BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

RALPH BURKOVICH,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1360672
	)	
HAINES FABRICATION & MACHINE,	)	
	)	
Employer.	)	

DECISION ON REMAND

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 September 25, 2013, in the Hearing Room of the Board, in Milford, Delaware. A decision was rendered which was appealed to Superior Court, which, on June 20, 2014, affirmed in part and remanded in part the matter for further findings. A hearing on remand was conducted on September 24, 2014.

PRESENT:

MARY DANTZLER[1]

JOHN BRADY

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

APPEARANCES:

Samuel Pratcher, Attorney for the Employee

John Klusman, Attorney for the Employer

[1] At the time of the original decision in 2013, the Board consisted of Mr. Brady and Victor Epolito. Mr. Epolito was no longer with the Board at the time of this remand hearing. Ms. Dantzler is sitting in his place.

NATURE AND STAGE OF THE PROCEEDINGS

Ralph Burkovich ("Claimant") injured his lower back in a compensable work accident on September 1, 2010, while he was working for Haines Fabrication & Machine ("Employer"). The injury was acknowledged as compensable and Claimant received certain workers' compensation benefits, including compensation for total disability. At the time of the injury, Claimant's average weekly wage was $664.50 per week and his compensation rate was $443.00 per week.

On March 1, 2013, Employer filed a Petition to Terminate Benefits alleging that Claimant was no longer totally medically disabled, and therefore, no longer entitled to total disability compensation benefits. Claimant opposed Employer's Petition and claimed that he remained totally disabled.

A hearing was held on the petition on September 25, 2013. In its decision, the Board determined that Claimant was physically capable of working in some capacity, and was, therefore, no longer medically, totally disabled. *Burkovich v. Haines Fabrication & Machine*, Del. IAB, Hearing No. 1360672, at 18 (October 2, 2013)("Board Decision"). The Board went on to determine, *sua sponte*, that Claimant qualified as a *prima facie* displaced worker. *Board Decision*, 23. The Board further determined that Employer had failed to show that there was regular employment within Claimant's capabilities in the local labor market; therefore, Claimant was entitled to total disability compensation. *Board Decision*, 22.

On October 30, 2013, Employer appealed the Board's decision to deny its Petition to Superior Court. By decision dated June 20, 2014, the Court affirmed the Board's finding that Claimant was no longer medically, totally disabled. *Haines Fabrication & Machine v. Burkovich*, Del. Super., C.A. No. S13A-10-004, Graves, J. at 17 (June 20, 2014). The Court further determined that it was legal error for the Board to determine Claimant's displaced worker

status and that fairness considerations required a remand for further proceedings so that the parties could develop the displaced worker theory. *Haines*, at 17.

Pursuant to title 19, section 2348(f) of the Delaware Code, all evidence taken at the original hearing is considered part of the evidence for this remand. In addition, "the statutory scheme for conducting a hearing on remand is unambiguous. The Board is to decide the matter, after the remand hearing, on the basis of the evidence from the prior hearing plus any new evidence and legal arguments the parties decide to present." *State v. Steen*, 719 A.2d 930, 934 (Del. 1998). The parties were contacted by the Department of Labor's Office of Workers' Compensation to schedule a remand hearing. The remand hearing was held on September 24, 2014.

This is the Board's decision on the merits of the remand.

SUMMARY OF THE EVIDENCE

At the remand hearing, Claimant testified that he is a fifty-five (55) years old high school graduate. He has been a metal fabricator nearly his whole life and started at the age of twelve (12). On September 1, 2010, he was working for Employer and "almost got electrocuted." In 2011, Dr. Sabbagh performed Claimant's back surgery and Dr. Galuardi prescribed him Hydrocodone and Oxycodone for pain. Claimant reported that he was in pain during the remand hearing, but that his pain medications help him to a certain degree.

At home, Claimant is responsible for cooking, cleaning and other household chores. He lives alone so he runs the sweeper, does dishes, his own laundry, cooking, grocery shopping, and grass mowing (with a self- propelled lawn mower). He takes breaks during those activities. On a daily basis, he mostly has been attending medical appointments and staying home. He has

a fishing license, but has not gone fishing yet. Claimant reported that he sometimes goes out with friends and to the beach.

Claimant owns a car, has a Maryland driver's license, and drives on a daily basis if he needs to, but claims he cannot drive too long before he has to get out of the car. His son drove him to the hearing and he reportedly stopped three times on the way to get out and stretch because the trip was about forty (40) miles. He has no issues driving to the grocery store, which is three miles away.

Claimant testified that he started with Employer in May 2009. Before he worked for Employer, he worked at American Design & Fabrication for nine years as a metal fabricator. Before that he worked at Waco Welding in Pittsburgh for approximately two (2) years as a metal fabricator. Before that, he worked for Culley Anderson Welding for many years as a metal fabricator. Claimant reported that he was never fired from any of those jobs, but left those jobs to move on to other jobs. While testifying, Claimant produced a document indicating that he was exposed to classified government information while at Employer because they are government contractors. During the original 2013 hearing, Claimant testified that he had worked on projects for NASA while working for Employer. At the remand hearing, Claimant alleged that he could not disclose certain information to the Board because of a contract requiring him to keep information confidential. Claimant admitted that his work on those government projects required him to have certain security clearances.

Claimant explained that he worked on residential, commercial and government contract jobs. At the residential jobs, Claimant would complete projects such as hoods over stoves, exhaust hoods, and railings. He reported that he would go out to homes and deal with customers

one on one or with contractors who were handling the jobs. As a part of his job duties, Claimant would: draft the blueprints after he took the measurements for the jobs; make the railings or equipment; and install the railings or equipment that he made. Sometimes, Claimant had a helper to assist in installation. Claimant reported that he was able to create metal work for a large local restaurant after the owner drew a design in the sand. From that sand drawing, Claimant was then able to create the metal work the owner wanted for the restaurant. Claimant described that customer/owner as very "meticulous" and said "if you don't please him you don't stay on the job too long." Claimant admitted his list of jobs was endless some days. He would talk to customers, who would tell him what they wanted, then he would make what they wanted and then return and install what he made. Claimant reported that he is able to create a solution when the customer's idea of what they want does not match what is possible to do with metal. Claimant reported that he had to come up with a strategy to make things work. If customers wanted changes made to projects, he would discuss those with them and tell them whether their changes would work.

Claimant reported that he was never removed from a government job for his inability to keep information confidential. He was moved from jobs sometimes because someone else could not finish the job and he had to finish it for them. Claimant was skilled enough that he would administer welding tests to potential employees to see if they could perform the job sufficiently. Claimant described the tools he used primarily as; sheers, metal bricks and very heavy equipment. Claimant admitted that metal fabrication is "quite complicated." He had two (2) years of high school and a high school diploma. In addition to his high school diploma, he has three (3) years of specialized welding training. Claimant also had in house certifications when he worked for Employer.

Claimant testified that he wants to go back to work if he can get his back healed, but he claimed that he is unsure whether he can weld now. In addition, Claimant alleged that he is now allergic to the titanium hardware in his back. Claimant said that if he cannot work as a welder, he will go back to a job that pays the same as a welder. Claimant then said that if a sedentary job does not pay what he made as a welder then he does not want to go back to work at all because he is "not cut out for all that." Claimant admitted that he has not done anything at all to look for work "until they get me right." He does not own a computer nor does he know how to use one. Claimant admitted that he has seen the Labor Market Survey but claimed he did not believe anything on it was suitable for him.

Claimant said he would not describe himself as a "people person," but he can get along with others if it is required. Claimant stated that he does not believe he can do metal fabrication right now, but then later testified that he believes metal fabrication is all he can do because that is all he has ever done. He describes himself as an expert in metal fabrication, but he does not believe he has any transferrable skills.

Ellen Lock, an expert in Vocational Rehabilitation, testified, without objection, on Employer's behalf. Since the original hearing in September 2013, she has identified seven additional jobs that Claimant can do, which made a total of eighteen (18) jobs available. She personally visited each of the job sites and has seen each of the jobs being performed and each job met the requirements in Claimant's profile. She has now had the opportunity to see Claimant personally at both hearings and see how he presents himself. She used an education level of high school education plus 2 years of vocational or trade school in welding. Ms. Lock explained that there is no specific training required for the listed jobs, but they do provide on the job training. She described the jobs as basic entry level jobs that anyone without prior

experience could apply for regardless of work injury. Ms. Lock was told by the prospective employers that Claimant would be considered for the available positions.

Ms. Lock testified that Claimant has been employed for over 43 years in a "skilled" position as defined by the occupational dictionary. She described Claimant's transferrable skills as: knowledge of production and processing; design; blue prints; mechanical and mathematical knowledge; customer service; command of English language; use of machinery; use critical thinking; and perform reading comprehension. She added that Claimant is able to please customers based on his testimony about meeting with them and creating projects from what the customers described.

Ms. Lock stated that, in her opinion, there are no requirements at any of the listed jobs that are beyond Claimant's capabilities. She reported that when combining all eighteen (18) jobs, the low average weekly wage would be $412.00 and the high average weekly wage would be $429.20. The total average weekly wage would be $421.00. Claimant's average weekly wage was $664.54.

On cross examination, Ms. Lock stated that in 2013, at the time of the original hearing, she found eleven jobs and she still believes Claimant can do those jobs. She has heard Claimant testify at the original hearing and at the remand hearing, but she has not had the opportunity since then to speak to Claimant or his physicians. For her original Labor Market Survey, she relied on Dr. Piccioni's recommendations, but for the second updated survey she relied on the Board's decision, which included both physicians' opinions. In her opinion, Claimant would fall on the low to mid- range of the pay scale for most of the jobs. Ms. Lock stated that she

disagrees with the Board's original decision that Claimant does not have the skills to do those jobs. She reported that six of the eighteen jobs listed are still available.

When asked by the Board if Claimant had the ability to take care of a gas emergency at a gas station, Ms. Lock said that she believed that he did. She believes Claimant has the ability to learn the computers and customer service functions required at the cashier positions. She reiterated that none of the listed positions require computer usage and there is on-the-job training at all of them. In Ms. Lock's opinion, Claimant could be retrained to perform alternative positions and could be employed at any of the listed positions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Displaced Worker

Normally, in a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973). 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. *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1. In this case, at the original Board hearing, the Board found that Claimant was physically capable of working with restrictions and Superior Court affirmed that finding.

The Court remanded the case so that the Board could hear arguments on whether Claimant is a displaced worker. An injured worker can be considered displaced either on a *prima facie* basis or through showing "actual" displacement. The employer can then rebut this

showing by presenting evidence of the availability of regular employment within the claimant's capabilities. *See Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1. In this case, Claimant did not provide any evidence concerning any efforts at finding work, so there is no basis to find "actual" displacement. The sole question is whether he should be considered displaced on a *prima facie* basis.

With respect to the issue of *prima facie* displacement, generally elements such as the degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age are considered. *Duff*, 314 A.2d at 916-17. As a practical matter, to qualify as a *prima facie* displaced worker, one must normally have only worked as an unskilled laborer in the general labor field. *See Vasquez v. Abex Corp.*, Del. Supr., No. 49, 1992, at ¶ 9 (November 5, 1992); *Guy v. State*, Del. Super., C.A. No. 95A-08-012, Barron, J., 1996 WL 111116 at *6 (March 6, 1996); *Bailey v. Milford Memorial Hospital*, Del. Super., C.A. No. 94A-03-001, Graves, J., 1995 WL 790986 at * 7 (November 30, 1995). In Claimant's case, the Board finds that Claimant can work in a sedentary capacity. He is only fifty-five years old and has over a decade of a useful work life in front of him before reaching a normal retirement age. He is a high school graduate with several years' specialized training and decades of experience in the specialized welding trade, which by Claimant's own admission is "quite complicated."

In addition, Claimant has extensive experience in: fabricating metal projects; using large tools and equipment; maintaining a federal government security clearance; working with customers (including some who are "meticulous") and contractors; and, designing and creating projects with minimal guidance and/or instruction. Ms. Lock testified that Claimant had numerous transferrable skills, including: knowledge of production and processing, design, knowledge of mathematics and mechanics, use of machinery, critical thinking and reading

comprehension and customer service. By Claimant's own admission, he is an expert in a field that is "quite complicated." The fact that he does possess skills that are transferrable to many of the positions listed on the Labor Market Survey is supported by both Claimant's own and Ms. Lock's testimony. Claimant's mere lack of desire to work at a job that pays less than his former job is not sufficient for a finding of a displaced worker. He has the ability and capacity to earn wages, even if those wages are less than what he was earning. The Board is satisfied that this is not the presentation of a person who, on a *prima facie* basis, is a displaced worker. On the contrary, Claimant's ability to create, design and complete projects independently and work with sometimes difficult customers will be attractive to some employers.

Because Claimant can physically work in some capacity and he is not a displaced worker, his total disability status is terminated. The next issue in this case is to determine the effective date when Claimant's total disability status terminates. The Board is specifically authorized by statute to end awards of compensation. *See* DEL. CODE ANN. tit. 19, § 2347. However, under the doctrine set forth in *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000), Claimant is permitted to rely on his doctor's no-work orders, at least temporarily, regardless of actual physical ability or condition. *Gilliard-Belfast*, 754 A.2d at 254; *see also Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878-79 (2003). This reliance only lasts until the Board renders a ruling to the contrary. *See Gilliard-Belfast*, 754 A.2d at 254. *See also Clements*, 831 A.2d at 879 ("[W]hen the treating physician renders a no work order . . . the claimant is totally disabled for the purpose of the Delaware Workers' Compensation statute *until the Board resolves that issue in favor of the employer.*")(emphasis added). "[I]f a claimant is instructed by his treating physician that he or she is not to perform *any* work, the claimant will be deemed to be totally disabled during the period of the doctor's order" until the time that the Board decides otherwise.

Delhaize America, Inc. v. Baker, Del. Supr., No. 108, 2005, Berger, J., at ¶ 5 (August 12, 2005)(ORDER)(emphasis in original). In this case, Dr. Galuardi has kept Claimant on total disability status since November 2011. Thus, Claimant's total disability status is terminated as of the date of this decision.

Partial Disability

The next question is whether Claimant is entitled to compensation for partial disability. The threshold question is whether Claimant still has work restrictions related to his work injury that could reasonably affect his earning capacity. *See Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (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"). Clearly, Claimant has such restrictions.

Employer submitted a Labor Market Survey of available positions for a person with sedentary restrictions such as Dr. Piccioni and the Board's decision recommended. Based on the evidence presented, including Claimant's own testimony regarding his job skills, it is clear that Claimant could be employed by many of the employers listed on the survey, if not all. In considering all eighteen (18) of the positions, the low average weekly wage of the jobs calculates to about $412.00 per week, the high average weekly wage calculates to be about $429.20, which makes the average about $421.00 per week. The Board finds the average ($421.00) to be an accurate assessment of Claimant's likely earning capacity. Taking this into account, the Board finds that Claimant's appropriate return-to-work wage would be $421.00 per week. Claimant's weekly wage at the time of injury was $664.50, so he has a diminished

earning capacity of $243.50 per week, which results in a compensation rate for partial disability of $162.33 per week.

Attorney's Fee & Medical Witness Fee

Attorney's fees are not awarded if, thirty days prior to the hearing date, the employer gives a written settlement offer to the claimant that is "equal to or greater than the amount ultimately awarded by the Board." DEL. CODE ANN. tit. 19, § 2320. A settlement offer was tendered by Employer that was for an amount greater than what the Board awarded Claimant. Accordingly, an award of attorney's fees is not appropriate in this case.

While there were no medical witness fees for testimony on behalf of Claimant for the remand hearing, there were such fees for the original hearing and, to the extent that those have not been paid, they are awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons stated above, the Board finds that Claimant is not a displaced worker, but is entitled to compensation for partial disability at the compensation rate of $162.33 per week, beginning October 8, 2014. Employer shall make appropriate reimbursement to the Workers' Compensation Fund, in accordance with title 19, section 2347 of the Delaware Code.

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

INDUSTRIAL ACCIDENT BOARD

/s/Mary Dantzler
MARY DANTZLER

/s/John Brady
JOHN BRADY

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

HEATHER WILLIAMS

Mailed Date: 10.9.14

OWC Staff