BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE



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| PRISCILLA STOVE, Employee, v. ARAMARK C/O WESLEY COLLEGE, Employer. | ) | Hearing No. 1258714 |

**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 June 21, 2012, 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:**

Brian Lutness, Attorney for the Employee

Chris McGarry, Attorney for the Employer

## NATURE AND STAGE OF THE PROCEEDINGS

Priscilla Stove ("Claimant") suffered compensable injury to her lumbar spine in a work accident on October 8, 2004, while working for Aramark c/o Wesley College ("Employer"). This injury was agreed to be compensable and Claimant has since received certain worker's compensation benefits including compensation for total disability at the rate of $192.05 per week, based on a wage at the time of the accident of $288.08 per week.

On December 21, 2011, Employer filed a Petition for Review seeking to terminate Claimant's total disability benefits alleging that Claimant is capable of returning to work in a sedentary capacity. Claimant maintains that she continues to be totally disabled and alternatively, that she is a displaced worker. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision.

A hearing was held on Employer's petition on June 21, 2012. This is the Board's decision on the merits.

## SUMMARY OF THE EVIDENCE

Dr. Jerry Case, M.D., a board certified orthopedic surgeon, testified by deposition on behalf of Employer. Having examined Claimant on several occasions in addition to conducting a review of her relevant medical records, Dr. Case opined that Claimant is capable of returning to work in a full-time sedentary duty capacity.

Dr. Case testified that he first examined Claimant on March 20, 2007, issuing a later addendum on October 2, 2007. He saw Claimant a second time on February 1, 2010 and issued a July 13, 2011 addendum to that report. His third and final visit with Claimant took place on February 13, 2012. Over the course of time and these assessments, Dr. Case came to appreciate that Claimant, at the age of 57, was injured on the job while working as a housekeeper for

Employer on October 8, 2004. Claimant was moving a piece of furniture and experienced pain and injury to her low back. After being diagnosed as having suffered a back strain by her primary care physician, Claimant was prescribed medication and was out of work for two weeks. Claimant returned to work but her symptoms persisted until November 5, 2004, when she fainted and fell down a set of steps at work. This fall aggravated her earlier work-related back injury and caused some neck complaints as well. Claimant initiated treatment with Dr. Balu and Dr. DuShuttle in 2004. Dr. DuShuttle recommended therapy for what he thought was a cervical and lumbar strain with canal stenosis while Dr. Balu administered Claimant several epidural injections with little success. According to Dr. Case, a November 5, 2004 MRI of Claimant's lumbar spine and later March 6, 2006 MRI of her cervical spine, led him to the diagnosis of cervical degenerative multilevel disc disease with paracentral disc herniation at C4-5 and multilevel degenerative disc disease of the lumbar spine with a small disc herniation at L2-3.

Dr. Case testified that when he saw Claimant in February 2010, she complained of some neck pain that had improved but low back pain that she rated at eight out of ten on the pain scale. Claimant noted pulling behind her left thigh but presented with no real radicular symptoms. Claimant, at that point, was seeing Dr. Balu every month or two and was not looking for work. An EMG had been attempted but failed because Claimant could not tolerate the needles involved in the testing.

On September 3, 2008, a repeat MRI was performed on Claiamnt's low back showing no change. Thereafter in January and April 2009 she received epidural injections into the low back as administered by Dr. Balu. Subsequently, on October 9, 2009, Dr. Balu documented his belief that Claimant was capable of modified part-time work; an opinion he confirmed when he saw Claimant again on December 20, 2009.

Dr. Case acknowledged that some time later in 2011, Dr. Katz recommended a microdisectomy surgery at L3-4 and decompression laminectomy for Claimant. After reviewing Dr. Katz's records as well as the utilization review Determination issued in relation to the procedure, Dr. Case agreed that it was a reasonable measure that was both necessary for treatment of Claimant's condition and causally related to the underlying 2004 work accident. Dr. Katz went on to perform the surgery on August 19, 2011 to include a bilateral L3-4 microdisectomy and decompression with a decompression at L4-5 bilaterally as well. Dr. Katz, in doing so, made the diagnosis of a herniated disc at Claimant's L3-4 with spinal stenosis.

Dr. Case indicated that Claimant improved after the surgery with Dr. Katz. While she still reported some pain in her left lateral thigh and some modest pain in her right leg, she had no leg pain below the lateral thigh. Claimant made no neck complaints. Claimant could walk and sit for up to 30 minutes at a time but still rated her pain at eight out of ten on the pain scale. Physically she could bend forward to 70 degrees, backward to 15 degrees and laterally to 20 degrees left and right. She had no muscle spasm but mild tenderness at L4-5. She had no sensory loss in her legs and while the straight leg raising caused a pulling sensation behind and above her left knee, she presented with no radicular symptoms below the knee. Claimant's hip motion was normal and she had no atrophy to measurement in the lower extremities. Moreover, Claimant ceased used of the narcotic Dilaudid and was relying only on Lidoderm patches and Ibuprofen.

Dr. Case, in the wake of the February 2012 evaluation of Claimant, concluded that Claimant was improved post-operatively, particularly with regard to her leg pain, though her low back pain remained about the same. Clamant, according to Dr. Case, appeared capable of full-time sedentary to light-duty work with restrictions of avoiding continuous standing and walking,

bending and twisting and all lifting over ten to fifteen pounds with the added caveat that a sitting position should afford her the opportunity to get up and move around periodically. He indicated that while Dr. Katz, Claimant's treating surgeon, released Claimant to return to part-time sedentary work beginning September 21, 2011, he found no reason that Claimant could not perform full-time work particularly given the progress evidenced by her ability to wean off of all narcotic pain medications.

On cross examination, Dr. Case admitted that he did not examine and offered no opinion as to Claimant's neck because, according to Dr. Case, Claimant made no complaints of ongoing neck pain and really never any significant complaints of neck pain at all. As for Claimant's suggestion that her surgery did nothing for her back symptoms, Dr. Case was skeptical citing the fact that Claimant no longer required narcotic pain medication.

In terms of her physical examination, Dr. Case acknowledged that Claimant noted some pulling behind the knee with straight-leg raising though he did not characterize that as significant. He admitted that her range of motion was restricted and that she was still tender at L4-5.

Dr. Case confirmed that other than some unknown amount of housework, Claimant has not done ay work to speak of in years.

Claimant testified that she was born on April 28, 1949. She has an eighth grade education and worked her entire life as a housekeeper; the position she was in for many years with Employer prior to her 2004 injuries.

Claimant indicated that at present, she continues to suffer from significant low back pain that, most days, prevents her from being able to get out of bed without use of a heating pad first. She testified that her neck, which provides pain from the bottom of the cervical spine into her

shoulder with intermittent spasms, has always bothered her since the second 2004 fall but admitted that she tended to focus on her low back because it, along with the pain radiating into her legs, was the more severe of the pains she was experiencing. Claimant indicated that the surgery with Dr. Katz relieved about 45 percent of her leg symptoms but caused her low back pain to actually increase.

Claimant testified that when she saw Dr. Case in February 2012 she was not taking narcotic medication but indicated that it was a trial initiated upon her request. She explained that she has had some long standing concerns about the possibility of addiction to narcotic medications given the extended period of time she has been taking them. She asked Dr. Balu to attempt to manage her pain without narcotics. He did not think it advisable but she persisted and asked Dr. Katz for alternatives to narcotics. As such, Claimant attempted to medicate her symptoms with only use of Lidoderm patches and Ibuprofen, however, after just a couple short months, was forced to return to Oxycodone (a narcotic) because the pain was too severe otherwise. She now takes Oxycodone twice a day.

Claimant acknowledged that Dr Katz has advised her that she can return to work in a sedentary capacity up to four hours a day, however, Claimant does not think that she is capable of physically managing even this. Claimant testified that she cannot sit or stand for more than 15 minutes or so without radiating pain and the need to return to her heating pad and a lying down position. Claimant alleges to do very little for herself, instead relying on her husband and daughter for most of the household maintenance. While Claimant admits to sometimes attempting the dishes and a few minutes of vacuuming, she claims to spend most of her time lying on her side. Claimant has not worked since 2004 and relies on social security disability compensation for survival.

Claimant testified that she struggles with reading but can read slightly better than she can spell. Claimant maintained that housekeeping is the only profession in which she has ever worked and indicated that she gave everything she had to do her job with Employer. She testified that she does not know how to type or use a computer and does not believe that she knows or could do anything other than the work she did for Employer.

Upon questioning from the Board, Claimant indicated that she is in pain constantly, from sun up to sun down. She testified that she does not drive because of the excessive pain associated with lifting her leg to apply the gas and brake petals. Furthermore, she went for a Functional Capacity Evaluation but it could not be completed because of unrelated blood pressure complications.

## 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").[1] In other words, the initial burden is on the employer to show "that the employee is no longer totally incapacitated for the purpose of working."[2] In response, the claimant may rebut that showing, by showing that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actual displacement). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities.[3] In this case, the Board finds that while Claimant is no longer medically totally disabled, she is a displaced worker.

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[1] *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973).
[2] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).
[3] *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

The only medical testimony offered in these proceedings was that of Dr. Jerry Case. Dr. Case confirmed that his review of Claimant's treating surgeon's records suggests that Dr. Katz has found Claimant physically capable of some degree of work since approximately September 2011. Similarly, despite ongoing complaints of significant low back pain, Dr. Case also finds Claimant physically capable of some degree of work. While the Board finds credible Claimant's complaints of severe ongoing low back pain, the Board cannot ignore the undisputed medical evidence which suggests that Claimant is medically capable of working in some capacity. As such, the Board finds that Claimant is no longer totally physically incapacitated from any and all work.

The analysis, as noted above, thus shifts to consideration of whether or not Claimant is an actually displaced or *prima facie* displaced worker. Claimant has made no attempt at locating a job noting that she does not believe she is physically capable of working in any capacity and so she has clearly fallen short of showing herself to be an actually displaced worker. The same, however, cannot be said for the evidence she has offered as to her displaced worked status. The Board is, in fact, satisfied that the record in this matter supports a finding that Claimant is a *prima facie* displaced worker.

The term "*prima facie* displaced worker" is used to refer to a worker who, while not completely physically incapacitated from working, is so disabled as a result of a compensable injury that he or she is no longer regularly employable in any well-known branch of the competitive labor market.[4] Generally, elements such as the degree of obvious physical impairment, coupled with the claimant's mental capacity, education, training, and age are considered in establishing the *prima facie* case.[5] In the instant case, Claimant is 63 years old

[4] *Duff*, 314 A.2d at 917; *Ham v. Chrysler Corporation*, 231 A.2d 258, 261 (1967).
[5] *Duff*, 314 A.2d at 916-17; *Facciolo Paving & Construction Co. v. Harvey*, 310 A.2d 643, 644 (1973); *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (1973).

with only an eighth grade education. Her undisputed testimony is that she has difficulty with threshold tasks such as reading and spelling. She has never used a computer and cannot type. In fact, the only work she has ever done is the physically demanding work of housekeeping. Thus, assuming, *arguendo*, that Dr. Case is correct and Claimant can only work in sedentary to light duty jobs, it would seem clear that she is no longer capable of doing the only work that she has ever done in her life; a contention supported by Claimant's testimony that she has to rely on her husband and adult daughter to perform most if not all of the household chores in her own home. The argument that there are a multitude of jobs available in the local labor market that are entry level and therefore allow for a lack of skills and the expectation that there will be on the job training fails to take into account the question of whether or not Claimant is trainable at her age, in her condition and with the limited foundational education she possesses.

While Employer produced a Labor Market Survey[6] in this case which identifies ten jobs that are allegedly indicative of Claimant's earning potential, eight of the ten jobs identified either require or prefer a high school diploma of GED; educational milestones that Claimant has not achieved despite the vocational rehabilitation specialists suggestion to the contrary and further reason to question whether employer's believe that such a basic education is necessary to be successful in these entry level positions. Despite the fact that the two remaining jobs identified in the Labor Market Survey do not require or prefer the equivalent of a high school education, one of the identified jobs was part-time (as opposed to the full-time work that Employer has argued Claimant should be doing) and required direct customer service, including checking out customers; duties that suggest a level of reading skill that Claimant has testified she does not have. The one remaining job with Goodwill Industries, admittedly more promising than the rest,

[6] *See* Joint Exhibit 1 (Stipulation of Facts) and the attached Labor Market Survey.

is insufficient on its own to establish that legitimate employment opportunities exist in the local labor market that are compatible with Claimant's abilities and limitations.

As such, the Board is persuaded that Claimant has established herself as a *prima facie* displaced worker. The Board is further persuaded that Employer's labor market survey, as noted above, fails to demonstrate that regular employment (i.e., not a specially-created job) exists within Claimant's physical and academic capabilities. Therefore, the Board finds that Employer has failed to meet the burden necessary to terminate Claimant's total disability benefits.

**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."[7] At the current time, the maximum based on Delaware's average weekly wage calculates to $9,330.80. 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.[8] A "reasonable" fee does not generally mean a generous fee.[9] 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 successfully defeated termination of her total disability benefits. Claimant's counsel submitted an affidavit stating that he spent a total of approximately 22 hours preparing for this hearing which itself lasted approximately 1/2 hour. Claimant's counsel was admitted to the Delaware Bar in 1997 and is experienced in workers' compensation litigation.

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[7] DEL. CODE ANN. tit. 19, § 2320.

[8] *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).

Counsel or his firm's first contact with Claimant was on March 14, 2006. Thus, Claimant has been represented by counsel or his firm for approximately six 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 he 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 $5,500.00.

**STATEMENT OF THE DETERMINATION**

For the reasons set forth above, Employer's petition 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 entitled to payment of attorney's fees in the amount of $5,500.00 and payment of medical witness fees.

IT IS SO ORDERED THIS 26 DAY OF JUNE, 2012.

**INDUSTRIAL ACCIDENT BOARD**

VICTOR R. EPOLITO JR.

[9] *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

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.

Mailed Date: 6-28-12

OWC Staff