. Claimant reported that use of his right hand increased his symptoms and pain levels. While he had been able to do household chores after the surgery he had to decrease that activity as the cramping in his hand began to return and increase.

Dr. Townsend indicated that physical examination of Claimant showed full cervical range of motion with no spasm or tenderness. He had brisk reflexes more so on the left side than the right at the biceps brachial radialis and wrist, as well as brisk knee jerks bilaterally. Claimant also displayed an asymmetric Hoffman's sign suggesting that there has likely been a spinal cord issue or at least an upper motor neuron issue. He had a normal gait and walked unassisted in addition to producing a normal sensory examination.

Dr. Townsend reached the conclusion that Claimant's neck complaints that went into the right upper extremity were related to the industrial accident with Employer but that his myelopathy, the condition affecting his walking, likely preexisted the work accident. Dr. Townsend further opined that Claimant was capable of returning to work in a sedentary position. He specified that Claimant should not lift more than 10 pounds; should sit no more than five to six hours a day; stand three to four hours; walk no more than one to two hours; and, avoid overhead work.

Dr. Townsend next saw Claimant on December 4, 2013. Claimant reported that he remained essentially the same though he had good days and bad days. He had no pain in his neck but continued to follow up with Dr. Paul Boulos, his surgeon. Claimant complained of pain in his right leg as well as tingling and numbness in his left hand. He also noted continued problems that affected his ability to walk distances or traverse stairs. Claimant acknowledged

that he could drive his automobile a little and perform modest tasks around the home such that it seemed to Dr. Townsend that Claimant was somewhat more active than he had been in May 2013. Contrary to his May 2013 report that he could not work if he wanted to, Claimant now indicated that he was looking for work. He maintained that he did not feel he could do his old job or stand at any job for more than 15 minutes at a time but noted that he was stopping in at construction sites looking for work of some kind.

In terms of the interim medical care Claimant had received, Dr. Townsend testified that Claimant had a follow-up with Dr. Boulos on March 12, 2013, at which time he reported that his arm, neck and fingers were better. An updated MRI of his cervical spine showed some ongoing disc osteophyte complexes that were causing central canal stenosis and there was evidence of mild cord edema versus myelomalacia. At a subsequent June 11, 2013 appointment with Dr. Boulos, the notes reflect that Claimant was improving and was using Lyrica for his dysesthetic sensations in his hands.

Dr. Townsend's physical examination of Claimant was very similar to his May 2013 assessment. The only difference noted had to do with Claimant's reflexes seeming more settled. His upper extremity reflexes were now equal as were his knees and ankles. His gait was normal and there was no evidence of spasticity. He was walking unassisted and had no sensory abnormalities though he did still have a mildly asymmetric Hoffman's sign. There was, however, now evidence of a left ulnar compression neuropathy. Dr. Townsend explained that the ulnar nerve goes through a tunnel in the back of the elbow and can sometimes become compressed in that area or affected by scar tissue in that area. When that happens, pain develops around the elbow region as well as numbness and tingling into the last three digits of the affected hand. Dr. Townsend indicated that while he felt that Claimant's neck and right upper extremity

complaints were related to his work injury, he did not believe that Claimant's left upper extremity issues were related because the symptoms developed long after the 2011 work accident in an area that is often injured just from day-to-day activity. Moreover, Dr. Townsend maintained that Claimant's myelopathy, a condition which he believes was long standing and preexisted his work accident with Employer based on the myelomalacia evidenced in his early imaging scans, was what was causing his difficulty with standing and walking and his lower extremities in general.

In terms of Claimant's work capabilities as of the time of Dr. Townsend's December 2013 assessment, Dr. Townsend opined that they had not changed dramatically from his May 2013 assessment. He continued to believe that Claimant should be restricted to sedentary duty, lifting no more than ten pounds, sitting five to six hours a day, standing three to four hours a day, walking one to two hours a day and avoiding overhead work. These restrictions, according to Dr. Townsend, were largely based on Claimant's subjective reports regarding his own belief as to his capabilities and particularly his walking and standing difficulties. Having reviewed the Labor Market Survey[2] created relevant to Claimant, Dr. Townsend opined that all but one of the jobs was within Claimant's physical capabilities. Specifically, he felt that the McDonald's job identified in the survey would require more standing than Claimant should be doing.

On cross examination, Dr. Townsend agreed that he has not found, in any of his multiple examinations of Claimant, that Claimant has exaggerated or magnified his symptoms. In fact, he has always found Claimant to be pleasant, cooperative and attempting to provide a reasonable account of his circumstances.

Looking back over his own documented contacts with Claimant, Dr. Townsend confirmed that even back in August 2012 Claimant was reporting to him increased pain with use

[2] *See* Employer's Exhibit 2 (Labor Market Survey).

of his right hand that resulted in fairly circumscribed activities around his home. Dr. Townsend confirmed that Claimant reported identical complaints and abilities when he saw him in May 2013. Dr. Townsend also confirmed that he found Claimant's subjective complaints to be consistent with his objective findings on physical examination. By the time of his December 2013 assessment of Claimant, Claimant was still reporting increased pain with use of his right hand but had indicated that he was trying to use the leaf blower a little and look for work. Dr. Townsend admitted that he did not inquire as to what a "little" meant to Claimant.

Dr. Townsend indicated that he observed Claimant walk down the hallway in his office, a distance of approximately 150 yards, without issue.

Dr. Townsend reiterated his belief that Claimant's cervical myelopathy preexisted the development of his work-related radiculopathy and that Claimant's right ulnar neuropathy was related to his work for Employer.

In regards to the classification of work he recommended Claimant be released to perform, Dr. Townsend clarified that sedentary duty equates to the amount of weight an individual should be lifting and not necessarily a designation of the amount of time one should be sitting. He maintained that the walking and standing restrictions he recommended for Claimant are appropriate in that they would require Claimant to be sitting more than half the day, standing less than a third of the day and walking less than that. He conceded that he would not prefer Claimant take a job that extended his standing and walking time above his sitting time as his restrictions for Claimant would be suggestive of primarily seated work. Specifically addressing the jobs identified in Employer's Labor Market Survey, Dr. Townsend indicated that his knowledge of the requirements of each identified position comes from the job descriptions provided in the survey as well as his 24 years experience in reviewing similar jobs. He further

acknowledged that if the Goodwill position listed in the survey required even occasional lifting up to 30 pounds that would not be appropriate for Claimant nor would the Genesis van driver position if it required Claimant to assist individuals potentially in wheelchairs into and out of a transport van.

On re-direct examination, Dr. Townsend confirmed that the standing and walking complaints and corresponding restrictions he has suggested for Claimant are, in his opinion, the result of health conditions unrelated to Claimant's industrial accident with Employer.

Ellen Locke, a vocational case manager for Coventry with 17 years experience in the field, testified on Employer's behalf. Having conducted a Labor Market Survey relevant to Claimant at Employer's request, Ms. Locke opined that Claimant is employable in the local labor market with little to no loss in earning capacity despite his sedentary-duty restrictions.

Ms. Locke testified that she identified eight jobs consistent with Claimant's physical, educational and vocational abilities. She testified that these eight jobs are merely a representative sampling of the kinds of employment opportunities that have existed in the local labor market and do not suggest a complete list of the kinds of opportunities that continue to be available. The jobs identified were available between August 16, 2013 and November 28, 2013.

In compiling the survey data, Ms. Locke assumed that Claimant did not complete a high school education or attain a General Education Diploma. She also looked to his vocational history to determine that Claimant had been employed for approximately a year and a half with Employer prior to his injury and prior to that had worked in construction trades including concrete work. She estimated that his transferable skills equate to the need for an entry level position that offers on the job training; as is the case with all eight jobs that she identified, none of which have educational or prior experience requirements. Ms. Locke further relied on the

physical restrictions recommended by Dr. Townsend of sedentary duty, lifting no more than ten pounds, sitting five to six hours a day, walking one to two hours a day and standing no more than three to four hours a day. Ms. Locke testified that in identifying the eight jobs on the survey and creating the written job descriptions that accompany each, she gathered detailed information from personal conversations with the potential employers in addition to making her own observations of the performance of each position.

Ms. Locke testified that Dr. Townsend approved all of the jobs on the survey as being consistent with Claimant's physical abilities except the McDonald's crew member position which does require moderate standing and walking, ranging from 21 to 33 percent of the time. Ms. Locke also spoke with each employer to determine that Claimant is appropriate to apply for and be considered for each identified position.

Ms. Locke testified that the average weekly wage for the jobs identified in the survey is $352 per week with the low average being $351 per week and the high average equating to $352.50. Removing the McDonald's job from consideration results in an average weekly wage of $405.71.

On cross examination, Ms. Locke confirmed that she was looking for sedentary jobs for Claimant. She admitted that she did not review the actual job postings created by the individual employers identified on the survey though she has seen some of them in the past. In this regard, Ms. Locke acknowledged that the Fasmart posting created by that employer indicates that an applicant must be able to clean, stock shelves, check in vendors and perform other miscellaneous customer service related tasks. Ms. Locke indicated her belief, however, that the weights associated with the vendor deliveries and stocking of shelves could be broken down to meet

Claimant's limitations and that the cleaning was little more than keeping the counters neat. Nonetheless, Claimant would have to complete paperwork associated with the vendor deliveries.

Ms. Locke admitted that she has not seen the Safeway Gas posting created by that employer which indicates customer service skills and/or similar experience preferred. At any rate, she confirmed that an applicant for that position would have to be able to use a cash register, stock shelves, accept deliveries and do some modest overhead work stocking and selling cigarettes. Ms. Locke admitted that she is not aware of any customer service experience Claimant may have nor is she aware of the degree to which he can perform basic math sufficient to manager cash flow coming in and out of the store. She also acknowledged that while not required or a disqualifying factor, a high school education is preferred by that employer as is the case with many employers. Moreover, this job is in excess of 30 miles from Claimant's home with an estimated travel time of approximately 40 minutes; a deviation, albeit a slight one, from the 30 mile, 30 minute parameters that she typically attempts to stay within in searching for jobs in the vicinity of individuals looking for employment.

As for the Goodwill job identified in the survey, Ms. Locke acknowledged that the Goodwill employment posting for this position calls for frequent standing and/or walking as well as lifting up to 30 pounds on occasion. Ms. Locke insisted, however, that her conversations with a representative of the Goodwill agency in Wilmington, Delaware confirms that accommodations can and will be made for an individual whose restrictions do not allow for those levels of tolerance.

Ms. Locke indicated that she is somewhat familiar with Employer and the fact that it is a private, not-for-profit vocational rehabilitation agency that provides specialized services to assist individuals with disabilities in obtaining and maintaining employment. In early December 2013,

after creation of the present Labor Market Survey, she reviewed Claimant's personnel file held by Employer. In that file, she observed a Photography and Information Consent Waiver release form executed by Claimant which speaks to the existence of some disability in Claimant. She also saw a Rights of Developmentally Disabled Persons Acknowledgement form that Claimant had executed. While this suggested that Claimant may have some developmental disabilities, she did not inquire further as to the nature of those limitations or the extent of Claimant's literacy. Ms. Locke also admitted that Claimant earned $7.88 per hour at his job for Employer while all of the jobs she identified in the Labor Market Survey, excepting the McDonald's position, actually pays more than that wage.

Ms. Locke confirmed that she is not aware of any job placement service that Claimant may have been offered from Employer, Employer's insurance carrier or otherwise.

During re-direct examination, Ms. Locke indicated that she did not have the benefit of interviewing Claimant prior to creating her Labor Market Survey for him. She has, however, used Employer on other of her surveys in the past and knows that like Goodwill and McDonald's, Employer frequently hires the disabled.

Ms. Locke confirmed that she reviewed the job search logs provided by Claimant detailing his personal job search efforts from October 2, 2013 through November 27, 2013; 47 in all. The jobs that Claimant described applying for in these logs included a host of driving and delivery jobs, construction related jobs, retail jobs, management jobs and a variety of others. Ms. Locke indicated that she deduced from her review of these job search logs that Claimant must have believed that he could perform them based on his application. She admitted however that she believes that several of the jobs he applied for exceed his physical and/or vocational abilities.

Dr. Paul Boulos, M.D., a board certified neurosurgeon and Claimant's treating physician, testified by deposition on Claimant's behalf. Dr. Boulous opined that while it is remotely possible that Claimant is physically capable of working in some sedentary capacity, he maintained Claimant on a total disability status up until September 3, 2013 and then reinstituted that no work status as of December 3, 2013.

Dr. Boulos testified that he assumed treatment of Claimant on August 10, 2012. At that time, Claimant presented with complaints of pain, numbness, weakness and tingling in his arms, worse on the right side than the left. A cervical MRI taken before this initial consultation revealed disc problems at C4-5, 5-6 and 6-7. This study was older and so Claimant was sent for a repeat diagnostic as well as a repeat EMG of his right upper extremity. A prior October 2011 EMG had been performed on both upper extremities and while incomplete, revealed bilateral upper extremity issues with Claimant's median and ulnar nerves.

Dr. Boulos saw Claimant for a second time on September 6, 2012 at which time the repeat MRI and EMG had both been performed. These studies confirmed that Claimant had multiple problems in his neck as well as his arm at the carpal tunnel and ulnar nerve. A plan was developed to perform the cervical spine surgery first to address the significant spinal cord compression and cord signal changes indicated in the studies. This surgery was performed on November 12, 2012 and included a two-level anterior cervical disectomy and fusion from which Claimant received a good result and recovered well.

Subsequently, Dr. Boulos performed a second surgery on Claimant on January 29, 2013. This was an ulnar nerve release to address persistent symptoms in Claimant's right hand and arm. Claimant again received a good result and recovered well from the procedure.

Dr. Boulos testified that he saw Claimant in follow-up on June 11, 2013. Claimant was doing reasonably well at that point though he continued to have numbness and tingling in his right hand from what Dr. Boulos believed was the ulnar and median nerves as well as his neck. When Claimant returned to Dr. Boulos on September 3, 2013, he was continuing to improve but was still having numbness, tingling and weakness in both hands. Then, on his most recent visit with Dr. Boulos on December 3, 2013, he presented with greater complaints in the left hand than the right. A plan to get a repeat MRI of Claimant's neck as well as a new EMG of the left upper extremity was implemented. The new MRI has since been completed but adds nothing to the treatment at this point while the EMG has not yet been performed.

Dr. Boulos testified that at present, the plan for Claimant's treatment is to have the EMG of his left upper extremity completed and consider the possibility of an ulnar nerve release on the left side comparable to what was performed on the right in January 2013. Dr. Boulos explained that carpal tunnel and ulnar nerve entrapment syndromes like Claimant has suffered are repetitive-use injuries as scar tissue builds up from performing the same motions over and over, eventually causing compression on the nerves. Given Claimant's work history and the history of his complaints, Dr. Boulos indicated his belief that Claimant's left upper extremity condition, like the right, is causally related to his work for Employer.

In regards to Claimant's ability to work, Dr. Boulos testified that Claimant was placed on a no-work status by one of his prior physicians in October 2011. He did not modify that until September 3, 2013, when he released Claimant to return to work in a sedentary duty capacity. Subsequently on December 3, 2013, he again changed Claimant's work status back to no-work based on Claimant's increasing symptoms and his own belief that Claimant could not tolerate work. Unaware of any activities Claimant may be doing at home that would be aggravating his

condition, Dr. Boulos agreed that Claimant's reports to Dr. Townsend of a progressive decline in his ability to do things around his home is consistent with Claimant's reports and presentation to him.

Looking at the jobs identified in Employer's Labor Market Survey for Claimant, Dr. Boulos confirmed his agreement with Dr. Townsend that the McDonald's position would require more standing and walking than Claimant could do. Dr. Boulos added to that concerns regarding any job that required Claimant to work as a cashier because of the repetitive motion associated with such work. Dr. Boulos discounted the Dominos pizza delivery job as involving too much walking and the potential for Claimant to have to go up stairs. He similarly discounted the Goodwill position to the extent that it requires even occasional lifting of up to 30 pounds. Noting that Claimant does not have full strength in his arms, Dr. Boulos also eliminated the Genesis van driver position as being beyond Claimant's physical capabilities.

On cross examination, Dr. Boulos confirmed that his February 2013 note for Claimant reflects his documentation that Claimant's ulnar nerve symptoms had completely resolved and that his wound was healing well. His note for Claimant from March 2013 also reflects that Claimant's neck, arm and fingers are significantly better. Dr. Boulos indicated, however, that the severity of Claimant's injuries was such that a potentially longer period of recovery before a release to return to work is accounted for. Dr. Boulos, in fact, indicated that Claimant continued to have problems including pain and weakness in his hands that would continue to hold him back; some likely related to persistent compression that even to date has not been addressed.

Dr. Boulos confirmed that his June 2013 note for Claimant reflects ongoing improvement despite continued numbness in Claimant's hand. This was what eventually led to the repeat MRI and EMG which have subsequently ruled out Claimant's neck as the cause of his ongoing

symptoms. Dr. Boulos indicated that he may have been slightly exaggerating in his September 3, 2013 note for Claimant when he wrote that Claimant's neck and upper arm symptoms had completely resolved testifying instead that Claimant continued to have weakness and atrophy in his muscles that would not just go away. He explained that the issues that have been addressed and fixed as they relate to Claimant's neck and right upper extremity should not come back though he cautioned there are issues that still have not been addressed accounting for Claimant's ongoing difficulties.

Dr. Boulos confirmed that Claimant is right hand dominant and conceded that it is possible that Claimant could work in some capacity if he were able to sit at a desk and perform one-handed work that didn't involve moving, lifting, shifting or anything repetitive in nature.

During a combination of re-direct and re-cross examination, Dr. Boulos specified that while he has most recently restricted Claimant to no-work status as of December 3, 2013, Claimant may be physically capable of performing one-handed sedentary, non-repetitive duty if such work were available. Dr. Boulos expressed concerns for issues Claimant would have beyond the physical components for getting and maintaining such a job noting his concern that Claimant may have mental limitations that are implicated in such an analysis. Nevertheless, Dr. Boulos maintained that he took Claimant back out of work for physical reasons including weakness in his upper extremities.

Dr. Boulos confirmed that while he has his doubts as to Claimant's abilities, he would not be opposed to Claimant working in a sedentary capacity with the restrictions he has detailed if such work existed and were available to Claimant.

Claimant, who is 62 years old, testified that he worked for Employer for 18 months prior to being injured on the job. His job duties for Employer included moving and stacking baby

wipes on pallets, dragging boxes of wipes from the production line and packaging wipes. While performing this work, Claimant developed pain in his right thumb that got progressively worse and spread up his arm and down his leg. His left hand and arm hurt as well but initially was not as bad as his right. At present, however, it is the left hand that is the bigger problem.

Claimant, who has an eighth grade education, can only read a little and has never filled out a job application on his own, testified that he has not been employed since his injury. He was recently terminated by Employer. Prior to working for Employer, Claimant worked for ten or eleven years with Shea Concrete performing concrete services. Before that he worked for Gerald Green putting up metal buildings; an occupation he performed when living in Florida as well. From the ages of 18 through 27, Claimant worked as a migrant farmer. It was a friend who referred him to Employer when he was laid off by Shea Construction.

Claimant testified that his wife completed the applications and job log that he submitted for this case. He also indicated that he relies on his wife, nephew or friends for assistance with things that require reading and/or writing. On his own, Claimant, who recognizes that he is no longer physically able to do the heavy manual labor that he has done most of his life, did stop at local construction sites to inquire as to whether or not anyone needed any light labor services but was unsuccessful in finding any work. He indicated that he has never used a computer but, with the assistance of his wife, applied for more than 70 jobs without positive response since October 2013. Claimant indicated that he was terminated by Employer approximately a month ago but noted that he has never been out of work since he was 16 years old and wishes that he could find employment because he enjoys working.

Claimant acknowledged that he does drive a car some though he relies on assistance from his wife for that as well when his hands go numb and he has pain in his leg.

Claimant indicated that while he recalls signing several forms for Employer that included language about developmental disabilities, he did not understand what he was signing and only did so to get the job.

Claimant testified that he has never used a cash register and does not believe that he has enough education to complete paperwork for an employer. He noted that he cannot walk distances because his leg gives out and that he does not have the strength in his hands that he use to have. Even light cleaning at home makes his pain worse.

On cross examination, Claimant testified that he learned how to perform steelwork and construction watching others. At present, he knows that he isn't physically capable of doing some of the jobs that he applied for in his recent job search despite feeling improvement in his condition after the surgeries.

During re-direct examination, Claimant clarified that while he thinks he could do some kind of driving job, he knows that he is only capable of driving for a little while and not necessarily an eight hour day. He explained that while some of the jobs on his job log reflect work that he knows he could not perform, he applied for anything he could find hoping to get lucky. As of yet, he has not received any response, positive or negative, from any of the employers to whom he applied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

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 further 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 while Claimant may no longer be medically totally disabled, he continues to be totally disabled by virtue of his displaced worker status.

There is little medical dispute that Claimant is physically capable of working. Dr. Townsend testified, and at least as of the date of his December 2013 deposition, Dr. Boulos agreed, that Claimant is capable of performing modified duty to include, at a minimum, sedentary, one-handed, non-repetitive work. As such, while Claimant may continue to have injuries necessitating further investigation and treatment, as a present medical matter, the evidence seems clear that Claimant is no longer totally medically disabled.

Having found that Claimant is physically capable of working in some capacity, the next issue is whether he qualifies as a 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*, 30 A.3d 775, 777 (Del. 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, he has sedentary restrictions according to Dr. Townsend that should allow for more sitting then standing or walking. Dr. Boulos reluctantly indicated similar restrictions for Claimant suggesting that his work should not only be sedentary in nature but primarily in a sitting position with performance allowed by use of one hand and in the absence of repetitive tasks. Both physicians agree, however, that Claimant cannot work in the physically demanding capacity that he once worked in. Claimant has an eighth grade education. He has never used a cash register, and has suggested that he is only minimally literate at least in regard to his ability to read and write. His affiliation with Employer, a private, not-for-profit agency whose mission is to assist the developmentally disabled in obtaining and maintaining employment suggests that Claimant may have additional deficits that extend beyond exposure to formal education; a distinction that Ms. Locke, Employer's vocational expert, acknowledged could have an impact on Claimant's employability. Moreover, vocationally, it is undisputed that Claimant, now 62 years old, has worked exclusively as an unskilled laborer, limited to doing only heavier duty work such as construction and migrant farming for the entirety of his life. Given the expansive physical restrictions now placed upon his as a result of his industrial injuries, the Board is persuaded that the employment prospects of someone with Claimant's limited education and experience combined with the existence of developmental disabilities significant enough for him to qualify for the assistance of an organization like Employer are questionable at best. In fact, the Board

finds compelling evidence that Claimant is precisely what has been defined by our courts as a *prima facie* displaced worker.

Even beyond the elements noted above supporting a finding that Claimant is *prima facie* displaced, the Board is persuaded that Claimant is more likely than not "actually" displaced as well. 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*, 30 A.3d at 777-78. 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). 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*, 30 A.3d at 779.

In the instant case, upon an initial release to return to work issued by his treating physician in September 2013, Claimant embarked on a job search that resulted in application to

more than 70 employers. While admittedly some of the job he applied for were beyond his physical, mental and/or vocational abilities, Claimant indicated that he was desperate to find something and was hopeful that some employment opportunity would result from these efforts. It is true that Claimant has not received any response from these job search efforts despite the passing of many months in some cases. This reality alone, however, cannot be meaningfully interpreted to suggest that Claimant has failed to demonstrate an inability to secure employment despite his best efforts.

What is more telling to the Board in light of the magnitude of Claimant's unsuccessful job search efforts is the fact that he has recently been formally terminated by Employer. It has been stated that the failure of a large employer (such as Wal-Mart) to offer to rehire an injured claimant is "strong evidence" of displacement. *See Watson*, 30 A.3d 780. The Supreme Court has indicated that it would be proper for the Board to assume without evidence that a large employer such as Wal-Mart would have a wide variety of available jobs of all work descriptions, so that the failure of Wal-Mart to offer to rehire one of its injured employees would be "strong evidence" of displacement. *See Watson*, 30 A.3d at 780 (noting that "Wal-Mart did not find any job within its many, large retail stores that Watson could perform"). In the present case, the Board finds this rationale to be particularly persuasive and applicable if not for the size of Employer's operation, for the nature of Employer's business. Employer is a private, not-for-profit agency whose mission is to assist the disabled in obtaining and maintaining employment. To the extent that Employer has terminated Claimant, indicating its belief that it cannot find a job placement for him, the Board is persuaded that such conduct is "strong evidence" of displacement under the facts of the present case. It would be hard to imagine that if Employer

cannot find job placement for Claimant that Claimant could do so on his own; a proposition bolstered by the extensive yet unsuccessful job search efforts Claimant has undertaken.

Accordingly, despite the fact that the Board finds that Claimant is no longer medically totally disabled, the Board finds that Claimant continues to be entitled to compensation for total disability based upon his status as both a *prima* facie and actually displaced worker.

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is generally 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."[3] At the current time, the maximum based on Delaware's average weekly wage calculates to $9,911.90. 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.[4] A "reasonable" fee does not generally mean a generous fee.[5] Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant has defeated Employer's Petition for Review establishing a continued entitlement to compensation for total disability. Claimant's counsel submitted an affidavit stating that she spent a total of approximately 13 hours preparing for this hearing which itself lasted approximately three hours. Claimant's counsel was admitted to the Delaware Bar in 1986 and has spent much of her career representing injured workers in workers' compensation

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[3] DEL. CODE ANN. tit. 19, § 2320.
[4] *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).
[5] *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

litigation, a specialized area of the law. Counsel or her firm's first contact with Claimant was on December 16, 2011. Thus, Claimant has been represented by counsel or her firm for approximately two years. This case was of average complexity involving no novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although she naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment other then potential representation of Employer. There is no evidence that the employer lacks the ability to pay a 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 awards a total attorney's fee in the amount of $4,800.00.

Claimant is awarded payment of medical witness fees for testimony on his behalf, 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. Employer shall make appropriate reimbursement to the Workers' Compensation Fund, in accordance with title 19, section 2347 of the Delaware Code. Claimant is awarded payment of his medical witness fees and a reasonable attorney's fee in the amount of $4,800.

IT IS SO ORDERED THIS 8th DAY OF JANUARY, 2014.

INDUSTRIAL ACCIDENT BOARD

VICTOR R. EPOLITO, JR.

MARY MCKENZIE DANTZLER

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

Angela Fowler

Mailed Date: 1-10-14

Karen Miller
OWC Staff