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Case Number 116,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Magdalena Guardado,

Appellant Below-
Appellant,

v.

Roos Foods,

Appellee Below-
Appellee.

No. 116, 2018

Court Below: Superior Court
of the State of Delaware

C.A. No.: S17A-05-003-RFS

Reply Brief of the Appellant Below-Appellant

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Argument I

Employer's statistical evidence and labor market survey do not establish that work is available to Claimant within her physical restrictions, vocational qualifications, and status as an undocumented worker.

The Claimant in this case succeeded in showing that she is a *prima facie* displaced worker. Thus, Employer was required to show that jobs are actually available to Claimant, while taking into account her status as an undocumented worker. Guardado Supreme at 12.

Employer's Statistical Evidence is Insufficient to Prove Work Available to This Claimant.

Employer argues that it provided the Board with the exact evidence this Court called for through Dr. Toohey's testimony. Appellee's Ans. Brief at 28. Claimant disagrees. The undocumented workers analyzed in Dr. Toohey's report do not accurately reflect Claimant's circumstances and prospects for employment. The only common factor is their undocumented status. In fact, Dr. Toohey ignored data regarding other relevant factors when compiling his report,[1] because he "was not charged with identifying jobs available to [Claimant] or jobs that could accommodate [her] physical and vocational restrictions." Id. at 36.

[1] See TR-37.

Employer seeks to rely on the Superior Court's holding that Employer complied with this Court's directives on presenting "reliable market evidence that employment within the worker's capabilities is available to undocumented workers." Id. at 34. However, Employer must establish that there is work available to this claimant, not just undocumented workers in general. Abex Corp. v. Brinkley, 252 A.2d 552 (Del. Super. Ct. 1969). Dr. Toohey's testimony purports to show jobs held by undocumented workers, *in general*, within the categories listed on the labor market survey; however, that testimony says nothing about the employment prospects for undocumented workers with disabilities, let alone with Claimant's other vocational limitations.

Further, the labor market survey produced by Ms. Lock only purports to establish available jobs within Claimant's physical capabilities. Thus, it is inaccurate to say that the evidence Employer presented showed that employment within Claimant's capabilities is available to undocumented workers.

General showings of job availability have consistently been rejected as an insufficient basis for terminating a claimant's lost wages benefits. See Abex Corp v. Brinkley, 252 A.2d 552.; see also Jennings v. Univ. of Delaware, 1986 Del. Super. LEXIS 1088 (Del. Super. Ct. Feb 27, 1986); and see Campos v. Daisy Constr. Co., 107 A.3d 570 (Del. Super. Ct. 2014). Thus, a decision in Employer's favor would place the equal protection rights of undocumented

workers in jeopardy and significantly affect the course of workers' compensation claims filed by undocumented workers in the future. It is well established law that a showing of physical ability to perform certain appropriate jobs and the general availability of such jobs is an insufficient showing of job availability as to a particular claimant,[2] but that is precisely the sum of Employer's evidence.

In Abex, the claimant was able to perform light duty work and the employer presented evidence that light duty work was "generally available at various times of the year." Id. The court rejected employer's evidence as insufficient where employer's witness had not discussed claimant's situation with possible employers and did not base his testimony on a consideration of all of the relevant factors. Id. at 553-54. A similar holding is warranted here where, although Ms. Lock discussed Claimant's physical restrictions and vocational limitations with prospective employers, she did not disclose Claimant's status as an undocumented worker.

If Employer were to have its way, prevailing with a lesser burden of proof in cases where claimants are undocumented workers, then the effect would be to deny undocumented workers equal protection under the law and to treat them as a special class where employers are excused from showing *actual* jobs available

[2] Abex Corp. v. Brinkley, 252 A.2d at 553.

to the disabled worker so long as the employer can make a general showing that undocumented workers are employed in Delaware within certain categories contained in a labor market survey, without any concrete analysis on the composition of the statistical undocumented workers' compared to that of the subject claimant.

Employer's evidence fails, not so much because it did not address the prevalence of undocumented workers employed in Delaware in various categories listed on the labor market survey, but because it failed to address the prevalence of undocumented workers employed in Delaware similarly situated to this Claimant (i.e. a reasonable stable market for jobs within this Claimant's capabilities).

To comply with this Court's directive, Employer presented expert testimony and a report completed by Dr. Toohey. Despite the various reports Dr. Toohey relied upon, his study was one-dimensional and failed to address the prevalence of workers with disabilities in the general labor market, despite the fact that such data was available to him. TR-37; A-42. Dr. Toohey admitted that he "would be very comfortable coming up with an estimate of the total number of disabled workers who are in Delaware," but the way those statistics correlate with unauthorized immigrants is "less clear" and "less likely to be predictive." TR-45; A-50. Further, Dr. Toohey's study failed to address the

prevalence of undocumented workers in the general labor market with no vocational skills or training, limited education, and no English fluency, despite his concession on cross-examination that such information would be relevant to the determination. TR-54; A-59. In short, Dr. Toohey's statistical anaylsis does not reflect job prospects for this Claimant because it only seeks to describe job availability for someone who is merely undocumented.

Given that the labor market survey purported to identify jobs within Claimant's capabilities that fell within certain occupational categories and Dr. Toohey examined the labor market survey jobs to determine the number of undocumented immigrants working in each category, the next step would be to determine the number of undocumented workers with disabilities and/or similar limitations, such as non-English language fluency and minimal vocational skills and training within the category of jobs listed in the labor market survey. Neither Dr. Toohey nor Ms. Lock did this. We don't know from Dr. Toohey that employees who have all of Claimant's vocational limitations are employed in Delaware – in fact, Dr. Toohey specifically refuted this possibility when he testified that the data wouldn't support that conclusion. (TR-39; A-44). Further, we don't know from Ms. Lock that employees who have all of Claimant's limitations are employed in any of the labor market survey jobs identified. Employer has therefore failed to show, either statistically or via the labor market

survey, that there is work generally available for this Claimant with these restrictions and limitations.

Employer misconstrues this Court's opinion as suggesting that a labor market survey cannot identify jobs available to undocumented workers and that reliable data regarding the undocumented labor force cannot identify specific jobs available to a particular claimant. Appellee's Ans. Brief at 26. However, what this Court made clear was that by using reliable social sciences methods, Employer *should* be able to present evidence regarding the prevalence of undocumented workers and combine that evidence with **more specific information**. Guardado Supreme at 13. Employer's evidence is devoid of the **specific information** required.

Employer argues that it met its burden of proof because Dr. Toohey was only required to show the general availability of jobs to undocumented workers,[3] but that is not the end of the analysis, especially where Dr. Toohey himself testified that it is very relevant to know the percentage of people within a certain occupation who look like the worker in some occupation. TR-54; A-59. To show that jobs are available in any given category listed on the labor market survey necessarily requires an assessment of any factors affecting employability and not just the sole factor of claimant's status as an undocumented worker,

[3] Appellee's Ans. Brief at 36.

especially given that this information is deemed relevant by Employer's own expert.

Although Dr. Toohey was of the belief that the statistics would support an opinion on the prevalence of undocumented workers with non-English fluency in Delaware, he did not assert an opinion as to how many or the proportion of undocumented non-English speakers in the specific occupations or industries. TR-40-41; A-45-46. Even if he was able to assert an opinion, that only covers two of the factors relevant to the Claimant in this case; as Claimant is undocumented, non-English speaking, unskilled vocationally, and medically restricted to one-handed light duty. Further, Dr. Toohey confirmed that for any further refinement (cross-referencing with other factors affecting Claimant's employability) the survey data is **not reliable** because there's not enough data to support a reliable conclusion. TR-43; A-48. In other words, there is no statistical evidence that workers with all of those limitations are employed in Delaware.

Upon questioning by the Board regarding identifying the categories of jobs and occupations who will hire undocumented workers, Dr. Toohey testified that "if [he] were going to randomly suggest that some worker try to go get a job in some occupation, the percent of people who look like them in that occupation definitely seems like a relevant thing." TR-54; A-59. In fact, this is the closest

the Employer's witness gets to the ultimate question posed by the Displaced Worker Doctrine analysis; yet, Dr. Toohey did not answer that question. Upon further questioning by the Board as to actual availability of jobs, Dr. Toohey testified that "the number of available positions now and the number of recent hires would be the most relevant thing to know" (as distinguished from the number of jobs currently held by undocumented workers—and thus not currently available for new hires). TR-55; A-60. Dr. Toohey admitted that he did not have that information either. TR-56; A-61. Of note, Employer also did not present this information through Ms. Lock's testimony, as Ms. Lock did not possess any knowledge about the applicants ultimately hired to fill the positions from the labor market survey nor did she make any assessment as to the qualifications or suitability of other applicants for the open positions. TR-77; A-82.

For expert testimony to be accepted, it must be both reliable and relevant. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). As aforementioned, Dr. Toohey's report failed to address factors relevant to the analysis of actual jobs available to this Claimant, focusing instead on a generic undocumented worker without all of the other limitations this Claimant has. As such, Dr. Toohey's study does not suffice to prove the availability of work to

Claimant. Therefore, the Board's decision was not supported by substantial evidence and the Superior Court erred in upholding the decision.

Employer's Labor Market Survey Evidence is Insufficient to Prove Jobs Available to Claimant.

Employer argues that the labor market survey prepared by its vocational expert, Ms. Lock, in 2017 "displayed a representative sample of seventeen actual positions available to [Claimant] specifically." Appellee's Ans. Brief at 28. Ms. Lock conceded that the labor market survey produced in 2015 listed jobs that even Employer's medical expert, Dr. Schwartz, did not find appropriate, including jobs requiring Claimant to sweep, vacuum, and mop for prolonged periods of time. TR-72; A-77. Yet, the current labor market survey includes jobs with similar job tasks at Embassy Suites and Working Solutions Recruitment. Id. Thus, not all seventeen jobs were "available" to Claimant. Employer asserts further that Ms. Lock personally spoke to each prospective employer, personally viewed each of the jobs identified on the survey, and witnessed employees performing the job duties. Appellee's Ans. Brief at 29. However, the record shows that Ms. Lock testified that two of the jobs she found on the internet and she actually personally visited fifteen of the jobs and spoke to them. TR-63; A-68. Of the seventeen jobs, four were located in Pennsylvania. Ms. Lock confirmed that Claimant performed a job search which

included six of the seventeen jobs on the survey[4] and that Claimant applied for eleven jobs total. TR-67; A-72. Ms. Lock had not identified the jobs on the labor market survey until January, February, and March of 2017. TR-76; A-81. In turn, Claimant performed her search in February and April. This testimony was undisputed and thus the Board was not free to ignore this evidence. Watson v. Walmart, 30 A.3d 775, 779 (Del. 2011).

Employer argues that Claimant's job search was insufficient, yet Claimant, as a *prima facie* displaced worker, is not required to prove that she made reasonable efforts to secure employment. Franklin Fabricators v. Irwin, 306 A.2d 734, 736 (Del. 1973); Watson v. Walmart, 30 A.3d at 777-78. Importantly, and unlike Watson, the burden of proof remained on the Employer to establish the availability of regular employment within Claimant's capabilities. Id. at 779. Claimant contends that Employer failed to meet this burden.

One of the jobs to which Claimant applied was Margaritas Restaurant. Ms. Lock testified that Margaritas was looking to hire both wait staff and kitchen help, but the wait staff needed to be able to communicate in English. TR-65; A-70. Despite Ms. Lock sitting down and having lunch with the owner of Margaritas and "discussing Claimant's specific physical restrictions and

[4] TR-66; A-71.

vocational limitations,"[5] Claimant was not contacted regarding her application, nor was she offered a job. In fact, Claimant did not receive a call back from any of the jobs to which she applied despite Ms. Lock's testimony that employers were "willing to hire" after explaining Claimant's limitations. TR-71; A-76.

At the time of the hearing, Lock testified that only eight jobs from the survey remained open, including a position at Margaritas,[6] yet none of the filled positions had been offered to Claimant. Of the eight remaining positions, Ms. Lock confirmed that three of those positions were too great a distance for Claimant to travel, reducing the results further, to five open positions. Id. Despite Employer's own expert, Dr. Toohey's, testimony that such info would be the most relevant thing to know, Ms. Lock had no information on the applicants who were ultimately hired for the filled positions and believed that there would be multiple applicants for the remaining open positions. TR-77; A-82. If a job opening generates a long line of applicants it cannot reasonably be considered an "available" job. Watson v. Walmart, 30 A.3d at 781 n.7. That Ms. Lock identified seventeen jobs from January through March (although not all seventeen were within Claimant's capabilities) and by April only eight of those jobs remained (three of which were too great a distance for Claimant to

[5] TR-64; A-69.

[6] TR-76; A-81.

travel), leads to the conclusion that the labor market survey cannot reasonably be considered to have identified jobs "available" to this Claimant where she applied to six of them and received no call back.

Ms. Lock was unable to provide any testimony as to whether Claimant was a good competitive candidate in comparison to the applicant pool for the open positions. TR-77-78; A-82-83. Theoretically, if there were other, more competitive candidates that fit the job, for Margaritas, for example, then the job may have been filled. However, this Court cannot ignore that Ms. Lock met with the owner of Margaritas regarding Claimant's qualifications, Claimant applied for a position at Margaritas, and Claimant has still not received a call back. Indeed, one reasonable inference to be drawn from these facts is that the owner of Margarita's finds Ms. Guardado so unsuitable for the position that she would sooner have the job go unfilled than to hire Ms. Guardado. This is, in fact, entirely in keeping with Claimant's status as a displaced worker.

In Abex, the Court said "there must be a realistic showing that the plaintiff can do the job" and "some willingness by employers to **hire** men with claimant's physical disabilities." Abex Corp. v. Brinkley, 252 A.2d at 554. Ms. Lock testified that she spoke with employers who were "willing to hire." TR-71; A-76. This is careful language by Ms. Lock—willing to hire someone (but not necessarily Claimant) is effectively equivalent to a "Now Hiring" sign in the

window—it doesn't mean that a particular applicant, such as this injured worker, gets the job. Indeed, to the contrary, Claimant testified that two employers expressed doubt as to Claimant's ability to perform the job duties for a kitchen help position. TR-94, 98; A-99, 103. None of the jobs to which she applied offered her a position. Thus, Employer's evidence is lacking as to showing any prospective employers' willingness to hire this Claimant and is 'significantly diminished' by the fact that Ms. Lock identified specific jobs that she visited and spoke to the manager, describing Claimant's physical limitations, Claimant applied for a job at the same restaurant, but she was not offered a job. Watson, 30 A.3d at 780.

Claimant also testified that she applied for a job at Tequila Restaurant to clean tables and pick up glasses but was told that the job would be very difficult for her to perform because she would be required to work fast. TR-98; A-103. Although she was promised a call, no job offer was made prior to the hearing. Id.

These doubts about Claimant's ability to do the job are exactly what the Court meant in Abex: "an employer might well question [her] ability to perform efficiently and may feel unable to rely on [her] continued health and ability to work steadily." Abex Corp. v. Brinkley, 252 A.2d at 553.

Contrary to Employer's belief, the labor market survey fails not just because Ms. Lock did not discuss Claimant's undocumented status with prospective employers, but also because, despite Employer's evidence that thousands of undocumented workers are working in the service industry, this Claimant cannot get a job in said industry. If it is not due to her status as an undocumented worker (since that matter was not discussed with prospective employers), then a strong inference arises that it is due to her injury. See Watson v. Walmart, 30 A.3d at 779 (citing Keeler v. Metal Masters Foodservice Equip. Co., Inc., 712 A.2d 1004, 1005 (Del. 1998)). Although Claimant's undocumented status was a factor for consideration, it was not the only factor applicable to Claimant. Despite Employer's contentions that this Court excused Ms. Lock from specifically discussing Claimant's undocumented status (one factor for consideration) with prospective employers, such information was pertinent to the discussion with prospective employers in order for her opinion to be considered anything more than "mere speculation." Jennings v. Univ. of Delaware, 1986 Del. Super. LEXIS 1088, at *7.

Employer seeks to justify its conduct by hiding behind the Court's holding that an affidavit stating prospective employers' willingness to violate the law was not required. However, discriminating against disabled workers is also illegal and frequently litigated, but Ms. Lock had no problem discussing

this limitation with prospective employers. In sum, the value of the labor market survey is severely diminished in that it lists jobs that are out of driving range, were previously rejected as unsuitable by Dr. Schwartz, and more physically demanding than Claimant is able to perform.

Accordingly, Employer's labor market survey evidence in unreliable and does not suffice to show available jobs to Claimant in this case. Thus, the Board's decision was not supported by substantial evidence and the Superior Court erred in upholding the decision.

Employer's Combination of Evidence is Insufficient to Prove Work Available to Claimant.

Employer argues that this Court specifically instructed it "to combine statistical evidence of occupations employing undocumented workers with market evidence of jobs available to Guardado within those previously identified occupations." Appellee's Answering Brief at 38. Claimant submits that Employer's "combination" of evidence still does not meet the mark. The sole question here is whether Employer met its burden simply by statistical evidence that undocumented workers are employed in Delaware and a labor market survey listing jobs that will not and have not hired Claimant. Claimant's status as an undocumented worker is only a threshold issue which Employer's evidence failed to address in the prior appeal. This Court's 2016 remand did not instruct the Board to conclude that Employer satisfied its burden simply because

some statistical evidence was coupled with a deficient labor market survey. Employer contends that Claimant "ignores this Court's specific remand instructions,"[7] but Employer is adamant about interpreting this Court's instruction as a specially carved out exception to a well-established rule for proving job availability. However, this Court was only providing guidance to Employer as to how it might present evidence of work available to undocumented immigrants. This Court was not relaxing the burden of proof for Employer in showing jobs available to this Claimant. Employer was still required to consider the other factors affecting Claimant's employability, including a language barrier, one-handed restriction, and limited vocational skills and training. Employer's own expert testified that there was data relevant to determining the availability of jobs to undocumented workers that was not reported in his study. TR-37, 40-41, 54, 55-56; A-42, 45-46, 59, 60-61.

Dr. Toohey's study only identifies the prevalence of undocumented workers in the categories of jobs listed on the labor market survey, but not the prevalence of undocumented workers with the same limitations of this Claimant. Employer's labor market survey evidence falls short in that it does not rise to the level of a "realistic showing" that Claimant can perform the jobs listed nor does it establish that employers are willing to hire Claimant with all of her

[7] Appellee's Ans. Brief at 35.

limitations. Thus, contrary to what the Board decided below, the Employer did not establish the appropriate nexus because it did not give adequate consideration to all relevant factors for determining whether jobs were realistically available to Claimant and the Superior Court erred in upholding the decision.

Argument II

A reversal of the Board's decision will not undermine the path this Court paved with respect to establishing Employer's burden of proof when Claimant is an undocumented worker, in terms of proving that the worker is displaced from the labor market.

This Court's instruction to Employer to present "reliable market evidence that employment within the worker's capabilities is available to undocumented workers" will not be disturbed should this Court find against Employer. Claimant contends that Employer's combination of evidence failed to meet the standard of proof required. In setting forth a requirement for "more specific information about actual jobs," the court contemplated the additional factors for consideration which were applicable to this Claimant, such as her language barrier, one-handed restriction, and limited vocational skills and training. These are factors which Dr. Toohey admitted were relevant to determining that jobs are available to any given worker seeking employment. As these additional factors were not considered in Dr. Toohey's report, his report is inadequate in that it does not address this issue of this Claimant's employment prospects. As the value of the labor market survey is severely diminished by the fact that many of the jobs listed were not realistically within Claimant's reach, it too is unreliable. Thus, Employer's evidence combined still falls short of that required by this Court.

Employer argues that this Court "made clear that a labor market survey cannot identify jobs available to undocumented workers and that reliable data regarding the undocumented labor force cannot identify specific jobs available to a particular claimant." Appellee's Ans. Brief at 26. Accordingly, Employer did not charge Dr. Toohey with identifying jobs available to Claimant or jobs that could accommodate Claimant's physical and vocational restrictions because that was the "purpose and function of the labor market survey." Appellee's Ans. Brief at 36. Employer charged Ms. Lock with identifying those jobs, without considering Claimant's undocumented status. Id. at 37. While the Court suggested certain statistical studies as guidance for presenting evidence, nothing in the Court's decision prohibited Employer from presenting statistical evidence which addressed all the specific limitations affecting Claimant's employability besides her undocumented status. That failure is made all the more evident by Dr. Toohey's admission that such data would be quite relevant. Further, nothing in this Court's decision restricted such consideration to the labor market survey. Employer chose to do so unilaterally, and as a result came up short.

Employer appears to be making an attempt to prevail by performing the bare minimum to satisfy its burden. In fact, Employer cites this Court's 2016 decision as a license to avoid what is required by interpreting the Court's remand instruction as relaxing Employer's burden of proof, when in fact this

Court was providing guidance to Employer on how it might satisfy its burden with respect to proving the availability of jobs to undocumented workers, (thereby responding to Employer's claim that the burden was too great). In doing so, this Court did not abrogate prior law on the Displaced Worker Doctrine; this Court did not abrogate the requirements of Jennings v. Univ. of Delaware or Abex Corp. v. Brinkley, among others. Employer still has to demonstrate that there is work available to this Claimant in the general labor market. This Court's proffer of a suggestion of statistical evidence was simply a response to Employer's claim of inability to obtain the necessary evidence to support its petition.

Thus, a clear path was paved for Employer to follow, but the evidence presented does not suffice to establish that work is realistically within reach of the Claimant in this case.

Argument III

Claimant's argument as to the insufficiency of Employer's evidence does not undermine this Court's specific remand instructions, but rather highlights Employer's meager attempt to satisfy its burden of proof.

Employer argued, at length, in the 2016 appeal to this Court, that it should not be required to provide affidavits from prospective employers that they are willing to violate immigration law by hiring undocumented workers. This Court, both at oral argument and in its decision, clearly gave considered thought to how an employer might seek to establish the availability of work to undocumented workers absent such direct evidence. In so doing, this Court theorized about what sort of statistical evidence might assist in the employer's proof in this regard. However, this Court did not (and indeed, could not) consider all of the possible permutations of that future statistical evidence, and further what might be elicited when such evidence was subject to cross-examination.

In particular, this Court did not anticipate in its 2016 decision that Dr. Toohey would concede in his testimony that, while he can come up with reliable statistics for the number of undocumented workers employed in particular industries and job categories in Delaware, and he might even be able to develop statistics for undocumented workers with no English language fluency in Delaware (although he didn't), the statistics would not reliably support

conclusions beyond that on the number of undocumented, non-English speaking, disabled, with limited vocational experience and limited education, unskilled laborers employed in the State of Delaware. That is, of course, the ultimate question to be answered here by the Displaced Worker Doctrine analysis – whether Ms. Guardado has any reasonable prospects for employment with all of those limitations and restrictions on her ability to work. That is also precisely the question that Dr. Toohey was not only unable to answer, but further said that the statistics would not reliably support.

While this Court theorized about the possible statistical evidence that might help the Employer's effort to prove that work was available to Mrs. Guardado, it does not appear that the Court considered the possibility that the statistical testimony might at the same time *undermine* the Employer's case, and further undercut the Employer's labor market witness testimony. Employer desperately wants the Board and this Court to ignore this undisputed information from its own witness, most importantly that there's no reliable statistical data to support the presence of workers *like Ms. Guardado* in the Delaware labor market (with all of her limitations and restrictions).

The Employer asks this Court today to find that the Employer did what this Court suggested – it obtained statistical evidence on the prevalence of undocumented workers in Delaware's labor market (and simply ignore the

cross-examination of Dr. Toohey). The Employer thus argues that this statistical evidence, coupled with the labor market survey evidence proffered (also replete with defects) should be sufficient to support the termination of Claimant's ongoing lost wage benefits. The Employer thus seeks a hyper-technical reading of this Court's opinion – it touched all of the bases, meeting those technical requirements, and so it should win – which is anathema to the Displaced Worker Doctrine specifically and the Board's (and the appellate courts') adjudicative function generally.

Conclusion

The ultimate question here is whether the Employer has shown that there is work available to this claimant, Ms. Guardado, with all of her limitations and restrictions. The statistical evidence doesn't show that; it merely purports to show that undocumented workers are employed in Delaware. The labor market evidence proffered by Ms. Lock also doesn't show that there is work available to this claimant; it's clear that many of those jobs are not a good fit – several are housekeeping jobs that were categorically rejected by the Employer's medical expert in connection with the 2015 hearing, others required two-handed work that she's not capable of (as, for example, in a commercial kitchen), and Ms. Lock did not identify any employees using only one hand in doing any of the jobs that she identified on the survey. Further, Ms. Guardado applied for many of those jobs, and a number of others as well; not only did she not get hired, but she was specifically told by several employers that she would not be able to do the job. Under this Court's analysis in Watson, the value of this labor market survey is more than 'significantly diminished' under these circumstances. See Watson, 30 A.3d at 780.

Further, and perhaps most importantly, the combination of the labor market evidence and the statistical testimony do not together constitute evidence that there is work generally available for this Claimant, with all of her

limitations and restrictions. First and foremost, Dr. Toohey's testimony that there is no reliable statistical evidence that undocumented workers who are non-English speaking, disabled, with limited vocational experience, limited education, and unskilled laborers are employed in Delaware severely undercuts Ms. Lock's testimony that the jobs she identified are available to Ms. Guardado, who is undocumented, non-English speaking, disabled, with limited vocational experience, limited education, and unskilled. Second, the defects in the labor market survey evidence substantially call into question whether these jobs are realistically within reach of Ms. Guardado, even if she meets the minimum qualifications (which Claimant does not concede). As the burden of proof rests with the Employer, if the Employer's evidence is insufficient, the analysis can stop here -- the petition should be denied (and at this stage, the Board's decision should be reversed). Notwithstanding that the Employer has the burden of proof, Claimant did proffer evidence about her job search – she was met with denials and even admonitions from prospective employers that she would not be able to do the job with her restrictions. Under Watson, it is clear that the value of the labor market evidence is 'significantly diminished' and does not carry the Employer's burden of proof in establishing work available to a *prima facie* displaced worker – someone who "is so handicapped by a compensable injury that [s]he will no longer be employed regularly in any well-known branch of the

competitive labor market and will require a specially created job if he is to be steadily employed." Ham v. Chrysler, 231 A.2d 258, 261 (1967).

This Court's decision in Watson re-confirmed that a real, substantive evaluation of a Claimant's prospects for employment in the labor market is required of the IAB in evaluating a petition seeking to terminate a claimant's ongoing lost wage benefits – and further, that this Court would not simply 'rubber stamp' any labor market evidence as sufficient to show the availability of work; this Court reviewed and passed judgment on the sufficiency of the labor market and job search evidence in Watson and found it lacking, and reversed the Board's termination of benefits as a result. The Court's decision in this case will similarly determine whether undocumented workers are also entitled to a real, substantive evaluation of their prospects for employment in the labor market, or merely the hyper-technical, touch-all-the-bases evidentiary exercise that Employer seeks in this case to allow it to terminate this Claimant's benefits without an actual showing that there is work regularly available to this Claimant in the general labor market. To that end, Employer's evidence fails and its petition to terminate Claimant's benefits should have been denied. Thus, the Board erred in terminating her total disability benefits and the Superior Court erred in affirming that decision.

Respectfully submitted,

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