BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MAR 20 2013

ANGEL FRANCISCO,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1349699
	)	
NATURAL HOUSE, INC.,	)	
	)	
Employer.	)	

Unclaimed total worker is awarded temporary

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 February 8, 2013, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

WILLIAM F. HARE

OTTO MEDINILLA

Susan D. Mack, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael I. Silverman, Esquire, Attorney for Claimant

John Gilbert, Esquire, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Angel Francisco ("Claimant") suffered a crush injury to his left arm as a result of a work-related accident on November 20, 2009 while working for Natural House, Inc. ("Employer"). Claimant has been receiving total disability benefits at the rate of $270.78 per week, based on an average weekly wage of $406.15. On July 2, 2012, the Employer filed a termination petition seeking to terminate total disability benefits. The Employer argues that total disability benefits should be terminated and disputes any entitlement to ongoing partial disability. Claimant opposes the termination petition and claims that he is a displaced worker.

A hearing was held on the pending petition on February 8, 2013. This is the Board's decision on the merits of the petition.

SUMMARY OF THE EVIDENCE

Stipulation of Facts: The parties stipulated that Claimant Angel Antonio Francisco sustained a crush injury to his lower left arm on November 20, 2009. He had an average weekly wage of $406.15 at the time of injury and a disability compensation rate of $270.78 per week. Claimant has received permanency and disfigurement benefits. The Employer seeks to terminate total disability benefits and disputes any entitlement to partial disability benefits pursuant to *Gonzalez v. Krispy Kreme Doughnuts, Inc.*, IAB Decision, Hrg. No. 1181878 (Mar. 5, 2002). Claimant claims that he is a *prima facie* displaced worker or otherwise displaced from the competitive labor market. The medical experts, Dr. Case and Dr. Crain, agree that Claimant is no longer medically totally disabled and that he is capable of returning to work with restrictions.

Dr. Jerry Case, an orthopedic surgeon, testified by deposition for the Employer, Natural House, Inc. (Employer's Exhibit 1) Dr. Case examined Claimant Angel Francisco twice on behalf

of the Employer, on January 13, 2011 and April 26, 2011. He also reviewed Claimant's relevant medical records. Claimant was accompanied by an interpreter at the exams. Claimant was injured on November 20, 2009 when his left forearm was caught in a compactor machine. He was treated at the emergency room and then underwent emergency surgery to the left forearm. He returned to surgery again on November 22 and November 27, 2009 for additional debridement and washing of the wound. Additional surgery was performed on December 22, 2009 for a skin graft. Claimant followed up with Dr. Crain and underwent rehabilitation. Dr. Crain released Claimant to sedentary work on March 3, 2010 and then medium duty work on April 14, 2010, which allowed lifting between 20 and 50 pounds. Dr. Crain noted that Claimant had good wrist and finger motion but decreased strength in the left hand. He believed Claimant's restrictions were permanent. The Employer would not allow Claimant back to work with his restrictions. Claimant has since looked for work, but Claimant told Dr. Case than no one would hire him when they saw his arm. Claimant also told Dr. Case than he was not taking pain medicine or seeing any doctors. He reported some tingling when he attempted to lift with his left hand and had persistent numbness in the fourth and fifth fingers of his left hand. He is right hand dominant.

On examination in January 2011, Dr. Case found a large split thickness skin graft on the volar aspect of the left forearm that measured 12 by 7 centimeters, a 14-cm scar on the dorsum of the forearm, and a 2.3-cm scar on the dorsum of the hand. Claimant's grip was fair and he could close his fingers. Wrist range of motion was limited. Sensation was decreased in the fourth and fifth fingers of the left hand. Dr. Case diagnosed Claimant with a crush injury of the left hand, status post multiple surgical procedures, with residual limited motion, numbness, and weakness. Dr. Case concluded that Claimant could perform fulltime work with lifting restrictions of ten pounds on the

left arm only. The right arm had no restrictions and Claimant could lift more than ten pounds with both arms combined.

Dr. Case examined Claimant in April 2011 and found him to be much the same as before. Claimant still had pain in the left forearm, left wrist, and left hand, but he was not taking pain medicine or seeing any doctors. Dr. Case noted that Dr. Crain had seen Claimant in September 2010 and January 2011 and maintained him on a permanent medium duty work classification. Dr. Case agreed with this classification, noting that Claimant could use the left arm to assist his dominant right arm in lifting. Dr. Case further commented that Claimant had done as well as he could with the treatment he received for his serious injuries. Claimant had made steady improvement after the initial injury and had reached maximum medical improvement. The medium duty restrictions were permanent. Dr. Case reviewed the 11 jobs in a labor market survey prepared for the Employer. He approved all the positions as within Claimant's medium duty restrictions.

On cross-examination, Dr. Case confirmed that he had rated Claimant with an 18 percent permanency to his left upper extremity as a result of his injury. Claimant had residual limitations in range of motion, numbness, and weakness. As a result, Dr. Case had restricted Claimant from repetitive movements with his left upper extremity. Dr. Case explained that Claimant could perform gross lifting but not typing or repetitive grasping. Claimant would need to use both hands for heavy work. Dr. Case felt Claimant could work in food prep because he would not be cutting with his left hand; he thought Claimant would be able to use the left hand to hold or stabilize materials. Continuous grasping with the left hand would be problem, but Dr. Case pointed out that Claimant would use his dominant arm for most things. Dr. Case agreed that the more Claimant used his left hand, the more aching and pain he was likely to have.

Claimant Angel Francisco was called by the Employer. An interpreter provided translation between English and Spanish.[1] Claimant testified that he was born in February 1983 in Guatemala and came to the United States about six years ago. Prior to working for Natural House, he had done landscaping and roofing work. He began working for Natural House in November 2008. He was able to take instruction from his co-workers at Natural House. He also has a cellphone and knows how to use it. Claimant rides public transportation. Since he was injured at work, Claimant has not undergone any educational, language, or job training. On September 25, 2012, he met with Ms. Gonzalez at his attorney's office, and she called a number of employers for him. He did not speak to the employers or fill out any employment applications himself. This was the only date he met with Ms. Gonzalez to conduct a job search. Over objection from his counsel, Claimant confirmed that he does not have a social security card, green card, visa, or working papers.[2] He verified a copy of his

[1] Claimant indicated that he spoke a particular Guatemalan dialect called Kanjobal, but an interpreter ofthis dialect was not available for the hearing. Claimant confirmed that he could understand the Spanish interpreter provided telephonically and the hearing proceeded with her interpretation of the testimony.

[2] Claimant's counsel objected to any testimony regarding Claimant's legal residency status, claiming that it was not relevant to the displaced worker analysis and was inadmissible under Rule 403. Counsel further argues that Claimant did not have to answer under the Fifth Amendment to the United StatesConstitution. Counsel also requested a mistrial for the "injection" of the residency issue into the hearing.

The Employer relied on *Gonzalez v. Krispy Kreme Doughnuts, Inc.*, IAB Decision, Hrg. No. 1181878 (Mar. 5, 2002), for the contention that legal status could be considered by the Board in determining whether Claimant was a displaced worker. The Board agrees with the Employer that legal eligibility to work can impact a person's ability to obtain work, and therefore is relevant to the question of whether a claimant is displaced from the competitive workplace. Legal status is not one of the factors to be considered in whether Claimant is *prima facie* displaced, *see, e.g., Chrysler Corporation v. Duff*, 314 A.2d 915, 916-917 (Del. 1973); the Board believes this is what was referred to in the IAB Order dated September 4, 2012 in this case. However, the Board concludes that legal status is relevant to determining why Claimant's job search was unsuccessful. To be clear, undocumented status does *not* make a claimant ineligible for workers' compensation benefits under Delaware law. *See, e.g., Delaware Valley Field Svcs. v. Ramirez*, C.A. No. 12A-01-007, Herlihy, J. (Del. Super. Ct. Sept. 13, 2012), *aff'd*, No. 556,2012, 2013 WL 436259 (Del. Feb. 5, 2013). However, as discussed in *Krispy Kreme*, the claimant is not a displaced worker if he would be able to obtain employment *but for* his legal status. Accordingly, the Board finds that the evidence is probative and not substantially outweighed by any danger of unfair prejudice to the Claimant. The Board often hears cases in which it is acknowledged that claimant is an undocumented worker, and the Board has awarded benefits, including disability benefits, to such claimants when warranted by the evidence.

To counter Claimant's argument that being required to answer a question regarding his legal documentation violates the self-incrimination privilege of the Fifth Amendment, the Employer responds that this hearing is a civil

Guatemalan identification card.[3] He has not completed any workplace applications since the accident. He is right hand dominant and has no limitations in the use of his right arm. He can use his right arm without any difficulty.

Under questioning by his own counsel, Claimant testified that he attended school in Guatemala through first or second grade. He cannot speak, read, or write English. He cannot read or write Spanish, other than his name. In Guatemala, he cleaned coffee and planted corn. In his landscaping jobs in the United States, he worked with other Hispanics and did not need to read, write, or speak English. Claimant has some difficulty understanding some Spanish speakers, because he speaks a specific Guatemalan dialect called Kanjobal. Claimant does not have a driver's license, so he takes the bus for transportation. He makes and receives calls on his cellphone but does not use it for any other tasks. His job with Natural House entailed unpacking vegetables from boxes and putting them in the front of the store. He sometimes would put the boxes in a crusher. His boss was Hispanic but spoke English.

Claimant showed his arm to the Board members, revealing the large scars and discoloration on his left arm. He explained that he feels pain on the bottom side of his wrist and top side of his hand, where it is swollen. He feels pain daily. When he lifts heavy things, he feels pain in his

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proceeding not a criminal proceeding, so the Fifth Amendment does not apply, citing *Loufakis v. United States*, 81 F.2d 966 (3d Cir. 1936). The Board recognizes that, generally, the privilege may be invoked in a civil proceeding where the testimony may incriminate the witness in future criminal poceedings; however, no criminal proceedings are pending against the claimant here and the Board is not convinced that the limited testimony actually elicited at the hearing could subject Claimant to criminal prosecution. *See Baxter et al. v. Palmigiano*, 425 U.S. 308, 316, 317 (1976). The Third Circuit has also held that "an alien is not entitled to the same rights against selfincrimination and right to counsel as a criminal. . . ." *Strantzalis v. Immigration and Naturalization Service*, 465 F.2d 1016 (3d Cir. 1972) (citing to *Ah Chiu Pang v. Immigration and Naturalization Service*, 368 F.2d 637, 639 (3d Cir. 1966), cert. denied, 386 U.S. 1037 (1967)). The Board therefore overrules Claimant's objection and admits his testimony about his current work documentation into evidence.

[3] Claimant's counsel objected to the Guatemalan identification document and discovery response which the Employer offered into evidence as Employer's Exhibit 2. The Board overrules the objection and admits the

forearm like it will explode. It is difficult to use his left arm to lift things and he has trouble holding things with his hand and moving his hand in different directions. He has difficulty making a tight fist. His little finger and ring finger on the left hand are numb.

Claimant recalled meeting with a woman at the library to fill out job applications. He thinks he filled out two applications over a three to four hour period. He met with this woman and a man on another occasion, and they asked him about his education and background. Claimant did not recall filling out any applications when he met with Ms. Gonzalez in his attorney's office. Claimant has not gotten any job offers. He is able to write his name and wrote it very carefully on a piece of paper for his attorney. (Claimant's Exhibit 1)

Claimant answered additional questions from the Board. He testified that, during the day, he prepares food, goes out for a walk, and cleans his house. He was able to move the Bible on the witness stand without difficulty and could open its pages. No one has ever said why he has not received any job offers.

Claimant confirmed that it hurts his left hand to do cleaning, but he is able to do it slowly. When he uses both of his hands to cut a lot of food, his left hand bothers him. He can open up a book, but does find it a little hard to turn pages one by one with his left hand and fingers.

Mary Ann Shelli Palmer testified next for the Employer. Palmer is a vocational/rehabilitation expert. She prepared a labor market survey (LMS) that identified eleven jobs that she believed to be consistent with Claimant's vocational and physical capabilities. (Employer's Exhibit 3) Palmer reviewed the available records and met with Claimant to determine his age, work history, educational background, and transferable skills. She noted that Claimant had normal mental capacity.

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document into evidence for the same reasons stated in Footnote 2.

Claimant's job at Natural House was classified as an unskilled "SVP Level 2" job, in which it would take one month to learn job tasks and duties. His previous jobs in landscaping and as a roofer helper also fell into SVP Level 2. Therefore, Palmer looked for unskilled jobs in her labor market survey. She insisted that Claimant had transferable skills, such as the ability to follow directions, perform specific, recurrent work activities, communicate in his language, and move around. She was aware that Claimant had injured his left upper extremity and had medium duty restrictions in the use of that limb. She also knew that Claimant was right hand dominant. Palmer identified eleven jobs she believed to be within Claimant's capabilities. She observed the positions to ensure the job descriptions accurately reflected the work required. Palmer insisted the jobs were compatible with Claimant's abilities and he would have been able to apply for them but for his residency status. She felt he could do the jobs, if he possessed the proper documentation. She noted that the employers had Spanish speaking workers, the positions were entry level, on-the-job training was provided, and they were unskilled positions. Claimant's inability to read or write in Spanish was not a bar to his employment. He just needed to be able to follow instructions. Palmer did not believe the left hand limitations would keep Claimant from performing the jobs, because his left hand was not dominant. Claimant could use the left hand to stabilize items while doing the more dexterous tasks with his right hand. Palmer further testified that several of the jobs were still available as recently as early January 2013: La Tonalteca, Goodwill, McDonald's, Olive Garden, Red Lobster, Chipotle, and Residence Inn.

Palmer proved job placement services for Claimant. She met with him in an effort to place him into a job, and though Palmer did locate available positions, she was unable to place Claimant in them. Palmer first met with Claimant in his counsel's office and an interpreter was present. Palmer

then met with Claimant at the Middletown Library near his residence and arranged for access to a computer there as a learning tool on filling out applications online. A professional interpreter was present, but Palmer acknowledged that the interpreter was not of the same caliber or professionalism as the first interpreter. Claimant was concerned about the public setting of the library computer, so his counsel arranged for use of a computer at a nearby law office. Claimant was instructed by counsel to leave the questions about legal status blank on the applications that Palmer was helping Claimant to complete. A Goodwill application was rejected as incomplete because no legal status was provided. Handwritten applications for Victory Christian Fellowship and Taco Bell were begun, but no information was included regarding legal status. This status designation was a criteria for hiring by the employers. Palmer contacted Natural House and was told that no job was available at that time. In any event, Claimant would need proper documentation to be hired. To her knowledge, the only job searches Claimant did were during his meetings with her and Ms. Gonzalez. Palmer would recommend a reasonable job search to include looking for work daily and obtaining assistance from agencies. Claimant had not done these things, so far as she knew.

On cross-examination, Palmer agreed that the transferable skills possessed by Claimant were basic skills that require little on the job training. She considered the work restrictions from both Dr. Crain and Dr. Case in preparing the LMS. She assumed that Claimant had no restrictions in use of his right upper extremity, and medium duty restrictions in use of the left upper extremity, with additional restrictions of avoiding repetitive fine motor skills and grasping from Dr. Crain. Dr. Case limited Claimant to grasping with the left hand 25 percent of the day. Palmer was asked to review Dr. Case's testimony restricting Claimant from repetitive movements, and Palmer insisted she took this restriction into account. Palmer had Dr. Case's January 2011 report with an attached physical

capabilities form in her file. This form instructed Claimant to avoid repeated arm motion and limited Claimant to medium duty lifting. Palmer read Dr. Case's deposition testimony and considered that in her testimony at the hearing.

Palmer acknowledged that Claimant would need to use his hands frequently in the jobs identified in the LMS. She pointed out, however, that the worker would predominantly use his dominant hand for most of the work and manipulation, with assistance from the non-dominant hand. The food prep jobs required two hands, but she expected Claimant would use the left, non-dominant hand just to assist. The positions at TA Instruments, Goodwill, Victory Christian Fellowship, Red Lobster, and Nordstrom would require frequent handling and/or fingering. Palmer insisted the dominant hand would be used for tools, for example, tightening screws on the TA Instruments assembly job. There were Spanish-speaking employees at this job, so she did not believe Claimant's language would be a barrier to employment.

When Palmer met with Claimant to fill out applications, they spent three to four hours and went through three applications. The applications could not be submitted online successfully for several reasons: Claimant had no email account, there was insufficient number of references, and the legal status was not filled out. Palmer filled out the applications that are attached to the LMS (Employer's Exhibit 3). A second visit with Claimant at the library was canceled and never rescheduled. Palmer believes there is no point in scheduling another session because Claimant does not have the credentials necessary to obtain a job.

On re-direct, Palmer confirmed that three references were included on the Taco Bell application. She was asked to review a printout of the online application for Goodwill (Employer's Exhibit 4) and agreed that several items were flagged as the reasons for rejecting the application:

email address format, legal eligibility information, missing reference, and missing phone number. Palmer insisted that the employers on the LMS would accommodate Spanish speaking employees. She testified that the employers would all consider hiring Claimant with his education and language skills. She also pointed out that Goodwill's mission was to work with person who had disabilities. Also, washing dishes in a restaurant was different than at home; she testified that Claimant could use his dominant hand to load the dish washer. Palmer confirmed that Dr. Case had approved all the positions identified in the LMS. Nonetheless, she felt it was not possible to place Claimant in a job because of his legal/residency status.

Dr. Evan Crain, an orthopedic surgeon, testified for Claimant Angel Francisco. (Claimant's Exhibit 2) Dr. Crain has been treating Claimant since February 3, 2010. Claimant was a 26-year-old, right hand dominant male who had injured his arm when it was caught in a compacter while he was working as a packer at a farmer's market. The injury caused severe swelling and pain in the forearm. Claimant was taken to the emergency room and diagnosed with an acute forearm compartment syndrome, which required emergency surgery. Dr. Shweiki performed fasciotomies to the forearm and hand. Only a severe crush injury would require the degree of surgery performed. The injury was limb-threatening. Multiple followup procedures were required to close the wound and to perform a skin graft on the palm side of the extremity. Claimant presented to Dr. Crain about three months after the accident with the remnants of the severe crush injury to his left arm and had very little functional use of the arm. Claimant had persistent neurologic symptoms and a very stiff and dysfunctional arm. Dr. Crain thereafter directed Claimant's care with therapy and a rehabilitation program, including specialized hand therapy.

Dr. Crain saw Claimant about six times and noted progress through each of the visits. The last visit was on September 20, 2010, when Claimant had reached maximum medical improvement. Claimant overall was doing better, but he had persistent numbness along the dorsum of the hand from the level of the wrist crease distally and ongoing weakness. He reported less pain and better use of his hand. Dr. Crain had placed Claimant on medium duty work. An examination showed persistent loss of grip strength and weakness in wrist flexion and extension. Claimant also had decreased finger strength. He had trouble making a tight fist and his average grip strength was fairly weak. Because of the severe trauma and the weakness in the wrist and finger muscles, Dr. Crain restricted Claimant from repetitive use of the left hand and grasping. These restrictions were related to the work injury.

Dr. Crain opined that it would be difficult for Claimant to work in food preparation, because this was typically repetitive work. He explained that Claimant's injury affected virtually all the muscle groups of the lower arm, forearm, and hand, leaving Claimant with weakness and an inability to do any type of repetitive activity with the left hand. Dr. Crain also believed Claimant would be unable to work as a dishwasher because of the repetitive nature of the work and the weakness in his hand. Claimant would be able to perform some of the activities of a housekeeper at a hotel, but activities such as dusting, scrubbing, and cleaning would be very difficult for him to do. The fine motor manipulation and repetition required of an instrument assembler would make it difficult for Claimant to perform the job as an instrument assembler with TA Instruments. Dr. Crain agreed that Claimant could perform medium work that involved lifting, but he believed Claimant would be precluded from doing a lot of activities required of a maintenance person due to his limited coordination and ability to do repetitive work.

On cross-examination, Dr. Crain could not recall whether Claimant required interpretation during his visits to communicate, but Dr. Crain explained the resources he has available to assist with translation if necessary. He insisted that he was able to communicate with Claimant effectively. Dr. Crain confirmed that at the first visit with Claimant on February 3, 2010, Claimant was totally disabled from work. On March 3, 2010, Dr. Crain released Claimant to sedentary work with no use of his left arm. By that time, the use of the hand, arm, and elbow had improved with therapy. The therapist suggested a transition to rehabilitation therapy, which involved strengthening of the left upper extremity. At the April 14, 2010 visit, Dr. Crain indicated that Claimant had made tremendous progress in a relatively short period of time given the severity of his injury. His numbness and tingling symptoms had nearly all resolved, though he still had occasional tingling in the fingertips. Dr. Crain concluded that Claimant could not return to his previous job, but he could perform a medium duty job that did not require lifting over 50 pounds. A physician's assistant examined Claimant on May 10, 2010. It was noted that Claimant showed continued progress, with numbness and tingling resolving and full range of motion in the elbows, wrists, and digits. He still had discomfort in the area of the skin graft. The PA indicated that grip strength was good. There was a hint of weakness in the left hand compared to the right. Claimant was released to regular duty work as of May 16, 2010. Dr. Crain saw Claimant again on June 23, 2010 and September 20, 2010. Range of motion remained good but Claimant had a persistent strength deficit. Dr. Crain felt that Claimant had a permanent degree of weakness, numbness, and soreness, particularly with lifting. He encouraged Claimant to remain as active as possible and placed him on permanent medium duty work restrictions. Dr. Crain never felt that Claimant recovered to the point where he could perform

full, unrestricted work. As of September 20, 2010, Claimant was released to return to Dr. Crain as needed. Claimant had not returned.

Dr. Crain testified that his opinions about Claimant's ability to perform certain jobs were based on a review of the summary sheets from Perry and Associates in the labor market survey and his own understanding of what the jobs entailed. He reiterated his opinion that Claimant would have difficulty doing any job that required coordination and repetitious activity with the left hand. He felt that any of the jobs in the survey would require this to some degree. Dr. Crain agreed that Claimant could do medium duty lifting with the left hand, but Claimant would have difficulty doing any type of fine motor or repetitious activity. The severe crush injury suffered by Claimant was uncommon and limb threatening. Virtually anyone with this type of injury would be left with loss of use in the extremity. Claimant could not do anything that required repetitious fine motor use due to the damage that occurred. Dr. Crain acknowledged that the right arm had no restrictions in use.

Jose R. Castro, a vocational expert, testified next for Claimant. Castro conducted a vocational assessment for Claimant after meeting with Claimant on January 11, 2011 with an interpreter present, though Castro was unsure Claimant understood the interpreter. Castro met with Claimant for a couple of hours and also reviewed Dr. Case's report after it came out. He did not perform or recommend any testing, because Claimant could not read or write. Castro noted that Claimant had held only unskilled labor jobs. Claimant did not have directly transferable skills from these jobs, but that did not mean he was unemployable or could not learn to do a job. Castro explained that acquired work traits such as being on time or following instructions were different than transferable skills, which consist of skills obtained through education or a job that can then be applied to another job, for example, typing or using a particular machine. Castro's understanding

was that Claimant was not educated past first grade in Guatemala and could not read or write in any language. Claimant was reliant on others to explain what to do in a job. All of his jobs had been obtained through friends or family, not through a job application. His past work had all been highly physical and heavy to very heavy duty in nature.

Castro reviewed the jobs identified in the labor market survey prepared for the Employer. Castro opined that all of the jobs had repetitive aspects to them. He did not believe Claimant could do the jobs, because he would need to use both of his hands repetitively. He assessed the jobs using Dr. Crain's work restrictions, which restricted Claimant with regard to repetitive use and grasping and limited him to 50 pounds lifting. Castro noted that, in a production job, Claimant would need to use both hands to keep up with requirements, unless the employer made special accommodations for Claimant's left hand restrictions. Castro did not believe an employer would actually hire Claimant with his disabilities, unless the employer was particularly benevolent or willing to make special arrangements for Claimant. This was especially true in the poor economy. Castro opined that Claimant was a displaced worker, because he would not be hired for any jobs generally available in the marketplace.

On cross-examination, Castro agreed that Claimant could follow instructions and had been able to testify at the hearing through the interpreter. The jobs in the survey could accommodate Spanish speaking employees. Being a Spanish speaker was not in itself a bar to employment, though it did limit the types of jobs available to a job seeker. The ability to learn on the job was an "acquired worker trait." Castro conceded that Claimant could work if a job did not require repetitive use of his left hand. He also agreed that Goodwill works with persons who have disabilities and Spanish speakers. However, the Goodwill job identified in the LMS required moderate to frequent

handling. In Castro's opinion, using the left hand even to assist his right hand would constitute repetitive use of the hand. Castro believed Claimant would need specialized assistance to obtain a job. He did not recommend any training or language education in his report, because Claimant would be starting at the beginning and would take years to learn reading and writing skills. Castro clarified that he was asked to evaluate Claimant, not place him in a job. Castro did not visit the job sites in the survey.

Under questioning by the Board, Castro testified that he would only place Claimant in a job that required use of the left hand on an occasional basis or less. Dr. Crain's restrictions indicated no repetitive use of the left hand, but Castrol had not recalled any specific percentage of time Claimant could use his left hand during the day. The first he had heard the limitation to 25% of the day was from Ms. Palmer on the witness stand today. Also, Castro did not think Dr. Crain was saying that Claimant could lift 50 pounds with his left hand, just that Claimant could use his left hand to *assist* in lifting 50 pounds. Castro conceded that Claimant could learn to speak another language, but it would take a long time to do so.

Abigail Gonzalez, a paralegal in Mr. Silverman's office, testified that she routinely deals with Claimant regarding his worker's compensation claim and met with him to assist with a job search. Gonzalez is bilingual. She spent one afternoon trying to contact employers and generally find employment for Claimant. She tried contacting employers similar to the ones identified on the labor market survey, including McDonald's, Domino's, 84 Lumber, Royal Farms, Molly Maids, Summit Marina, J&J Staffing, and security firms. Upon reaching an employer, she asked to speak with a manager or someone who could talk about employment opportunities. She told the employers that Claimant could speak Spanish, could not read/write/speak English, had limited use of his left upper

extremity, but was willing and able to work. None of the employers was able to hire Claimant. Gonzalez did not complete any job applications for Claimant.

Gonzalez used to work as a restaurant manager. She did not believe a dish washer could wash dishes with one hand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination of Total Disability

The Employer, Natural House, Inc., argues that Claimant's total disability benefits should be terminated and Claimant Angel Francisco can now return to work in a limited capacity pursuant to the testimony of both doctors and the results of a labor market survey. *See* DEL. CODE ANN. tit., § 2347. Claimant argues that he is displaced from any regular job in the competitive labor market. In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated. 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 that have been unsuccessful because of the injury. The employer would then have the burden of showing the availability of regular employment within the claimant's capabilities. *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918 n.1 (Del. 1973).

In reaching a decision, the Board first considers whether Claimant is medically capable of performing work in some capacity. Claimant's treating physician, Dr. Crain, released Claimant to work in a medium duty capacity, with restrictions on repetitive use of the left hand and grasping with the left hand. These restrictions are considered permanent and have been in place since at least September 2010. Dr. Crain affirmed that Claimant could lift up to 50 pounds and his dominant right

arm had no restrictions in use. Therefore, the Board finds that Claimant is now medically capable of working in a medium duty capacity with restrictions on repetitive use of his left arm.

Although Claimant is physically capable of working in a limited capacity, the Board also recognizes that one can still be considered "totally disabled" economically while only partially disabled physically. *Huda v. Continental Can Co.*, 265 A.2d 34, 35 (Del. 1970); *Ham v. Chrysler Corporation*, 231 A.2d 258, 261 (Del. 1967). Such a worker may be "displaced" from employment. Claimant has the burden to show displacement either on a *prima facie* basis or through a failed good-faith job search.

A "*prima facie* displaced worker" refers to a work who, while not completely 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. *See Chrysler Corporation v. Duff*, 314 A.2d 915, 917 (Del. 1973); *Ham*, 231 A.2d at 261. 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. *Duff*, 314 A.2d at 916-917; *Facciolo Paving & Construction Co. v. Harvey*, 310 A.2d 643,644 (1973); *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (1973). Claimant has a permanent impairment to his left upper extremity that affects his ability to perform repetitive and fine motor tasks and also restricts him to 50 pounds of lifting. While the disability to the left arm is significant, the Board notes that Claimant has full, unrestricted use of his dominant right arm. In addition, he has been released to medium duty work, which allows for a greater degree of physical work in comparison to several of the *prima facie* displacement cases

cited by Claimant, in which the claimants were limited to sedentary or light duty work.[4] Claimant is also a young man of 30 years who appeared to be of normal intelligence in his testimony before the Board, both factors which favor a finding of no *prima facie* displacement. On the other hand, Claimant testified that he cannot read or write in his native language, other than writing his name; does not read, write, or speak English; and attended school only through the first or second grade in his native Guatemala. His jobs have consisted of general labor type jobs such as landscaper, roofer, and agricultural work. The vocational expert who testified for the Employer conceded that Claimant's jobs all fell within an unskilled category. In the Board's view, she did not identify any specific transferable job skills that would lift Claimant out of the general laborer category. Claimant's education and unskilled labor history thus favor a finding of *prima facie* displacement. Nonetheless, on balance, the Board is not convinced that Claimant is *prima facie* displaced from the competitive labor market, primarily because he is still capable of medium duty work, is only 30 years old, and has unrestricted use of his dominant arm. Any difficulty finding work that flows from Claimant's legal residency status is not relevant to the determination of *prima facie* displacement, as the factor is completely unrelated to the work injury. *See, e.g., Gonzalez v. Krispy Kreme Doughnuts, Inc.*, IAB Decision, Hrg. No. 1181878 (Mar. 5, 2002).

A claimant who is not *prima facie* displaced can still establish displacement by demonstrating reasonable efforts to secure suitable employment which failed because of the work injury. *See, e.g., Watson v. Wal-Mart Associates*, 30 A.3d 775, 779 (Del. 2011). In conducting a reasonable job search, the claimant must make a "diligent, good faith effort to locate suitable employment in the

[4] *Priscilla Stove v. Aramark*, IAB Decision, Hrg. No. 1258714 (June 26, 2012), *Waters v. Statewide Maintenance*, C.A. No. 04A-03-001, 2005 WL 1177568 (Del. Super. Ct. Apr. 21, 2005), *Sabo v. Pestex*, C.A. No. 03A-11-001, 2004 WL 2735457 (Del. Super. Ct. Oct. 28, 2004).

vicinity." *Bernier v. Forbes Steel Wire Corp.*, 1986 WL 3980, at *2 (Del. Super. Ct. Mar. 5, 1986), *aff'd*, 515 A.2d 188 (Del. 1986) (Table). However, "[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. Claimant here conducted only a limited job search through the efforts of Abigail Gonzalez during one afternoon at his attorney's office and through the assistance of Shelli Palmer on one day in Middletown. Gonzalez testified that, during the course of a single afternoon, she contacted several employers similar to the ones identified in the labor market survey by telephone. She told each prospective employer about Claimant's language limitations and his limited use of the left arm. None of the employers were able to hire Claimant and Gonzalez did not fill out any job applications. Gonzalez did not say whether any of the employers actually had openings at the time she called them. The only other "job search" was the single day in which Claimant met with Shelli Palmer and Palmer tried to help him fill out several job applications for available jobs. None of the applications was completed satisfactorily, and in each case, at least one reason the application could not be submitted was the absence of information regarding Claimant's legal status. There is no evidence Claimant made any attempts on his own to find a job, even through friends or relatives. The Board finds that the limited attempts to apply for jobs on only two occasions does not constitute a reasonable job search. In addition, Claimant's refusal to provide complete information on several job applications, while understandable, clearly interfered with Ms. Palmer's attempts to help him apply for several available jobs. Palmer explained that providing a legal status on an employment application was a criterion for hiring by employers, yet Claimant declined to fill in this portion of the applications she was helping him prepare. Even Natural House expressed that they were unable to

hire Claimant back without proper legal documentation. Claimant must show an inability to find work *because of his work injury* to prove that he is a displaced worker. The Board finds that he has not done so.

Even if the Board had found that Claimant did meet his burden to show *prima facie* displacement or a failed, reasonable job search, the Employer also has the opportunity to rebut any such finding of displacement through a showing that regular employment within the claimant's capabilities is available in the competitive marketplace. The Employer offered the testimony of Shelli Palmer and a labor market survey she conducted that identified eleven jobs she believed to be within Claimant's vocational and physical capabilities. First, she noted that all of the jobs fell into the same unskilled job category as his job with Natural House and his previous jobs in landscaping and as a roofer helper. She also opined that the jobs all met the medium duty restrictions placed on Claimant's left upper extremity. In her opinion, Claimant would have been able to apply for and perform the jobs but for his residency status. She based her conclusion on the unskilled nature of the jobs and the on-the-job training provided. She explained that, while Claimant had limits on use of his left arm, he could use the arm to stabilize items and assist his right arm, which was the dominant arm. She also insisted that Claimant's inability to read or write in Spanish would not bar him from employment in any of these jobs. Dr. Case reviewed the eleven job descriptions in the LMS and agreed that they were within Claimant's medium duty restrictions. He felt that Claimant would use both hands for heavier work and would be able to perform food preparation tasks by using the left hand to stabilize materials while using primarily the right hand to cut. In contrast, Dr. Crain expressed a number of concerns about the jobs in the survey. He was particularly concerned about repetitive activities with the left arm or the need for fine motor manipulation with the left hand. He

thought it would be difficult for Claimant to work as an instrument assembler because of the need for fine motor skills and repetition, and he felt that working as a dishwasher would be inappropriate because of the repetitive nature of the work and the weakness in Claimant's left hand. He also doubted Claimant's ability to perform all the tasks of a housekeeper and a maintenance person. The Board shares Dr. Crain's concerns about several of the jobs in the survey. Nonetheless, after carefully reviewing the job descriptions prepared by Ms. Palmer and the testimony from Palmer, Jose Castro, the doctors, and Claimant, the Board concludes that Claimant would be able to perform several of the jobs in the survey, including the jobs at Goodwill, Victory Christian Fellowship, and Olive Garden. Claimant would be able to use mostly his right hand to sort clothes at Goodwill, and the employer's mission is to work with people who have disabilities. The janitorial job at Victory Christian Fellowship consists of a variety of tasks for which Claimant could predominantly use his right hand, with assistance from the left, rather than highly repetitive tasks. The job at Olive Garden appears more appropriate than some of the other restaurant positions, because it involves stocking the alley and line rather than cutting up food or dishwashing and does not require any customer interaction. Neither Palmer nor Jose Castro, the vocational expert who testified for Claimant, believes Claimant's inability to speak English is in itself a bar to employment. Many of the employers in the survey already have Spanish speaking or Hispanic employees. On balance, the Board finds that the Employer's evidence of suitable jobs available in the competitive marketplace is sufficient to rebut a finding of displacement from the job market.

Claimant has been found to be physically capable of working in a reduced capacity. He has not established displacement either on a *prima facie* basis or by means of a failed job search. As

such, the Board finds that his entitlement to total disability benefits has terminated as of the date of filing.

Partial Disability

The Board has determined that Claimant can return to work in a medium duty position with restrictions on repetitive use of his left arm. In *Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., 1983 WL 413321 (June 7, 1983), the Superior Court held that, when there is evidence that a claimant has a continuing disability that could reasonably affect earning capacity, the employer filing a petition to terminate benefits must not only show that the employee is no longer totally disabled, but also show that there is no partial disability. *Waddell*, 1983 WL 413321 at *3. Partial disability focuses on the difference between an injured worker's wages before and that worker's "earning power" after a work-related injury. DEL. CODE ANN. tit. 19, § 2325.

The Employer offered a labor market survey and the testimony of Mary Ann Shelli Palmer as evidence of Claimant's current earning capacity. (Employer's Exhibit 3) The LMS identified and described eleven positions that Palmer believed to be within the physical restrictions outlined by Dr. Crain and Dr. Case. The jobs paid an average of $325.46 per week fulltime. The jobs were entry level, unskilled positions in the same classification of the jobs Claimant held previously, and the employers provided on-the-job training. Palmer also emphasized that the positions are only a representative sampling of what is available within Claimant's physical restrictions. Seven of the jobs were still available in early January 2013. As discussed in the previous subsection, the Board believes that some of the jobs in the survey are inappropriate for Claimant, given his restriction from repetitive use of his left arm and his difficulty with fine motor manipulation. The Board also concludes that Claimant would be hired at the low end of any pay range, given his lack of previous

experience in the specific jobs identified. The low average of the three positions earlier identified by the Board as within Claimant's capabilities, Goodwill, Victory Christian Fellowship, and Olive Garden, is $326.67 per week, which is nearly identical to the $325.46 per week average from the survey as a whole. The Board thus accepts the $325.46 per week as a reasonable estimate of Claimant's earning capacity in medium duty work with limitations on the left arm. Claimant earned $406.15 per week at the time of his injury, so his loss of earnings due to injury is $80.69. Claimant therefore shall receive partial disability benefits at the compensation rate of $53.79 per week, which is two-thirds of his lost earning power. DEL. CODE ANN. tit. 19, § 2325.

Attorney's Fee and Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $9,675.20.

In setting an attorney's fee, the Board considers the factors set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. The Employer has successfully terminated temporary total disability as of the date of decision, but Claimant has been awarded partial disability compensation at the rate of $53.79 per week. Claimant's counsel submitted an affidavit stating that he spent 38.9 hours preparing for the hearing. Claimant's counsel is a member of the Delaware bar and has extensive experience in the practice of workers' compensation law. His first contact with Claimant was on December 2, 2009. Counsel does not

represent Claimant in anything other than a workers' compensation context. This case was somewhat more complex than the usual case due to the language barrier and displaced worker issue. Claimant's counsel represents that he has a contingent fee arrangement with Claimant. A copy of the fee agreement was provided to the Board. Counsel represents that no fees have been or will be received from any other source. There is no evidence that Employer is unable to pay an attorney's fee.

Based on the factors set forth above and the attorneys' fees customarily charged in this locality for similar proceedings, the Board awards an attorney's fee in the amount of $4800.

A medical witness fee for medical testimony on behalf of Claimant is awarded to Claimant, in accordance with title 19, section 2322(c) of the *Delaware Code*.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board GRANTS the Employer's Petition to Terminate Benefits and terminates temporary total disability as of the date of filing. The Board further finds that Claimant is entitled to compensation for partial disability at the rate of $53.79 per week. An attorney's fee of $4800 and a medical witness fee are also awarded to Claimant.

IT IS SO ORDERED THIS 18th DAY OF MARCH, 2013.

INDUSTRIAL ACCIDENT BOARD

William F. Hare

WILLIAM F. HARE

Otto Medinilla

OTTO MEDINILLA

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

Susan D Mack

Karen Miller

OWC Staff

Mailed Date: 3-19-13