ROCIO ESPINOSA, Employee,
v.
ELITE CLEANING COMPANY, INC.,
Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1423083

Mailed Date: July 23, 2019
July 19, 2019

DECISION ON PETITION TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on March 22, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

WILLIAM F. HARE

PETER W. HARTRANFT

Kimberly A. Wilson, Workers' Compensation Hearing Officer

APPEARANCES:

Christian G. Heesters, Attorney for the Employee

Joseph Andrews, Attorney for the Employer/Carrier

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NATURE AND STAGE OF THE PROCEEDINGS

On December 1, 2014, Rocio Espinosa ("Claimant") suffered a low back injury when she was involved in a work accident while employed with Elite Cleaning Company ("Employer" or "Elite"). Claimant has been receiving ongoing total disability benefits since the work accident. By stipulation of the parties, Claimant's average weekly wage was $261.79 at the time of the work accident and her compensation rate is $221.86 weekly.

On December 7, 2018, Employer filed a Petition to Terminate Benefits, alleging that Claimant is capable of working in some capacity. Claimant maintains that she remains totally disabled; in the alternative, she argues that she is either partially disabled or entitled to total disability as a *prima facie* displaced worker.

Since the date of filing of Employer's termination petition, Claimant's benefits have been paid by the Workers' Compensation Fund pursuant to 19 *Del. C.* § 2347. A hearing was held on Employer's petition on March 22, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant, sixty-five, was called as Elite's first witness.[1] She lived in Colombia for about sixty years and speaks almost no English. She had some college courses in Colombia in secretarial work. She performed no other work in Colombia other than secretarial work. She has lived in America for six years. Since then, she has held jobs at Wendy's, working a grill in a restaurant. She also held cleaning positions for Elite cleaning the Ramada Hotel and JPMorgan Chase (also "Chase") buildings. Claimant does not have any other job skills beyond cleaning, cooking and performing secretarial work.

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Claimant is not able to drive, and has no driver's license. She was unaware that undocumented immigrants are able to get a driver's permit. Her sister-in-law drove her to the hearing. She denied that anyone would be willing to drive her to potential jobs. Claimant is willing to take public transportation to work.

Claimant is unable to use a computer. She admitted that she had provided Elite with a list of jobs she identified for work. She agreed that she

had provided these potential employers with an email address that correlates with her own name. Claimant explained that her sister in law set the email address up for her, and had been the one to use the computer. Claimant does have an iPhone cell phone. She denied being able to use applications on the phone.

Now that she is not working, all Claimant does is watch television during the day. When questioned if she would like to work or if she wants to retire, she testified that if she can work, she will work. She has not worked at all since her workers' compensation benefits began.

Claimant testified that she applied for all of the jobs shown on the job search by email.[2] She did not personally type up the emails because she does not understand English. She agreed that the bulk of the jobs are written up in English on the job search list, and that she had applied for those jobs because she was given a list. She had not looked for any jobs on her own.

Claimant could not specifically recall applying for a job at Taco Bell, because she could not recall if it was on the list she was provided. She agrees that that application was written in Spanish. Claimant was next to her sister-in-law when she placed the applications, but she did not remember if one of the applications was submitted to Taco Bell.

Claimant agrees that as a secretary she can type, but only on a typing machine. She further agreed that the majority of jobs she applied for are cleaning jobs. If she is hired by any of the employers, she does not know if she would be able to perform any of the jobs. She had also

applied at IHOP and QDOBA. However, they both had indicated that Claimant had to carry forty pounds. She agreed that QDOBA also notes that they will make reasonable accommodations for those with disabilities to help them perform the essential functions of the job; however, she could not remember if she told them she might need accommodations. Claimant was asked if an employer would offer to train and teach her new skills if she would be willing to learn new skills; she responded that she did not know.

Claimant was questioned by her own attorney. She graduated from high school at seventeen years old, and then studied secretarial work. She worked as a secretary until she was twenty years old. Claimant then got married and did not work again until she arrived in the United States.

Claimant worked for Elite when she was injured. She was working for Elite but performing cleaning work at Chase. She has never worked for a bank.

Claimant lives with her mother and sister; her mother is ninety and her sister is forty-five years old. Her mother does not drive, and her sister would not be able to drive her to a job every day.

Claimant described her tolerances: before she has problematic back pain, she is able to stand for about thirty to forty minutes, sit for about forty minutes and walk for about forty to forty-five minutes. She has issues with sleeping about two or three times per week due to back pain. She does grocery shop, but her sister-in-law does everything. Her sister performs all of the household chores. Claimant can sometimes make her own bed. She is able to cook her own meals. A gallon of milk is too heavy for Claimant to carry. Her back hurts if she carries something that is too heavy.

In terms of treatment, Claimant takes medications whenever she has back pain, about three or four times per week. She has no other treatment. Claimant was unable to have pain management treatment, despite a referral, because insurance did not cover the treatment.[3] She is unable to pay for that treatment herself.

Claimant does not have a computer. She confirmed that she applied for the thirty jobs on the job list provided to her with the assistance of her sister-in-law. She had applied to these jobs because she was asked to do so, so she did it. She does not remember if she applied to any additional jobs. Claimant does not believe she could work any of these jobs, and only applied because her attorney told her to do so. None of the employers had hired her, and she received no response from any of them.

Claimant has not worked at all since the 2014 work accident. She is only capable of basic math, addition, subtraction and multiplication. Her mother handles her bills.

Claimant was again questioned by Elite. She confirmed that she had applied to the thirty jobs and had not heard back from any of them. She could not remember if she had later followed up with any.

The Board next questioned Claimant. She came to the United States in September 2012. She worked for Elite for about two years prior to the work injury.

Claimant tried to get pain management several times, making a last attempt this past year.

Claimant confirmed that if she were hired by a company willing to train, help and work with her she still does not know if she would be willing to take the job. She agreed that if any of the thirty jobs she had applied for had been willing to hire her, she does not know if she would

take any of the jobs. She explained that it would depend on whether she could take the pain and if the work does not hurt her back or her legs.

Dr. Ali Kalamchi, board certified in orthopaedics and spine surgery, testified by deposition on behalf of Elite.[4] He examined Claimant on November 30, 2017 and reviewed her pertinent medical records. At the defense medical examination ("DME"), Claimant was accompanied by an interpreter. Claimant reported a work accident occurring on December 1, 2014 when she slipped and fell on a wet floor. She fell backward and injured her back, feeling immediate low back pain.

Claimant ultimately had two surgeries, in January 2016 and August 2017. Claimant did not get better, in that she claimed the same symptoms following both surgeries. At the November 2017 DME, Claimant claimed that her pain was constant and worse with activities in the lumbar region. She watches television, tries to walk and occasionally does some cooking. She stated that her medications and lying down help. Claimant's back pain and leg radiation were aggravated by going for walks or sitting for long periods of time. She described shooting pain with numbness down the right leg to the toes.

In Dr. Kalamchi's opinion, despite the fact that Claimant has had a one-level fusion surgery, she is not totally disabled from any and all work. She is limited because of the unsatisfactory result of surgery, but she can work in a desk job position at least part-time. She could work from six to eight hours per day, one hour standing, walking and driving and four to five hours sitting. She requires restrictions in reference to climbing, overhead activities and lifting beyond fifteen to twenty pounds. Dr. Kalamchi placed Claimant in a sedentary capacity; kneeling, squatting, crawling and climbing were all at zero percent, bending, turning, twisting, repeated arm motions and reaching above the shoulders were at twenty-five percent and foot

controls were at fifty percent. As Claimant is over a year since her surgery, Dr. Kalamchi determined that she is at maximum medical improvement.

Dr. Kalamchi reviewed the LMS. The jobs were a mix of sedentary and light duty, and some had part-time availability. All of them were within the range of what Claimant can do, with

consideration of Dr. Kalamchi's stated restrictions for her. Claimant's job capability is in-between a sedentary to light duty capacity. Twenty-two of the LMS jobs were approved by Dr. Kalamchi.[5]

At this stage, in Dr. Kalamchi's opinion, Claimant does not need any future medical treatment. The surgery levels are already stable and there is no reason to revise it because, most of the time, that does not help.

On cross-examination, Dr. Kalamchi agreed that Dr. Rudin's notes indicate that he totally disabled Claimant about two weeks before the November 2017 DME. Dr. Kalamchi confirmed that it is his opinion that Claimant can work sedentary to light duty, preferably part-time, six hours per day or so.. Kalamchi agreed that because Claimant has not worked since 2014, it would be more reasonable for her to return in a part-time position to start. She also needs on-the-job training.

Dr. Kalamchi agreed that if the LMS jobs turn out to not be limited to desk jobs, this might cause his opinion to change as to whether Claimant can perform the job. He has not approved Claimant to be an instrument assembler, and Claimant also cannot sit for a full eight-hour shift. He agreed that there were jobs he had not approved for Claimant that were not included on the LMS.

The Chili's hostess position would be approved as long as she stands for an hour or two at a time, with breaks; but, if standing were continuous, it would not be approved.

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Dr. Kalamchi agreed that he saw no sign of symptom magnification or malingering in Claimant.

Claimant's moderate physical limitations are permanent in nature.

On redirect examination, Dr. Kalamchi agreed that as long as the LMS jobs accommodate Claimant's restrictions, he would approve them for her.

Dr. Barbara Riley testified next on behalf of Elite. She has a doctorate in education and has been a certified rehabilitation counselor since 1989. Since 1981, Dr. Riley's primary focus has been vocational rehabilitation work, placing injured individuals into jobs.

Dr. Riley compiled a labor market survey ("LMS") within Claimant's physical capabilities and background. She knows that Claimant is sixty-five years old. She had reviewed Claimant's educational and vocational background as well as her medical limitations. Claimant's medical limitations are sedentary to light duty work with lifting of fifteen to twenty pounds maximum, and caution as to overhead reaching and climbing. Per her job application with Elite, Claimant was a high school graduate from Colombia, and had post-secretarial education. Dr. Riley noted that Claimant was performing two housekeeping jobs at the same time at the time she was injured working for Elite. Her work for Elite was office cleaning, including emptying the trash and cleaning windows and bathrooms.

The LMS jobs are a sample representation of the jobs available in the general labor market. The jobs that Dr. Riley identified for Claimant are unskilled to semi-skilled in nature, so a person can learn the job within a few days while working with someone else and/or obtaining on-the-job training. They include positions as an assembler, cashier, ticket taker, a combination of greeter/host/cashier, reviewing security cameras[6] and sorting clothing. They are primarily

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located in New Castle County, with a few jobs located in Cecil County, near Newark. She factored in the availability of public transportation in identifying jobs, so Claimant would not need to be able to drive. To identify positions, Dr. Riley used Indeed.com and other job sites, such as Monster.com. However, she also had some in-person visits with employers to

identify positions. Her survey ran from November 30, 2017 until February 5, 2019. Dr. Kalamchi had approved twenty-two of the jobs on the LMS for Claimant; only those approved jobs appear on the LMS. The twenty-two jobs average weekly wage ("AWW") for full time work total $439.58, and part time work totals $239.41. The average AWW for all of the jobs is $348.60. Dr. Riley contacted all of the employers to determine job availability. She had visited each employer and watched the identified job being performed. In Dr. Riley's opinion, all of the jobs are within Claimant's education, job training and past work experience.

Dr. Riley addressed Claimant's testimony that one of the jobs has a forty-pound lifting need, as well as the Chili's job stating there is the potential of lifting seventy pounds. She had referred Claimant a hosting job at Chili's, whereas the seventy-pound job is a dishwashing job. It is the heaviest job in the restaurant and Dr. Riley had not referred that job to Claimant or added that job as part of the LMS.

Further, Claimant mentioned that the Terumo job had required standing, but that was not the job that was referred to Claimant. An assembler job is a lower-level sitting job and is not a standing job. Thus, it is possible that Claimant applied for positions that were not referred to her.

In Dr. Riley's opinion, knowing Claimant's background, these employers would give Claimant's application the same consideration as other applications. Dr. Kalamchi had approved all of the twenty-two jobs, and each are consistent with lifting up to fifteen or twenty pounds at most. Nothing precludes Claimant from performing any of the LMS jobs, in Dr. Riley's opinion.

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On cross examination, Dr. Riley confirmed she had checked on the availability of the LMS jobs the week of the hearing, and not all of the jobs were still available. The jobs that were still available were Terumo, BJ's, Chick-fil-A, Compass Group, YMCA of Delaware, Applebee's, Taco Bell (multiple locations), Chili's and Red Robin (various locations). Claimant would be considered an unskilled to semi-skilled worker.

The Chipotle job is a job where standing, sitting and walking can be alternated. There are some duties that are sitting, such as preparing things for takeout and packaging certain food items. Light duty work does include standing and walking.

Dr. Riley testified that a worker could be hired with limited English skills. English would not have to be the first language. The worker would need to be able to respond to yes and no questions and follow directions. All of the employers were told that Claimant's first language is Spanish. Dr. Riley made an effort to identify positions where she knew Claimant could work, and these positions allow her to speak Spanish. She has placed other Spanish-speaking applicants with some of these employers before, including Chick-fil-A. Dr. Riley admitted that she could not say if Claimant would be as likely to be hired as someone who is here in the United States legally; however, her job is to identify jobs appropriate for Claimant based on various factors. She personally has worked in the restaurant industry for years as a hostess, server, cook and bartender and undocumented workers and workers that do not speak English are hired. She agreed that she did not mention Claimant's undocumented status to these potential employers; however, she explained that Claimant had provided a social security number to Elite so Dr. Riley was not even aware until recently of her status as an undocumented worker. She was unsure if any of the LMS employers use E-Verify to see if potential employees are undocumented.

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The Hollywood Casino job offers training and does not require prior experience. Hertz was the only job that required a driver's license but Dr. Kalamchi had not approved that position. It was not included on the LMS.

Dr. Riley took into consideration that Claimant would need breaks, and also had identified part-time jobs for Claimant.

Claimant was questioned again by the Board. Claimant only went through eleventh grade in Colombia, but she was considered a high school graduate there.

Claimant had applied for the thirty LMS jobs without telling them that she was an undocumented worker without a social security number because that option was not given. She cannot remember if she lied about this when she applied for the job with Elite. She could not remember giving false information to Elite when she applied.

Desmond Toohey, Ph.D. testified on behalf of Elite. He has a Ph.D. in public policy in economics. Since 2015, he has been working as a professor of economics at the University of Delaware ("UD"). He teaches a Ph.D. course in labor economics. His primary fields of research are labor economics, demographics and aging.

Dr. Toohey complied a report on February 11, 2019 regarding undocumented workers in the Delaware labor market.[7] He utilized a number of data sources produced by the federal government, including some census bureau and other surveys. He also used administrative data compiled by the Department of Homeland Security on this topic. He used subsets of those data sets and commonly accepted social sciences methods to figure out how many undocumented workers are working in any given state at any time.[8] Generally, he took the primary number of people in a census that indicated that they are foreign born and then counted the number of legal

residents in that state that are foreign born and found the difference between the two numbers. Dr. Toohey agreed that he conducted the analysis multiple times and has concluded that there are about 29,000 undocumented people in Delaware, of which there are approximately seventy five percent, or 22,000, undocumented workers. While the political climate is that undocumented workers have decreased nationally, in Delaware, the population has actually grown. This is hard to pinpoint locally, but his number support this.

Dr. Toohey compiled approximate numbers for the type of work undocumented workers are performing in Delaware, including management and business, food services, arts and entertainment, educational services, manufacturing, finance, retail trade, production, transportation, and sales. Based on this data, Dr. Toohey confirmed that it is fair to say that there are thousands of undocumented workers in Delaware. These workers are working the types of jobs Dr. Riley identified in the LMS, and which were approved by Dr. Kalamchi.

On cross examination, Dr. Toohey admitted that he did not contact any of the employers identified on the LMS.

The Board questioned Dr. Toohey. Dr. Toohey uses the term "unauthorized" as opposed to "undocumented" because he is unsure whether some carry fraudulent identifications or expired visas.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Normally, in a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability").[9] 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 rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities.[10] The Board recognizes that it has long been established that "total disability" does

not mean the "inability to continue in the same employment or the same line of work."[11] Rather, it is the inability to perform *any* services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.[12]

From a medical perspective, only Dr. Kalamchi testified. After a thorough review of the evidence, the Board found Dr. Kalamchi convincing that Claimant is not totally disabled from any and all gainful employment. Dr. Kalamchi was persuasive that Claimant has reached maximum medical improvement, as she is well over a year removed from her last surgery. While those surgeries were unsuccessful, he opined that there is no indication that further treatment will help Claimant. Claimant also testified that she is not currently treating. She testified that she takes medication three or four times per week when she has back pain. Dr. Kalamchi acknowledged that Claimant does have lingering restrictions due to her surgical procedures, and he appears to have seriously considered those limitations in rendering his ultimate opinion that Claimant's work capacity lies in-between sedentary and light-duty work. Dr. Kalamchi agreed that it is preferable to have Claimant return to work at first on a part-time basis, six hours per day or so, and avoid or limit certain movements as directed. The Board found his opinion very persuasive.

In the absence of expert medical testimony presented on her behalf, the Board also notes that Claimant's own testimony was not suggestive of a complete inability to be gainfully

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employed. She testified that she takes medications about three or four times per week when she has back pain. Claimant does not otherwise treat. She is able to cook her own meals. Claimant grocery shops, with assistance. She watches television throughout the day. Her described tolerances for sitting, standing and walking, even if accepted as true, do not appear to differ greatly from Dr. Kalamchi's own opinion of Claimant's tolerances. For these reasons, and based on Dr. Kalamchi's expert opinion, the Board concludes that Elite has proven by a preponderance of the evidence that Claimant is capable of gainful employment.

Having found that Claimant is physically capable of working in some capacity, the next issue is whether Claimant 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."[13] An injured worker can be considered displaced either on a *prima facie* basis or through a showing of "actual" displacement. The employer can then rebut this showing by presenting evidence of the availability of regular employment within the claimant's capabilities.[14]

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.[15] 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.[16] Claimant has been in the United States for approximately six years. Spanish is her first language, and her knowledge of English is limited. Claimant testified that she worked in a secretarial

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capacity in Colombia years ago, and had taken secretarial courses beyond high school to do so. While she received the equivalent of a high school diploma from Colombia, there was no indication that this would, or has, prevented her from working when she is able and motivated. She worked for Elite and Wendy's for the first two years or more that she was in the United States.[17] Her duties included cooking (restaurant work) and cleaning. There is evidence that Claimant also held a second job at the time that she was injured. Claimant is sixty-five years old, about a year away from retirement age for a sixty-five year old

United States citizen, but she has indicated that she does not wish to retire.

Dr. Riley identified unskilled to semi-skilled LMS positions for Claimant. According to Dr. Kalamchi, the only medical expert to testify in this case, Claimant is restricted to sedentary to light duty work due to her back issues. Her background reflects that she has worked in different capacities: restaurant (cooking) work, cleaning work and secretarial work; she did not, for example, perform only heavy duty labor-intensive work. She does not have any particularly impairing issues, such as, for example, the lack of use of her dominant arm or hand in addition to her other work restrictions. To the Board, Claimant did not appear with any obvious physical impairment. Claimant's testimony was that she has back pain three to four times per week that requires her to take pain medications. She testified that she has fairly reasonable tolerances for sitting, standing and walking before her back becomes problematic. Dr. Riley's extensive expert testimony in this area also indicated that despite Claimant's restrictions and the fact that Spanish is her first language, there are jobs readily available in the open labor market for which she qualifies. The Board is satisfied that Claimant is not totally disabled on a *prima facie* basis. The Board thus finds that Claimant is employable.

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Not finding Claimant to be *prima facie* displaced, the next question becomes whether Claimant is "actually" displaced. 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.[18] 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."[19] In conducting a reasonable job search, the claimant must make a "diligent, good faith effort to locate suitable employment in the vicinity."[20] For example, making four job applications in over a year would not constitute a diligent or reasonable effort.[21] 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."[22] Nevertheless, if a claimant fails to take certain obvious, common-sense (*i.e.*, reasonable) efforts to find work, that failure should be considered as evidence against the reasonableness of the search. The inability to find work must be a direct result of an injury and not just the result of general economic conditions.[23] A claimant's status as an undocumented worker is another factor to consider in terms of whether a reasonable job search was employed.[24]

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In this case, Claimant presented a job log containing thirty-two jobs as evidence of a failed job search. However, the Board did not find Claimant's testimony convincing that she made a good faith effort to actually find work. Notably, the jobs that Claimant applied for[25] fell only within a ten-day period of time, about two months prior to the hearing. Claimant testified that she was handed a list by her attorney and told to apply for these jobs, and this is the reason why she did so. Claimant also testified that she did not believe that she could work at all, including any of the LMS jobs, and had only applied for these jobs because she was told to do so. She had not applied for any jobs other than the list of jobs she was given, and did not remember if she followed up on any of the applications that were placed. Perhaps most notable, however, she testified that even if she were given employment by one of the LMS employers and trained, helped and accommodated in terms of her restrictions, she was still not sure that she would take a job. The Board found this to be primary evidence against her making a good faith effort to find employment.

Additionally, Claimant seemingly lacked interest regarding or knowledge about the applications placed on her behalf. She did not seem to know which job applications were placed, despite her testimony that she sat next to her sister-in-law while she applied for the jobs. When

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questioned, Claimant was unsure about whether she had applied for jobs with specific LMS employers, although they were contained on her job search log. Claimant's testimony reflected that she believed that her sister-in-law had applied for *all* of the LMS jobs for Claimant, but the job log itself often seemingly contains written reasons why no application would or could be placed. The Board also notes that some of these "reasons," such as a requirement for heavy lifting, are inconsistent with Dr. Riley's testimony, and suggestive that Claimant had perhaps identified and/or applied for jobs outside of her restrictions that were not the actual jobs identified on the LMS. Claimant did testify that she had not heard back from any of the LMS employers about her applications though, again, it was unclear from the job log how many applications were actually placed.[26] Further, the Board also notes that whomever filled out the job log on Claimant's behalf appeared to have discounted almost every single job as unavailable or unacceptable for some reason for Claimant. To the Board, the contents of log itself appeared to have been directed toward the purpose of having the Board conclude that not a single one of the more than thirty identified jobs would be acceptable for Claimant. This was consistent with Claimant's own testimony that she did not believe she could work any of the jobs, or that she would take any such job if offered, which was also not credible for the Board in terms of a good faith effort to find work.

The Board notes that Claimant testified that she did not believe that her undocumented status had been revealed on any of her applications, though her job log did indicate that some of the employers use "E-Verify" to ensure that undocumented workers are not hired.[27] It did not appear that Claimant was technically turned down for work due to her undocumented status

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however, though in her testimony, Claimant herself was often unsure about what had transpired in terms of the applications placed on her behalf.

Finally, Claimant also pointed to the fact that she has no driver's license and has no one to take her daily to work as evidence of why she cannot work at present. However, the Board notes that despite the fact that this has apparently always been the case for Claimant, even prior to the work accident, she managed to get to work for approximately two years for Elite and, at some point in time, for Wendy's. She also testified that she is willing to take public transportation, and Dr. Riley confirmed that she made sure that the jobs on the LMS were accessible by public transportation.

The Board felt that the totality of Claimant's own testimony, especially her lack of knowledge of the job seeking performed on her behalf, reflected poorly on her motivation to find work. This was supported by her testimony that she is unlikely to take a job even if she receives a job offer of on-the-job training and accommodation of her medical restrictions. The Board was not convinced that Claimant personally put forth much effort toward actually *finding* work. Instead, Claimant essentially admitted that the effort she put forth in job seeking was because she was told to do so, not because she actually sought work. Thus, for these reasons, the Board concluded that Claimant has not shown that she made a good faith effort toward employment that was thwarted by her work-related condition, or by her status as an undocumented worker.

Although the Board did not find that Claimant was *prima facie* displaced or actually displaced, the Board must state that it was still convinced that Elite rebutted any such showing of displacement. Elite provided convincing evidence of the availability of jobs in the general labor

market for which Claimant would qualify. Dr. Riley's testimony was very convincing that there are jobs available for Claimant, considering her geographic location, her limited English skills,

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her undocumented status, her work background, as well as her physical limitations. Dr. Riley had informed each of the LMS employers that Spanish is Claimant's first language. Dr. Riley also testified that she has successfully placed Spanish speakers into some of these positions in the past. Dr. Riley further testified that she had visited each job and found that Claimant would be capable of performing the jobs. She noted that each of the LMS jobs provides on-the-job-training and also allows Claimant to change positions as needed. Dr. Kalamchi notably had also approved all of the jobs contained on the LMS, and he was convincing to the Board that he had thoroughly considered Claimant's physical limitations. The Board recognizes that he had eliminated a number of positions that he did not find appropriate for Claimant.

Dr. Riley admitted that she had not mentioned Claimant's status as an undocumented worker to the potential LMS employers; however, the Board also believes it unrealistic to expect that any potential employers will admit that they might illegally hire undocumented workers, even if Claimant's status had been mentioned. The Supreme Court recognized this challenge in *Roos Foods*.[28] Nonetheless, the Supreme Court noted that employers can still present evidence regarding the prevalence of undocumented workers in the region using reliable social sciences methods.[29] Based on the convincing testimony of Dr. Toohey, the Board was convinced that Elite successfully presented such evidence. Dr. Toohey provided testimony as well as a detailed written report. After an extensive analysis of the data, Dr. Toohey concluded that there are thousands of undocumented workers in Delaware working in each of the occupations and industries represented on the LMS. Dr. Toohey had reviewed each of the LMS jobs and provided an estimate of the number of undocumented workers in Delaware working in such positions. The evidence he presented shows that there is a prevalence of undocumented workers

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in the categories in which the LMS also indicates the availability of specific jobs. The Board was convinced that Elite provided reliable and relevant evidence of undocumented workers in the specific occupations and industries that Dr. Riley had compiled on the LMS. Notably, Dr. Riley had also confirmed her knowledge of the presence of undocumented workers being hired into some of these positions in Delaware.

After a thorough review of the evidence, and having found both Dr. Riley and Dr. Toohey very convincing, the Board concludes that Employer successfully established that there are both actual jobs available for Claimant as well as a prevalence of undocumented workers working in Delaware (and the surrounding area) in the job categories contained on the LMS. Thus, the Board recognizes that even if it were to have found that Claimant was a displaced worker, either *prima facie* or actually displaced, Elite was successfully able to rebut such a showing by presenting evidence of the availability of jobs within Claimant's capabilities, as well as establishing a prevalence of undocumented workers working in such jobs in Delaware and the surrounding area.

Therefore, because the Board was convinced that Claimant is capable of gainful employment, is not displaced and suitable employment is available to her, her total disability status is terminated as of the date of filing of Elite's petition, or December 7, 2018. The Board recognizes that under the doctrine set forth in *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000), Claimant would normally be permitted to rely on her doctor's no-work orders, at least temporarily, regardless of her actual physical ability or condition.[30] In this case, however, the evidence was limited and, in the Board's view, stale. Claimant did not have a medical expert testify at the hearing. The only evidence regarding her continued total disability

was elicited from Dr. Kalamchi (Elite's medical expert) and indicative that Dr. Rudin had totally disabled

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Claimant as of a November 6, 2017 visit. The Board notes that this was not too long after her August 22, 2017 lumbar surgery. Notably, Claimant herself did not testify that she has been told by Dr. Rudin, or any other treating doctor after that date, that she remains totally disabled. The November 2017 visit was approximately sixteen months prior to the March 2019 hearing. Thus, to the Board, there is no convincing evidence that Claimant has been told by a treatment provider close in time to the hearing that she remains totally disabled and that she has relied on such in not seeking employment. In fact, Claimant testified that she has sought employment.[31] Therefore, as Employer filed its termination petition on December 7, 2018, the Board finds that Claimant's total disability status terminated as of the date of filing of Elite's termination petition.

Partial Disability

In cases involving petitions to review compensation benefits, in addition to a showing that a claimant is no longer totally disabled, the employer must also show the claimant is not partially disabled where there is evidence of a continuing disability that could reasonably affect the claimant's earning capacity.[32] Dr. Kalamchi has opined here that Claimant does have continuing sedentary to light duty restrictions, and the Board recognizes that this certainly could affect Claimant's earning capacity. Dr. Kalamchi also testified that because Claimant has been out of work since 2014, it is preferable that she return to work on a part-time basis at first. He felt that she can work at least part-time, for six or more hours per day, with one hour standing, walking and driving and four to five hours sitting. She also requires restrictions in reference to climbing, overhead activities and lifting beyond fifteen to twenty pounds. After a thorough review of the evidence, based on Dr. Kalamchi's expert testimony that the remaining LMS jobs

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are acceptable for Claimant, the Board concludes that Claimant shall be deemed capable of returning to work in a part-time capacity with the restrictions outlined by Dr. Kalamchi effective December 7, 2018 for ninety days (twelve weeks);[33] and thereafter, she is deemed to have been capable of returning to sedentary work with restrictions in a full-time capacity.

The Board notes that the Court has stated that absent proof of compensation other than wages or additional evidence of earning power, the extent of a claimant's partial disability can be the difference between the claimant's wages before and after the injury.[34] The Board has already discussed and determined that Employer showed the availability of regular employment within Claimant's capabilities; the only determination left is whether or not that employment establishes that she has a loss of earning capacity regarding her work-related condition.

Because Claimant has certain limitations and has been out of work since 2014, the Board believes that the low AWW shall be employed in this determination. Regarding the twelve week part-time period of time beginning December 7, 2018, the LMS part-time jobs reflect a low average weekly wage of $225.26. Claimant earned $261.70 weekly while working for Elite. Thus, under title 19 of the Delaware Code, Section 2325, the Board finds that Claimant is entitled to $24.29 weekly as compensation for partial disability for twelve weeks effective December 7, 2018. Elite shall reimburse the Workers' Compensation Fund accordingly.

As to the period of time thereafter, the Board also employs the low AWW. The LMS jobs reflect a low AWW of full-time jobs of $427.50 weekly. As Claimant earned $261.70 per week prior to the work accident, she is not due a partial disability award for the period after the twelve week period

that is effective December 7, 2018. Based on the evidence presented, the Board

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does not find evidence of an economic loss beyond that period ending twelve weeks from December 7, 2018.

Attorney's 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."[35] At the current time, the maximum based on Delaware's average weekly wage calculates to $10,704.80.

Such fees are not awarded, however, if 30 days prior to the hearing date the employer gives a written settlement offer to claimant or claimant's attorney which is "equal to or greater than the amount awarded." Elite tendered a timely settlement offer that was greater than Claimant's award pursuant to this decision. Thus, Claimant is not entitled to an attorney's fee award.

STATEMENT OF THE DETERMINATION

Accordingly, for the reasons stated above, the Employer's petition for Termination of Total Disability Benefits is **GRANTED** effective December 7, 2018, the date Employer filed its petition. For the reasons discussed above, Claimant is entitled to a partial disability award of $24.29 weekly for twelve weeks, effective December 7, 2018; Elite shall accordingly reimburse the Workers' Compensation Fund under title 19, Section 2347, of the Delaware Code.

As Elite tendered a timely settlement offer that was greater than Claimant's award pursuant to this decision, Claimant is not entitled to an attorney's fee award.

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IT IS SO ORDERED THIS 19th DAY OF JULY, 2019.

INDUSTRIAL ACCIDENT BOARD

/s/_____
WILLIAM F. HARE

/s/_____
PETER W. HARTRANFT

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

/s/_____

Mailed Date: 7/23/19

/s/_____
OWC Staff

Notes:

1. Claimant testified with the assistance of a Spanish-language interpreter, Evelyn Diaz-Camacho of Para-Plus Interpreter Services.

2. Claimant's job search packet was marked into evidence as Claimant's Exhibit #1.

3. Employer's counsel objected to this question on the basis of relevance as medical treatment was not at issue for the hearing. Claimant's counsel responded this because there may be an inference of a lack of *need* for treatment where there is a lack of treatment, this is relevant in a case where the termination of benefits is at issue. The Board overruled the objection.

4. Dr. Kalamchi's deposition was marked into evidence as Employer's Exhibit #1.

5. The LMS was marked into evidence as Employer's Exhibit #2.

[6.] Dr. Riley testified that the security job just entails reviewing a monitor. The worker can get up or down to do the work, and does not walk around patrolling. The position offers on-the-job training.

[7.] Dr. Toohey's report was marked into evidence as Employer's Exhibit #3.

[8.] Dr. Toohey testified that he deems these social sciences methods commonly accepted because they have been used over the past thirty years.

[9.] *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973).

[10.] *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

[11.] *Federal Bake Shops, Inc. v. Maczynski*, 180 A.2d 615, 616 (Del. Super. Ct., Apr. 2, 1962).

[12.] *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967).

[13.] *Watson v. Wal-Mart Associates*, Del. Supr., No. 442, 2010, op. at 2 (October 21, 2011).

[14.] *See Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

[15.] *Duff*, 314 A.2d at 916-17.

[16.] *See Vasquez v. Abex Corp.*, Del. Supr., No. 49, 1992, at ¶ 9 (November 5, 1992); *Guy v. State*, No. 95A-08-012, 1996 WL 111116 at *6 (Del. Super. Ct., March 6, 1996); *Bailey v. Milford Memorial Hospital*, 94A-03-001, 1995 WL 790986 at * 7 (Del. Super. Ct., Nov. 30, 1995).

[17.] The Board notes that there was also evidence presented that Claimant held a second cleaning job while working for Elite.

[18.] *Hoey v. Chrysler Motors Corp.*, Del. Supr., No. 85, 1994, Hartnett, J., at ¶ 7 (December 28, 1994).

[19.] *Watson*, op. at 2.

[20.] *Bernier v. Forbes Steel Ensign Wire Corp.*, No. 85A-FE-17, 1986 WL 3980 at *2 (Del. Super. Ct., Mar. 5, 1986), *aff'd*, 515 A.2d 188 (Del. 1986). This same language can also be found in *Joynes v. Peninsula Oil Co.*, No. 00A-06-001, 2001 WL 392242 at *4 (Del. Super. Ct., Mar. 14, 2001).

[21.] *See Zdziech v. Delaware Authority for Specialized Transportation*, No. 87A-AU-10, 1988 WL 109338 at *5 (Del. Super. Ct., Oct. 13, 1988).

[22.] *Watson*, op. at 6.

[23.] *Federal Bake Shops, Inc. v. Maczynsky*, 180 A.2d 615, 616 (Del. Super. Ct., Apr. 2, 1962). *See also Doe v. General Foods Corp.*, No. 83A-AU-4, 1986 WL 6589 at *3 (Del. Super. Ct., May 21, 1986).

[24.] The *Roos Foods v. Guardado* Court has provided some guidance as to the question of undocumented worker status and the claim that one is a displaced worker:

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

Roos Foods v. Guardado, 152 A.3d 114, 122 (Del. 2016). Thus, the Supreme Court has determined that a worker's undocumented status is a relevant

factor in terms of consideration of a worker's efforts to find employment as well as in the determination of whether an employer has shown that there are jobs available suitable for the injured worker's background and capabilities.

[25.] Because Claimant herself admittedly did not apply for the jobs, she did not appear to have a full understanding of which jobs were applied for; she testified that her sister-in-law had applied for all of the jobs on her behalf "by email," but the job log itself seems to indicate reasons why many applications could not (or would not) be placed.

[26.] The contents of the packet within the job log often did not reflect proof of an actual application; instead, there was a printout of a description of a certain job's requirements.

[27.] The Board notes that it did find Claimant evasive and not credible regarding the fact that she "did not remember" that she had apparently applied for employment in the past with a social security number, despite her undocumented status.

[28.] *Roos Foods*, 152 A.3d at 121.

[29.] *Id.*

[30.] *Gilliard-Belfast*, 754 A.2d at 254.

[31.] The Board reiterates its ultimate conclusion that Claimant failed to show a good faith effort to find employment.

[32.] *Waddell v. Chrysler Corp*, C.A. No, 82A-MY-4, 1983 WL 413321 at *3 (Del. Super. Ct., June 7, 1983). (Burden to prove claimant is not partially disabled is on employer when "there is evidence that in spite of improvement, there is a continued disability, and such disability could reasonably affect the employee's earning capacity.")

[33.] The Board recognizes that the LMS might have been compiled with a four-hour-per-day part-time shift in mind, although Dr. Kalamchi testified that Claimant can work part-time "six or more" hours per day. The Board was content with Claimant returning to work four hours per day to start.

[34.] *Globe Union, Inc. v. Baker*, 310 A.2d 883, 889 (Del. Super. Ct. 1973), *aff'd*, 317 A.2d 26 (Del. 1974).

[35.] DEL. CODE ANN. tit. 19, § 2320.
