

DOCUMENTING THE UNDOCUMENTED WORKER

H. Garrett Baker

Tabatha L. Castro

Andrea G. Green

How did we get here?

A short history of cases regarding undocumented workers in Delaware

In 2007, the IAB considered a case of a non-citizen injured worker and his eligibility for temporary partial disability. In Hermosillo v. Cirillo Brothers, IAB No. 1269487 (Jan. 22, 2007), the Claimant had a valid social security number, but lacked a visa. He had been brought to the country by an employer who had obtained for the worker a visa that was specifically for the purpose of permitting the Claimant to work for that employer. After his injury, the Claimant was medically capable of light duty, and not able to return to work for the employer.

The Claimant was denied displaced worker status because the Board was unable to clearly determine that the Claimant's inability to find employment was related to his work-related injuries. However, in considering partial disability entitlement, the decision confirmed that the Board must consider the Claimant's reduced "earning power".

The Employer argued that, despite the Labor Market Survey findings, the Claimant was not eligible for temporary partial disability benefits because he was legally unable to work in the United States.

The Hearing Officer disagreed, finding that the Act does not limit temporary partial disability to workers with a work visa. Citing an essential purpose of the Act – to compensate an injured worker for a reduction in earning capacity resulting from an injury – and combining that with the statutory burden the Employer faces when an injured worker is no longer totally disabled, "*to show no loss of earning capacity related to the work injury*", the Hearing Officer found the Claimant entitled to temporary partial disability benefits and based the amount of those

benefits on the Labor Market Survey. The decision, however, appears to have left the door open, as it also indicated that “[i]f the loss of earning capacity is *no longer due to the injury*, then the Employer is entitled terminate benefits.”

In Melgar-Ramirez v. Delaware Valley Field Services, IAB No. 1363724, December 19, 2011, the Board considered an employer’s arguments of fraud and the illegality of the Claimant’s contract of employment as well as forfeiture regarding an undocumented worker. The Claimant, who had fallen down several steps at work and who had sustained disc herniations and spinal transverse process fractures as a result, had his medical treatment cut somewhat short, as he returned to Honduras, his country of origin.

The Employer sought termination of temporary disability benefits, not based upon a showing of physical or medical evidence that the Claimant was no longer totally disabled, but rather, based on its arguments of fraud and forfeiture. The IAB decision engages in a consideration of the Immigration Reform Control Act of 1986 (IRCA), exploring how it has been applied in other jurisdictions, but first reviews Delaware law, specifically finding that the Claimant met the statutory definition of “employee”. It then reviewed those individuals expressly excluded from the definition under the Act, finding that the Claimant did not fit within any of those exclusions.

The Board then considered the Employer’s argument that the Claimant’s false or fraudulent statement in providing a false SSN should bar recovery. The Board rejected that argument, citing case law regarding false pre-employment statements precluding benefits if there is a causal relationship between a misrepresented physical condition and the injury itself.

Considering the Employer’s argument of forfeiture, the Board initially rejected the argument that the unavailability of the deported Claimant for a medical examination constituted a refusal to submit to a DME. It then turned to and rejected the argument that the Claimant’s deportation should be likened to an “adjudication of guilt”. Citing the statutory requirements of 19 Del. C. §2353(d), and finding that none of them were met, the Board declined to order any suspension or forfeiture of benefits.

On appeal, the Superior Court in Delaware Valley Field Serv. v. Ramirez, 105 A.3d 396 (Del. Super. 2012) first addressed the issues of statutory construction and public policy.

When interpreting a statute, the Court's role is to give effect to the legislature's intent. Where a statute is unambiguous and there is no reasonable doubt about its meaning, the Court must give effect to the literal meaning. (footnotes omitted)

The Superior Court then confirmed that Delaware's Workers' Compensation laws are to be liberally construed with the aim of accomplishing their purposes. After further consideration of arguments, the Superior Court affirmed the IAB decision.

In 2014, the Superior Court in Campos v. Daisy Constr. Co., 2014 WL643067 (Del. Super. Jan. 16, 2014) affirmed the Board's decision that the Claimant's inability to obtain employment was unrelated to his work injury. However, the Supreme Court reversed, stating that an employer must continue partial disability benefits until it can demonstrate that the Claimant has suffered no decrease in earning power attributable to the work injury or until the period for benefits expires. Campos v. Daisy Constr. Co., 107 A.3d 570 (Del. 2014). The decision explicitly states that limiting or terminating benefits under certain circumstances would be counter to public policy, in that it would effectively condone a situation in which an employer could

hire an undocumented worker, have him suffer a workplace injury, and then avoid partial disability benefit payments by "discovering" his immigration status, offering to re-employ him if he could fix it, and claiming that a job is available to him at no loss in wages. This outcome would be contrary to the Workers' Compensation Act and our case law interpreting it.

The Supreme Court also considered and rejected the argument that its determination would result in a windfall to the Claimant specifically because of his status as an undocumented worker, citing

the fact of his permanent impairment, his legal inability to work and risk of deportation simply in seeking such work, the inability to pursue any type of tort recovery against the employer, and the payroll taxes paid, but not recoverable.

2. Roos Foods v. Guardado

Applying the displaced worker doctrine to undocumented workers

The Supreme Court in Campos v. Daisy Constr. Co., 107 A.3d 570 (Del. 2014) specifically noted that the displaced worker doctrine was not implicated by its decision. The Court did hold that the employer in Campos had not communicated a legally effective job offer since it cited its own inability to bring back to work someone who was legally ineligible to do so. Thus, the question arose as to how the Court would address this matter if the displaced worker doctrine was presented.

Enter the case of Magdalena Guardado v. Roos Foods, IAB No. 1405006 (Apr. 7, 2015). Ms. Guardado suffered an injury localized to her left wrist. It was undisputed that this injury standing alone did not render her disabled, since she was cleared by all physicians to light duty work. She had graduated from high school in El Salvador and was able to speak and write in Spanish, but not in English. Her employment history was limited to manual labor jobs. Additionally, Ms. Guardado contended that her status as an undocumented immigrant needed to be taken into account. Her position before the Board was that this status, aside from any other factors, rendered her unable to obtain employment and therefore rendered her a displaced worker. Ms. Guardado further contended that it would be impossible for the employer to show the availability of work to her within her restrictions since she is not legally eligible for employment.

The employer countered that to consider an employee's immigration status in addressing whether she was a displaced worker would be tantamount to creating a category of per se displacement. As the argument ran, this would be contrary to the policy of considering individualized factors such as age, education and training to address whether work was realistically within reach for that person within her restrictions. Consideration of immigration status, by definition, would mean that

work is not available to that individual regardless of any other factor or restrictions. The employer further contended that the employee's undocumented status should not be considered in addressing whether there was work available to her since, by operation of law, she is ineligible to work.

The Board cited various factors about Ms. Guardado but based its finding that she was *prima facie* displaced on the fact that she was undocumented. The Board further found that the employer had not shown evidence of job availability to Ms. Guardado as an undocumented worker. Accordingly, the Board denied the Petition for Review, finding Ms. Guardado to be a displaced worker.

The employer appealed to the Superior Court which affirmed the finding of displacement but on other grounds. Without addressing the legal issue of whether Ms. Guardado's undocumented status qualified her as a displaced worker, the court cited that there was enough other evidence in the record to support a finding of displacement whether Ms. Guardado was undocumented or not.

The employer appealed again to the Supreme Court, citing that the superior court had exceeded the scope of appeal by finding Ms. Guardado to be displaced based on findings other than those relied on by the Board in reaching that determination. The employer also contended that Ms. Guardado's immigration status was not a relevant consideration for purposes of the displaced worker doctrine. Claimant contended that the Court's prior decision in Campos was dispositive and that undocumented status is not only relevant but central to the issue of displacement.

The Supreme Court agreed with the employer that the Board based its finding that Ms. Guardado was a *prima facie* displaced worker based on her immigration status, as opposed to any other considerations. The Court held that immigration status, and more specifically that her status as an undocumented worker, was not relevant to whether she was a *prima facie* displaced worker. The Court noted that to do otherwise would risk creating a class of persons who were displaced based on immigration status rather than injury.

However, the Court did find a claimant's undocumented status relevant to the issue of whether work was available to that individual within her restrictions. The Court held that the employer was not foreclosed from doing so simply because

the claimant was not eligible for employment. The Court noted that the fact of life is that there are undocumented workers in the labor market. Therefore, the employer could meet its burden of showing job availability utilizing “reliable social science methods”. The Court indicated that the employer was not obliged to show that employers would transgress federal immigration laws and admit to a willingness to hire undocumented workers. Rather, the employer can “present[] evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions and combin[e] that with more specific information about jobs in those categories.”

How this all works has not yet been litigated by the IAB as of the date these materials were prepared. Therefore, until we have some authority from the Board and courts we will tell you our perspectives based on our interpretations of the decision and the uncharted waters it presents.

Where do we go from here?

How does the Roos Foods case work in “real life”?

From the Claimant’s perspective:

Public policy dictates that prompt payment of benefits should be provided to an injured worker without regard to fault; essentially to relieve the employers and the employees of the burden of civil litigation. Champlain Cable Corp. v. Employers Mut. Liability Ins. Co. of Wisconsin, 479 A.2d 835, 840 (Del. 1984).

In order for a Claimant to qualify as a “*displaced worker*,” Claimant must establish:

1. That he or she is an unskilled worker;
2. Unable to perform ANY task other than general labor; and
3. That Claimant’s inability to perform the duties of general laborer is due to the injury sustained in the employment accident. Bentzen v. Ciba Specialty Chemicals, 2013 WL 1209344, at *3 (Del. Super. Mar. 26, 2013)

All three (3) elements must be present in order to be deemed a displaced worker. It is a difficult burden to prove on the Claimant's part, but not impossible. Let's go back to Ham vs. Chrysler Corp. to get the foundation for *Displaced Worker Doctrine* that we use today. Once it is determined that the Claimant will use the displaced worker argument, the burden shifts to the Employer and here is why. "If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labour market if in other words the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well-known lines of the labour market, I think it is incumbent on the employer to shew that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase I should say that if the accident leaves the workman's labour in the position of an 'odd lot' in the labour market, the employer must shew that a customer can be found who will take it." Ham v. Chrysler Corp., 231 A. 2d 258 (1967)(quoting Cardiff Corp. v. Hall, 1 K.B. 1009) (1911)).

The Delaware Supreme Court in the 1960's also used other jurisdictions as precedent and cited the Pennsylvania Supreme Court, "Where the injured person can handle only a specially-created job, one light of effort and responsibility but laden with rest and comfort (employment plums that do not often dangle from the tree of everyday economics) the burden is on the defendant-employer to show that such a job is in fact within reach. If proof of that fact is not presented, the claimant then is entitled to a finding of total disability." Unora v. Glen Alden Coal Co., 104 A.2d 104 (1954).

Applying the rule, it is held that a "displaced" claimant must be deemed totally disabled, within the meaning of the Workers' Compensation Statute, unless the employer is able to show the availability of regular employment within the claimant's capabilities. If the labor market offers regular employment to a claimant, so handicapped by a compensable injury as to disqualify him from obtaining regular work in any well-known branch of the competitive labor market, the employer is in a better position to ascertain that fact than is the employee. Under such circumstances, the burden of proof fairly and properly rests with the employer. Ham v. Chrysler, *supra*.

In the Ham case, there was uncontroverted evidence that showed Ham's condition, at the time of the hearing before the Board, left him in the "displaced" category. He has no education, training, experience, or skills to qualify him for any kind of work except that of general laborer. He cannot bend, stand, walk or climb for long, and he cannot lift. He is able to do only certain unnamed "sedentary" or "light" work. The Court stated, "this, in our judgment, portrays a man disqualified for regular employment in any well-known branch of the competitive labor market, for whom a job must be specially-created if he is to be steadily employed. He must be classified, therefore, as a "displaced" worker." Ham v. Chrysler, *supra*.

The burden shifts to the Employer to show the availability of regular employment within a claimant's capabilities. In the absence of such proof, the claimant's total disability must be deemed to continue. How does the Employer accomplish this, through Labor Market Surveys, through Vocational Rehabilitation Experts and the like?

Once the Employer undertakes its duty to show availability of work, the burden then shifts again to the claimant to prove why they should continue to be known as a "displaced worker." If an Employer can sustain their burden, the failure of a claimant to seek or accept employment, and the reasons therefor, may become relevant to the issue of the claimant's total disability.

When you have a claimant where English is not their first language, is that enough to meet the displaced worker requirements? In Tejeda v. A-Del Constr., IAB Hearing No. 1295505 (Apr. 9, 2014) the Board granted the Employer's Petition for Review and rejected the claimant's "displaced worker" argument, commenting that a Spanish Speaking claimant is not displaced and the language barrier alone does not render the claimant unemployable.

How about a claimant who cannot produce a valid social security number? In Campos v. Daisy Construction Co. 107 A.3d 570 (Del. 2014), the Delaware Supreme Court held that employer's offer to re-hire claimant was not a bona fide offer, as claimant was unable to legally work in the United States, not having valid work authorization. The difficulty in proving job availability is borne by the employer, who takes the worker as it hired him.

What to look for:

1. Education
2. Training
3. Experience
4. Skills
5. Physical limitations
6. Availability of work by employer
7. Availability of work in open labor market

In Worthy vs. Kent Sussex Indus., IAB Hearing No. 1373382 (Jan. 8, 2014) the Board held that the claimant was “doubly displaced” in that he was 62 years old and semi-literate whose entire vocational history was that of an unskilled laborer and who was terminated by an employer of the developmentally disabled, thus claimant was both *prima facie* displaced and actually displaced.

From the Employer’s Perspective:

The Guardado decision has some very favorable elements for the employer. First and foremost is the Board’s holding that a claimant’s undocumented status is not a factor in the *prima facie* displaced worker analysis. The claimant in Guardado contended that the import of her undocumented status was that there is no work available for her within her restrictions, which means she cannot get a job, which means that she is displaced.

The Supreme Court concluded that this was a reach too far as it “would tend to create a class of injured general laborers, undocumented workers, who would be deemed *prima facie* displaced as a matter of law based on immigration status.” The Court held this would be a departure from the evaluation of individualized considerations. As such, and favorable to the employer, “a worker’s status as an undocumented worker is not relevant to determining whether the worker is *prima facie* displaced.”

Thus, if the Board finds that the claimant, based on factors such as physical restrictions, age, education and work history, is not a *prima facie* displaced worker, under the analysis in Franklin Fabricators v. Irwin, 306 A.2d 734, 737 (Del. 1973),

this presents the question of what the claimant would have to prove in order “to show that [s]he has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury.” It would seem that the claimant would then have to show that she was not hired because of her injuries, as opposed to her undocumented status.

However, if the claimant meets that burden and/or is a *prima facie* displaced worker based on factors other than her immigration status, the worker’s undocumented status was held to be relevant to the question of “whether there are regular employment opportunities within the claimant’s capabilities when the employer has that burden. (emphasis added).

In that case, a claimant’s immigration status is relevant “in deciding whether the employer has met its burden of showing that jobs are actually available to the worker ... with the injured employee’s undocumented status being taken into account as a factor.”

However, the Court did not hold that the employer has to show that an employer would hire undocumented workers to meet this burden. Rather, the employer can “present[] evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions and combin[e] that with more specific information about jobs in those categories.”

Thus, the Court seems to be saying that the employer can show generally that undocumented workers are employed in certain industries and then present evidence of specific jobs within those industries which are within the claimant’s restrictions and for which she is otherwise vocationally qualified. If the employer does so, then the Court seems to support the notion that this evidence would be sufficient to show job availability notwithstanding the employee’s undocumented status.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

| | | |
|---------------------|---|---------------------|
| MAGDALENA GUARDADO, |) | |
| |) | |
| Employee, |) | |
| |) | |
| v. |) | Hearing No. 1405006 |
| |) | |
| ROOS FOODS, |) | |
| |) | |
| 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 April 27, 2017, in the Hearing Room of the Board, in Dover, Delaware. Final deliberations concluded on May 9, 2017.

PRESENT:

MARY DANTZLER

PATRICIA MAULL

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

APPEARANCES:

Walt Schmittinger, Esq., Attorney for the Employee

Andrew Carmine, Esq., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Magdalena Guardado (“Claimant”) was injured in a compensable work accident on June 22, 2010, while she was working for Roos Foods (“Employer”). The injury has been accepted as compensable and Claimant has been receiving compensation for total disability at the compensation rate of \$204.00 per week, based on an average weekly wage at the time of injury of \$306.00.

On November 7, 2014, Employer filed a Petition for Review alleging that Claimant was no longer totally disabled and was physically able to return to work. Claimant disputes Employer’s claim and alleges that she remains totally disabled; or, in the alternative, is a displaced worker. Disability benefits have been paid to Claimant by the Workers’ Compensation Fund since November 12, 2014. Employer’s Petition was originally heard on March 24, 2015, after which the Board issued a decision, dated April 7, 2015, denying Employer’s Petition, based primarily on the Board’s understanding of the Supreme Court’s holding in *Campos v. Daisy Construction Co.*, 107 A.3d 570 (Del. 2014), and finding that Claimant remained legally totally disabled, although physically capable of working. See *Guardado v. Roos Foods*, I.A.B. Hearing No. 1405006 (April 7, 2015)(“*Board Decision*”). Employer appealed the *Board Decision* to Superior Court, which affirmed the *Board Decision*. *Roos Foods v. Guardado*, 2016 WL 355002 (Del. Super. Jan. 26, 2016). On November 29, 2016 the Supreme Court of Delaware issued an Order remanding the matter to the Board. *Roos Foods v. Guardado*, 152 A.3d 114 (Del. 2016).

A hearing on this remand was held on April 27, 2017. Pursuant to Title 19, section 2348(f) of the Delaware Code, all evidence taken at the original hearing is considered part of the evidence of this remand hearing. 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). At the remand hearing, further testimony was provided on the issues of: Claimant’s displaced worker status, an updated labor market survey, and job availability for undocumented workers. This is the Board’s decision on the merits.¹

SUMMARY OF THE EVIDENCE

Evidence from the original hearing (as set forth in the *Board Decision*) is incorporated by reference. At this remand hearing, the parties stipulated that Claimant’s average weekly wage at the time of injury was \$306.00 per week, with a compensation rate of \$204.00. The parties stipulate further that the medical testimony from the previous hearing, and the Board’s findings regarding Claimant’s medical/physical ability to work, remain unchanged from the prior hearing. Therefore, no new medical evidence was presented at the remand hearing.

Dr. Desmond Toohey, Assistant Professor of Economics at University of Delaware, testified on Employer’s behalf. Dr. Toohey testified that his primary fields of research include labor economics and economic demography. Dr. Toohey prepared a report regarding the jobs that exist for undocumented workers. Dr. Toohey had reviewed both studies cited in the Supreme Court’s Opinion² and then had performed independent research studies. Dr. Toohey started with the recommended studies and then gathered more information specific to Delaware. He established how many undocumented workers are in Delaware and then determined what types of jobs those workers hold. Dr. Toohey acknowledged that there are inherent problems in determining the exact number of undocumented workers present in the state.

¹ Normally, decisions are to be issued within fourteen days of a hearing. *See* 19 *Del. C.* § 2348(k). Because of workload demands and other time constraints, deliberations were not concluded until May 9, 2017 and it was necessary to take an extension of time to issue this decision in accordance with 19 *Del. C.* § 2348(k).

² *Roos Foods v. Guardado*, 152 A.3d 114, 121-122 (Del. 2016).

Dr. Toohey prepared a report entitled, "Report on the Distribution of Unauthorized Immigrants Across Jobs in the Delaware Labor Market." ("*Report*") (Employer's Exhibit #2). Dr. Toohey explained that the numbers documented in the tables in the report were rounded up to reflect numbers that are closely related to numbers documented in other reports. Dr. Toohey's report indicates that there are approximately 11.8 million unauthorized immigrants in the nation, and approximately 28,000 in Delaware. *Report* at 5. Dr. Toohey's report indicates that, of the 28,000 unauthorized immigrants in Delaware, approximately 80% of those are employed in the state. *Id.*

When evaluating the specific jobs in the labor market survey, Dr. Toohey evaluated which occupation was represented and which industry was represented. Dr. Toohey concluded that the undocumented labor force was well represented by his report. In his report, Dr. Toohey concluded that, "many unauthorized immigrants are employed in the occupations and industries of the surveyed jobs. In general, there are several thousand unauthorized immigrants in each." *Id.* at 8. Table I of Dr. Toohey's report indicates that the listed occupations have the following distribution of unauthorized immigrants: management, business, science and arts has 4,000; service has 5,000; sales and office has 1,000; natural resources, construction and maintenance has 4,000; and, production, transportation and material moving has 8,000. *Id.* at 14. Table II of Dr. Toohey's report indicates that the listed industries having the following distribution of unauthorized immigrants: construction has 4,000; manufacturing has 5,000; retail trade has 4,000; finance, insurance, real estate, rental, leasing has less than 1,000; professional, scientific, management, administrative and waste management has 2,000; educational services, health care social assistance has 2,000; and, arts, entertainment, recreation, accommodation, food services has 4,000. Table III of Dr. Toohey's report correlates the jobs listed on the labor market survey

with the number of unauthorized immigrants in each of the corresponding occupations and industries. *Id.* at 15.

For each of the jobs listed on the labor market survey, Dr. Toohey determined the number of unauthorized immigrants working in the corresponding occupation, as well as the corresponding industry. Specifically, Dr. Toohey's research indicated that the kitchen crew jobs at Margarita's Restaurant, Ioannoni's Bullroaster's, and Taqueria Los Primos describe a food preparation occupation in a food service industry, which account for 5,000 unauthorized immigrant jobs in that occupation and 4,000 in that industry. *Id.* at 9-10. Dr. Toohey's research indicated that the clerk job at Mi Ranchito Mexican Grocery describes a sales occupation in the retail trade industry, for which there are 1,000 employed unauthorized immigrants and 4,000 employed unauthorized immigrants, respectively. *Id.* at 10. Dr. Toohey's research indicated that the clerk job at Newark Farmer's Market describes a sales occupation in the retail trade industry, for which there are 1,000 employed unauthorized immigrants and 4,000 employed unauthorized immigrants, respectively. *Id.* at 10. Dr. Toohey's research indicated that the packer job at Giorgio Fresh describes a packer/packager occupation in the production/transportation/material moving industry, for which there are 8,000 employed unauthorized immigrants and 5,000 employed unauthorized immigrants, respectively. *Id.* at 11. Dr. Toohey's research indicated that the picker jobs at Modern Mushroom and Phillips Mushroom Farm describe a picking/packing occupation in a manufacturing industry, for which there are 8,000 employed unauthorized immigrants and 5,000 employed unauthorized immigrants, respectively. *Id.* Dr. Toohey explained that, while some of the picker positions were located across the Pennsylvania State line, the level of economic interaction and labor market integration made it reasonable to

conclude that the unauthorized immigrants were similarly represented there as they are in Delaware. *Id.*

Based upon his research, Dr. Toohey concluded that there are thousands of undocumented workers employed in Delaware (and southeastern Pennsylvania) in each of the occupations and industries corresponding to the jobs listed on the labor market survey. Dr. Toohey reported that the occupations listed in the survey included service, production and sales, all of which combined accounted for an estimated 14,000 unauthorized immigrants employed in Delaware. *Id.* at 12. The industries represented by the jobs listed in the labor market survey collectively employ approximately 15, 000 unauthorized immigrants. Based on these findings, Dr. Toohey concluded that “the unauthorized immigrant population is well-represented in the surveyed positions.” *Id.*

On cross examination, Dr. Toohey acknowledged that the margin for error in his estimated numbers is less clear, but it could be as great as twenty percent (20%). Dr. Toohey testified that he is sure that there are thousands of jobs available in each of the occupation and industry categories. Dr. Toohey was unaware of the total number of documented (authorized) workers compared to the total number of undocumented worker ratios for each occupation. Dr. Toohey did not correlate workers with disabilities in his studies, although he could have extrapolated those numbers from the information he had available.

Dr. Toohey testified that he was reluctant to reduce the categories further for Delaware because it would limit the information too drastically, but he would be comfortable reducing the categories on a larger scale (across many states). Dr. Toohey explained that he would have been more comfortable reducing the categories by English language fluency and undocumented status, because it would not reduce the numbers too drastically. Dr. Toohey acknowledged that many of

his numbers include undocumented workers that are fluent English speakers. Dr. Toohey had no information on frequency of job availability, job turnover, etc. Dr. Toohey reported that, in Delaware, the total labor force is approximately 500,000 – 600,000 workers, and the undocumented worker population is approximately 20,000-25,000 workers. Dr. Toohey admitted that knowing the frequency of hiring and the proportion of the number of total numbers of jobs available to number of undocumented worker jobs available could be relevant, but he did not complete those calculations.

Ellen Lock, Vocational Case Manager for Coventry, testified on Employer's behalf. Ms. Lock testified that Claimant had graduated high school in her native country of El Salvador and was non-English speaking, but was able to read and write in her native language. Ms. Lock believed Claimant was capable of one handed work with her dominant hand. Ms. Lock identified jobs that were entry level, with on the job training, that met Claimant's physical restrictions, and that did not require English language fluency. Ms. Lock testified that she believes that the need for Spanish speaking Employees has risen recently. Ms. Lock discussed with prospective employers Claimant's work restrictions. Ms. Lock is confident that Claimant is capable of finding work in the current labor market because she has graduated high school in her home country, is Spanish speaking, and there are entry level jobs available.

Ms. Lock is aware that Claimant conducted a job search of her own, including six of the jobs on the labor market survey, but she is unaware of whether Claimant received responses from those jobs. Ms. Lock reported that she prefers that applicants apply to at least ten jobs per week when searching for jobs. Ms. Lock concluded that Claimant's average weekly wage from the jobs listed on the labor market survey would be \$330.00. Ms. Lock reported that the physical requirements of some of the jobs would require limited use of her left hand, but no lifting or

heavy maneuvering. Ms. Lock testified that if there were many highly qualified applicants applying for each of the available jobs, then those jobs would not remain available for long. Ms. Lock confirmed that she was not asked to ask prospective employers if they hired undocumented workers.

On cross examination, Ms. Lock acknowledged that the restaurant jobs require dealing with large/commercial quantities of food. Ms. Lock admitted that she had not reported to the new employers in the new labor market survey that Claimant was undocumented. She did not discuss undocumented workers with any of the prospective employers. Ms. Lock acknowledged that some of the housekeeping positions require use of broom and a mop, which would require use of both hands and Dr. Schwartz had rejected those jobs in the last labor market survey. Ms. Lock acknowledged that a job that is more than an hour away would be too far for Claimant to drive. Ms. Lock did not prepare a *Maxey-Wade* calculation and her average weekly wage calculation is not a direct comparison to Claimant's wages at the time she was employed.³ Ms. Lock testified that the jobs on the current labor market survey were researched in January, February or March of 2017. Eight of the positions remain open and three of those eight are in Pennsylvania, which could be too far for Claimant to drive. Ms. Lock acknowledged that there would be multiple applications for the jobs that remain available. Ms. Lock was unaware if

³ In general, under Delaware law, a claimant's return-to-work wage will be adjusted to the wage scale in effect at the time of the work injury. See *Maxey v. Major Mechanical*, 330 A.2d 156, 158 (Del. Super. 1974); *Greggo & Ferrara, Inc. v. Wade*, Del. Super., C.A. No. 84A-AU-6, O'Hara, J., at 3-4 (November 18, 1985). The point of *Maxey* and *Wade* is that it is inequitable to determine a claimant's earning capacity by comparing the claimant's wage at the time of injury (in this case, Claimant's weekly wage from June of 2010) with wages existing at some later time (in this case, spring of 2017). Because the term "earning capacity" is not the same as actual earnings, post-injury earnings should be adjusted to the wage scale in effect at the time of injury. *Maxey*, 330 A.2d at 157-58.

However, because establishing a lower return to work wage results in a higher partial disability benefit to the claimant, it is normally considered to be the claimant's burden to demonstrate the *Maxey-Wade* wage differential. See *Elswick v. B.F. Rich Co.*, Del. Super., C.A. No. 97A-07-15, Gebelein, J. (October 23, 1998); *Abbate v. M.A. Bongiovanni, Inc.*, Del. Super., C.A. No. 85A-DE-12, Babiarz, J., at 5 (October 13, 1987). Thus, it is to the claimant's benefit to establish a *Maxey-Wade* adjustment. In this case, there was no *Maxey-Wade* adjustment calculated or sought.

Claimant would be a viable candidate for any of the jobs compared to other applicants for those positions. Ms. Lock acknowledged that employers are more likely to hire applicants with experience than those without experience.

Claimant testified that her home in Crumpton, Maryland is approximately forty-five minutes from Middletown, Delaware.⁴ Claimant testified that two months ago she began going to school two nights a week to learn English. Claimant remains undocumented to work in the United States. Claimant testified that there have been no changes in her inability to use her left arm since the last hearing. Claimant wears a brace on her left wrist because she went to the doctor one month ago and her wrist was inflamed and Dr. DuShuttle requires her to wear it all the time. Dr. DuShuttle has not made any changes to her medical restrictions.

Claimant testified that she has looked for work. She has seen the labor market survey and made notes regarding the jobs for which she applied. Claimant told prospective employers about her work restrictions when she contacted them about jobs. Claimant testified that it is difficult for her to find jobs because she cannot perform the duties because of her physical restrictions. Claimant has applied for some kitchen jobs. She asked one manager if she could prepare food, but that manager said it would be difficult for her to perform the job because she would need to lift heavy objects and there would not be people to help her all the time.

Claimant reported that she has no movement in her left wrist because it is fused. Claimant has considerable difficulty in some activities of daily living because of her wrist, including cooking, lifting cookware, and cutting vegetables. Claimant testified that she wants to work. Claimant reported that she was aware of other undocumented workers who were employed, but none with restrictions requiring one arm.

⁴ An interpreter was provided for Claimant's testimony – Interpreter #660841 Corina

On cross examination, Claimant testified that she moved to Maryland five months ago, but had not reported her new residence to Employer. When Claimant worked for Employer, she handled a machine and made cheese packets. Claimant did not use a computer in high school in El Salvador, but she is learning to use one now. Claimant has a social media account and a smartphone, on which she uses the internet. Claimant testified that she does drive. Claimant takes over the counter medication for pain (ibuprofen). Claimant came to the United States in 2004, but has not made any efforts to become a documented worker. Claimant testified that she does not intend to become a documented worker.

Claimant reported that she will try to do the jobs for which she applied because she wants to work. She only applied to restaurant jobs. Claimant testified that she applied to one restaurant job that involved packing glasses, but the manager said she would have difficulty because it required the job to be done quickly. Claimant has not heard back from that employer, however. Claimant reported she did not apply for any online positions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

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). Claimant is then required to rebut that showing, show that he or she is a *prima facie* displaced worker, or submit evidence of reasonable, yet unsuccessful, efforts to secure employment, which have been unsuccessful because of the injury (i.e., actual displacement). As a rebuttal, the employer may present evidence showing regular employment opportunities within claimant’s capabilities. *Howell*, 340 A.2d at 835; *Duff*, 314

A.2d at 918n.1. In this case, at the original hearing, the Board determined that Employer met its initial requirement that Claimant is medically employable; and the parties have stipulated that the Board's finding regarding Claimant's medical/physical ability to work remains unchanged from the original hearing.

Having found that Claimant is physically capable of working, the next issue is whether she qualifies as 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. With respect to the issue of *prima facie* displacement, the critical elements to be considered are claimant's degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age. *Duff*, 314 A.2d at 916-17. Under normal circumstances, to qualify as a *prima facie* displaced worker, one must 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).

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 consideration when deciding that worker's efforts to find employment and whether an employer has proven there are jobs available within the worker's capabilities, but not when deciding whether the worker is *prima facie* displaced. *Id.*

In this case, Claimant testified she came to the United States in 2004, but has only been employed, for five years, by Employer, since she came here. Claimant testified that her duties for Employer involved operating machinery and preparing food packets, which is not highly skilled labor. Claimant reported that she now wears a brace on her left wrist because it became inflamed and she continues to have no movement in her wrist due to the surgical fusion, which was the result of the work injury. Claimant is a high school graduate in her native country of El Salvador; however, she is only capable of reading and writing in her native language (Spanish) currently. Claimant did report that she has been taking courses to learn English for the past two months; however, she does not speak English yet and required an interpreter for both hearings. Claimant admitted that she has learned to use a smartphone, but is still learning to use a computer. While the Board finds Claimant has made some progress in her education (began an English course and use of a smart phone) since the last hearing, the Board finds that Claimant continues to be a *prima facie* displaced worker based on her limited education and minimal work experience as an unskilled laborer with a one hand work restriction.

Having found that Claimant is a *prima facie* displaced worker, a finding of actual displacement is unnecessary; however, the Board finds it warrants discussion. Claimant testified that she had only applied for a total of approximately eleven jobs, four of which were on the labor market survey and all of which were in restaurants/food service industry. The evidence indicates that Claimant contacted six employers on February 13, 2017, one employer on April 3,

2017, two employers on April 10, 2017, one employer on April 18, 2017 and one employer on April 24, 2017. While Claimant testified that one prospective employer indicated it would be difficult for Claimant to prepare food without assistance and another indicated she might have difficulty packing glasses, there was no other evidence that Claimant would not be hired because of her injury, work restrictions, or her undocumented status. The Board finds that Claimant's job search was minimal (only 11 applications: 6 in February of 2017 and 5 in April of 2017) and was unduly restricted to a single industry (restaurant/food services). While Claimant may prefer to work in such industry, for purposes of considering whether employment is available, it is unreasonable to restrict her search to a single industry/field. Based on this limited amount of evidence, if the Board had determined that Claimant was not *prima facie* displaced, the evidence would have been insufficient to warrant a finding of "actual" displacement.

Having found that Claimant is *prima facie* displaced, the Board must now decide whether Employer can rebut this finding by showing there are jobs available within Claimant's work capabilities. In this case, Employer prepared an updated Labor Market Survey of prospective jobs that could be available to Claimant with her physical restrictions.⁵ Ms. Lock testified that she had discussed Claimant's work restrictions with the prospective employers and she believed Claimant would be capable of performing the jobs listed on the labor market survey. Furthermore, Ms. Lock testified that the jobs on the labor market survey were entry level jobs and/or provided on the job training, so Claimant's minimal work experience would not be a barrier to her obtaining those positions. Ms. Lock confirmed that the listed jobs only required limited use of Claimant's left hand and did not require heavy lifting or maneuvering of her

⁵ Claimant testified that she had moved to the State of Maryland a few months prior to the remand hearing, but had not reported her relocation to Employer. Therefore, the Board finds Employer's job listings within a driving distance of Claimant's former residence (the only residence of which Employer was aware) to be sufficient for those purposes. A claimant cannot invalidate an otherwise proper labor market survey by changing his or her residential address shortly before the hearing, particularly when no notice was provided to the employer.

injured hand. Ms. Lock reported that she was confident that Claimant could find work because Claimant had a high school education, was literate in Spanish and there were entry level jobs available. Claimant herself testified that she had applied to approximately eleven jobs in the restaurant industry, some of which were listed on the labor market survey. While Claimant testified that she had only applied to restaurant jobs, the labor market survey includes jobs other than restaurant jobs, which are available and could accommodate Claimant's restrictions.

While Ms. Lock testified that she did not advise prospective employer's of Claimant's undocumented status, the Board notes that it is unrealistic to have expected the listed employers to admit that they may illegally hire undocumented workers. The Supreme Court anticipated this problem:

Using reliable social sciences methods, there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions and combining that with more specific information about actual jobs in those categories.

Roos Foods, 152 A.3d at 121.

Thus, the Board finds that Employer's updated labor market survey provides reliable and sufficient information regarding actual jobs that are available within Claimant's capabilities.

Employer has presented evidence of the prevalence of undocumented workers in the categories where the labor market survey shows the availability of specific jobs. In addition to providing the updated labor market survey, Employer provided reliable market evidence (in the form of Dr. Toohey's testimony and report) indicating that there are thousands of jobs available in each of the occupations and industries listed available for undocumented workers in Delaware. Specifically, Dr. Toohey provided testimony and a written report indicating the approximate number of jobs available for undocumented workers in each of the occupations and industries included in the labor market survey. Specifically, three of the available jobs (Margarita's,

Taqueria Los Primos and Ioannoni's Bullroasters) fell into the service occupation and food service industry categories, which have 5,000 and 4,000 unauthorized workers, respectively. Three other jobs (Giorgio Fresh, Modern Mushrooms, and Phillips Mushroom Farm) fell into the production occupation and manufacturing industry categories, which have 8,000 and 5,000 unauthorized workers, respectively. Two of the available jobs (Mi Ranchito Mexican Grocery and Newark Farmer's Market) fell into the sales and office occupation and retail trade industry categories, which have 1,000 and 4,000 unauthorized workers respectively. These numbers indicate that there are thousands of jobs available to undocumented workers within the occupations and industries listed on labor market survey. Thus, the Board finds that Employer has provided reliable and relevant evidence of the prevalence of undocumented workers in the specific occupations and industries listed on the labor market survey.

Based on all of the above and relying on the guidance provided in *Roos Foods v. Guardado*,⁶ the Board concludes that Employer was successful in establishing the appropriate nexus between actual jobs available on the labor market survey and the prevalence of undocumented workers in those job categories in Delaware (and the surrounding area). Therefore, the Board finds that Employer has successfully rebutted Claimant's showing that she is a *prima facie* displaced worker by presenting evidence of availability of jobs within Claimant's capabilities. Having found that Claimant is physically capable of working and that suitable employment is available, the Board finds that Claimant's total disability status is terminated. Claimant clearly was permitted to rely on the Board's earlier *Board Decision* that she remained totally disabled, so the period of total disability will end as of the date of this decision.

PARTIAL DISABILITY

⁶ 152 A.3d 114 (Del. 2016).

In determining whether Claimant is entitled to compensation for partial disability, the initial question is whether Claimant continues to have work restrictions related to her work injury that could reasonably affect her 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”). In this case, Claimant has such restrictions, as the parties have stipulated that both Dr. DuShuttle (Claimant’s surgeon) and Dr. Schwartz (Employer’s physician) have reported that Claimant is physically capable of returning to work with restrictions.

Therefore, Claimant’s current “earning power” must be calculated. Partial disability is based on the difference between one’s wages before a work-related injury and one’s “earning power” after a work-related injury. 19 *Del. C.* § 2325. When calculating earning power, the focus is not on actual earnings or wages received, but on one’s ability to earn. *Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700, 703 (Del. 1968). Earning power is a function of the employee’s “age, education, general background, occupational and general experience, the nature of the work performable with the physical impairment, the availability of such work and so on.” *Chrysler Corp. v. Williams*, 282 A.2d 629, 631 (Del. Super. 1971), *aff’d*, 293 A.2d 802 (Del. 1972). If a claimant is capable of working full time, that claimant’s partial disability compensation is calculated based on his or her *capacity* to work full time even if he or she never actually accepts such a job.

In this case, the labor market survey lists numerous jobs that only required activity within Claimant’s work restrictions. While there was some dispute as to whether Claimant was qualified for every job listed on the survey, there was sufficient evidence offered to establish an

average wage among at least eight of the listed jobs. The eight available jobs include: Margarita's Restaurant, Mi Ranchito Mexican Grocery, Newark Farmers Market, Taqueria Los Primos Restaurant, Giorgio Fresh, Modern Mushrooms, Ioannoni's Bullroasters, and Phillips Mushroom Farms. The average weekly wage of those positions is \$330.00 and the Board is satisfied that this is an accurate representation of what Claimant can realistically expect to earn in the competitive labor market. Claimant's weekly wage at the time of injury was \$306.66 per week, so Claimant has no diminished earning capacity. Therefore, pursuant to Title 19, section 2325 of the Delaware Code, Claimant is not entitled to partial disability compensation.

Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the Petition, pending a hearing and decision. The Board has found that Claimant's total disability status has terminated as of the date of this decision and no partial disability benefits are awarded. Employer shall make appropriate reimbursement to the Workers' Compensation Fund.

ATTORNEY'S FEES AND MEDICAL WITNESS FEES

A claimant who is awarded compensation is generally entitled to payment of reasonable attorney's fees "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." 19 *Del. C.* § 2320. At the current time, the maximum amount based on Delaware's average weekly wage calculates to \$10,341.80. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the Cox factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See

Heil v. Nationwide Mutual Insurance Co., 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96-A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A “reasonable” fee does not generally mean a generous fee. See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant bears the burden of proof and must provide adequate information to make the required calculation. By operation of law, the amount of attorney’s fees awarded by the Board applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant’s counsel. 19 *Del. C. § 2320(10)a.*

In this case, Claimant is no longer entitled to total or partial disability payments; therefore, she is not entitled to an attorney’s fee.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Employer's Petition for Review is granted. Claimant's total disability benefits shall terminate as of the date of this decision. Employer shall make appropriate reimbursement to the Worker's Compensation Fund.

IT IS SO ORDERED THIS 18th DAY OF MAY, 2017.

INDUSTRIAL ACCIDENT BOARD

John F. Beards for
MARY DANTZLER

Patricia G. Maul
PATRICIA MAUL

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

Heather Williams
HEATHER WILLIAMS

Mailed Date: 5-19-17

JB
OWC Staff

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---------------------|---|-----------------------------|
| ROOS FOODS, | § | |
| | § | No. 160, 2016 |
| Appellant Below- | § | |
| Appellant, | § | Court Below: Superior Court |
| | § | of the State of Delaware |
| v. | § | |
| | § | C.A. No. S15A-05-002 |
| MAGDALENA GUARDADO, | § | |
| | § | |
| Appellee Below- | § | |
| Appellee. | § | |

Submitted: September 28, 2016
Decided: November 29, 2016

Before **STRINE**, Chief Justice; **HOLLAND** and **VAUGHN**, Justices.

Upon appeal from the Superior Court. **REVERSED AND REMANDED.**

Garrett Baker and Andrew J. Carmine (*argued*), Elzufon, Austin, Tarlov & Mondell, Wilmington, Delaware, for Appellant, Roos Foods.

Walt Schmittinger, Schmittinger and Rodriguez, Dover, Delaware, for Appellee, Magdalena Guardado.

VAUGHN, Justice:

This appeal involves an undocumented worker who was injured in a work-related accident and is receiving total disability benefits. The employer petitioned the Industrial Accident Board (“the Board”) to terminate those benefits on the ground that the worker is no longer disabled and can return to work. The Board found that the employer met its initial burden of showing that the worker was no longer totally disabled. The Board then found that the worker was a *prima facie* displaced worker based solely on her status as an undocumented worker. The Board next found that the employer had failed to meet its burden of showing regular employment opportunities within the worker’s capabilities. Accordingly, it denied the employer’s petition. The questions before us are (1) whether an injured worker’s immigration status alone renders her a *prima facie* displaced worker and (2) whether the Board properly found that the employer failed to meet its burden of showing regular employment opportunities within the worker’s capabilities because its evidence failed to take into account the worker’s undocumented status. For the reasons which follow, we have concluded that an undocumented worker’s immigration status is not relevant to determining whether she is a *prima facie* displaced worker, but it is a relevant factor to be considered in determining whether she is an actually displaced worker. We have also concluded that the Board correctly rejected the employer’s evidence of regular employment opportunities for the worker because that evidence

failed to consider her undocumented status.

FACTS AND PROCEDURAL HISTORY

Magdalena Guardado was employed as a machine manager for Roos Foods when she was involved in a work-related accident on June 22, 2010. She injured her left wrist and thereafter received total disability benefits.

On June 18, 2014, Guardado underwent surgery, consisting of a left wrist fusion performed by Dr. Richard DuShuttle. Shortly after the surgery, Dr. DuShuttle released Guardado to light duty, one-handed work. Her dominant hand is her right hand, which is uninjured. The injury is to the left hand. On November 7, 2014, the employer filed its Petition for Review alleging that the claimant was able to return to work. At the hearing before the Board, Dr. Eric Schwartz, who testified on behalf of the employer, agreed that she could return to one-handed light duty work. He indicated that he believed that she could do desk work or any other type of work that did not require manipulation with both her left and right hand.

The employer also offered the testimony of Ellen Lock, a vocational case manager. Ms. Lock prepared a labor market survey in which she identified eight specific jobs which she believed Guardado could perform, despite the disability to her left hand. These jobs included: two carwash attendant positions; a sorter with Goodwill Industries; two housekeeping positions; a food service worker with a

hospital; and, two fast food crew member positions at McDonald's and Taco Bell. Dr. Schwartz believed that Guardado would have difficulty performing the carwash and housekeeping positions. Ms. Lock conceded that the housekeeping positions would not be suitable for Guardado in light of Dr. Schwartz's testimony, but she maintained that the carwash positions fit within Guardado's qualifications and limitations. Given that Guardado is only supposed to do light-duty work with her right hand and use her left hand as an assist, the proposition that she would be in a position to wash cars all day strikes us as implausible, but if we credit this odd suggestion, the survey identified a total of six jobs that fit within Guardado's restrictions. Most importantly, however, Ms. Lock's labor market survey did not take into account that Guardado was an undocumented worker because that fact was apparently unknown to her.

Dr. DuShuttle, testifying on behalf of Guardado, stated that the impairment to the left hand is permanent, and with that hand Guardado is capable of only simple activities, such as grasping light objects and assisting her right hand.

Guardado also testified before the Board. She was 38 years old at the time of the hearing and had worked for Roos Foods for about five years. That was the only job she had ever held. She testified that she obtained the equivalent of a high school diploma in her native El Salvador. She further confirmed that she does not speak or

write English.

Guardado came to the United States in 2004. She is not a U.S. citizen and does not have any resident alien status, green card, or other credentials or documentation that would establish that she is legally able to work in this country. She also testified about having looked for work since having had the surgery performed by Dr. DuShuttle, but not having been able to find a job.

The Board began its analysis by finding that Guardado was no longer totally disabled. It accepted the testimony of the two doctors that she was able to work one-handed light duty jobs, such as some of the jobs listed in the labor market survey. The Board then considered whether she qualified as a displaced worker. It concluded that “Claimant testified that she had only applied to a few jobs; however, she had not heard back from any of those. Based on this little evidence, there is no basis to find ‘actual’ displacement. The sole issue is whether she should be considered displaced on a *prima facie* basis.”¹ It next considered whether she was a *prima facie* displaced worker. Drawing on our case of *Campos v. Daisey Construction Co.*,² the Board concluded that it was “satisfied the Claimant qualifies as a displaced worker based upon her undocumented legal status and Employer has failed to present a Labor

¹ *Guardado v. Roos Foods*, I.A.B. Hearing No. 1405006, at 8 (Apr. 7, 2015).

² 107 A.3d 570 (Del. 2014).

Market Survey that shows regular employment opportunities within Claimant's capabilities as an undocumented injured worker."³

The employer appealed the Board's decision to the Superior Court. The Superior Court affirmed, explaining:

The undisputed testimony before the Board established that Guardado 1) is 38-years-old, 2) is unskilled, 3) only speaks Spanish, 4) has the equivalent of a high school diploma from El Salvador, 5) can only use her right hand for light-duty work and left hand as an "assistance hand," 6) has only worked for five years, and 7) is an undocumented worker unable to work legally in the United States. The Board recited these facts in its written opinion with the primary focus being on the fact Guardado was an undocumented worker. Even without Guardado's undocumented status, the evidence certainly supports the Board's finding that she fits into the *prima facie* displaced category. Guardado is almost middle-aged and has no education beyond high school in El Salvador. Guardado has no real workplace training, very little work experience, does not speak English, is unskilled in the labor market, and has work restrictions that limit her to light-duty work with one hand. These undisputed facts certainly portray a woman disqualified from regular employment in any well-known branch of the competitive labor market. When you add in the fact that she can not work legally in this country, then her difficulties in obtaining work become even greater. There is no doubt that Guardado, with her disabilities and limitations, is going to have a very difficult time finding a job.⁴

³ *Guardado*, I.A.B. Hearing No. 1405006, at 11.

⁴ *Roos Foods v. Gurdado*, 2016 WL 355002, at *3 (Del. Super. Jan. 26, 2016).

This appeal followed.

DISCUSSION

“The review of an Industrial Accident Board’s decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board’s findings of fact and conclusions of law.”⁵ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶ “On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.”⁷ Absent errors of law, which are reviewed *de novo*, we review a Board’s decision for abuse of discretion.⁸ An abuse of discretion occurs when the decision has “exceeded the bounds of reason in view of the circumstances, [or] so ignored recognized rules of law or practice so as to produce injustice.”⁹

Where an employer seeks to terminate a claimant’s total disability benefits, the employer must initially show that the claimant is not completely incapacitated.¹⁰ The

⁵ *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at *2 (Del. Mar. 24, 2008).

⁶ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)).

⁷ *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

⁸ *Id.*

⁹ *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

¹⁰ *Chrysler Corp. v. Duff*, 314 A.2d 915, 918 n.1 (Del. 1973)

claimant may then rebut that showing by establishing that she is a displaced worker.¹¹

The definition of a displaced worker is well established, and has been stated as follows:

The term is used to refer to a worker who, while not completely incapacitated for work, is so handicapped by a compensable injury that [she] will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if [she] is to be steadily employed.¹²

In deciding whether a worker is a displaced worker, one considers “not only the medical and physical facts but also such factors as the employee’s age, education, general background, occupational and general experience, emotional stability, the nature of the work performable under the physical impairment and the availability of such work.”¹³

A worker may be a “*prima facie*” displaced worker if the degree of obvious physical impairment, coupled with the other factors just mentioned, makes a *prima facie* case that the worker is displaced.¹⁴ If the evidence does not obviously place the worker in the *prima facie* displaced category, the worker may still show that she is “actually” displaced by showing that she “has made reasonable efforts to secure

¹¹ *Id.*

¹² *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).

¹³ *Id.*

¹⁴ *Duff*, 314 A.2d at 916.

suitable employment which have been unsuccessful because of the injury.”¹⁵ If the employee succeeds in showing that she is a *prima facie* or an actually displaced worker, the burden shifts to the employer “to show availability to the worker, thus ‘displaced’, of regular employment within [her] capabilities.”¹⁶

In the section of the Board’s decision in which it made Findings of Fact and Conclusions of Law, it seems to have based its conclusion that the claimant is a *prima facie* displaced worker entirely upon her status as an undocumented immigrant. It does take note of the fact that the only place she has worked since coming to the United States is with Roos Foods and that she can neither read nor speak English. But when the Board’s analysis is considered as a whole, it seems apparent that the finding that she is a *prima facie* worker is based entirely upon her undocumented legal status. The parties have so formed their arguments on appeal. Roos Foods argues that an undocumented worker is not *per se* a displaced worker. Guardado argues that the Board properly determined that her undocumented status warranted a finding that she is a *prima facie* displaced worker.

The Board’s analysis relies upon our decision in *Campos v. Daisy Construction Company*.¹⁷ In *Campos*, the Board granted an employer’s petition to terminate the

¹⁵ *Id.* at 917.

¹⁶ *Id.*

¹⁷ 107 A.3d 570 (Del. 2014).

claimant's total disability benefits, "reasoning that Campos was no longer totally disabled because he was physically capable of working and therefore was not displaced from the workforce."¹⁸ On appeal, Campos did not challenge the Board's termination of his total disability benefits and did not claim to be a displaced worker.¹⁹ The displaced worker doctrine was not before the Court in *Campos* and was not considered by the Court.²⁰ *Campos* was a partial disability case, where the issue on appeal centered on the employer's burden "to prove that Campos had no decrease in earning power following the workplace injury in order to avoid owing Campos partial disability payments."²¹ Thus, *Campos* is not dispositive of the issue before us.

Whether a person is a *prima facie* displaced worker is based upon an individualized examination of the factors set forth above.²² Although two cases may appear to be analogous, one case is not determinative of the other.²³ Adding a worker's undocumented status to those factors would tend to create a class of injured

¹⁸ *Id.* at 573.

¹⁹ *Id.* at 574.

²⁰ *See id.*

²¹ *Id.* at 575.

²² *See Duff*, 314 A.2d at 916-17.

²³ *See id.* at 917. "It seems to us that, given the great variety of factual situations, it is unwise to focus solely on one factor as necessarily decisive on the burden of proof. Both the employer and the employee share a mutual duty to obtain employment for the employee, the precise extent of which cannot be clearly and definitively expressed as a general rule." *Id.*

general laborers, undocumented workers, who would be deemed *prima facie* displaced as a matter of law based on immigration status. We believe that this would be a misapplication of the *prima facie* displaced worker concept. Determining whether an injured claimant is a *prima facie* displaced worker should continue to be an individualized determination based upon the factors recognized by the case law, which are the degree of obvious physical impairment, “the employee’s age, education, general background, occupational and general experience, emotional stability, the nature of the work performable under the physical impairment and the availability of such work.”²⁴ We find that a worker’s legal status as an undocumented worker is not relevant to determining whether the worker is *prima facie* displaced.

Campos does, however, have a bearing on the employer’s burden of showing that there are regular employment opportunities within the claimant’s capabilities, when the employer has that burden. As we discussed in *Campos*, “the worker must be taken as he was hired,” and “the employer who seeks to terminate benefits also bears the burden to prove that jobs are actually available – *i.e.*, ‘within the reach’ – of the injured employee.”²⁵ The employer in *Campos* argued that it had a job for Campos if he could prove legal status.²⁶ We observed that the employer’s offer was

²⁴ *Ham*, 231 A.2d at 261.

²⁵ 107 A.3d at 575, 577.

²⁶ *Id.* at 572.

not a bona fide offer because Campos was not, in fact, legally within this country.²⁷ After *Campos*, where the employer has the burden of establishing that jobs are actually available to a claimant, that burden must take into account the claimant's undocumented status.²⁸

As discussed above, where a claimant is successful in showing that she is a displaced worker, either *prima facie* or actually, the burden shifts to the employer to show availability to the worker of regular employment within the worker's capabilities.²⁹ *Campos*' requirement that the worker's undocumented status be taken into account in deciding whether the employer has met its burden of showing that jobs are actually available to the worker, applied in a partial disability case there,³⁰ applies with equal force in a total disability case. Where the claimant in a total disability termination case succeeds in showing that she is a displaced worker, the employer must take the worker as she was hired, and the employer must then prove that jobs are actually available, *i.e.* within the reach of the injured employee, with the injured employee's undocumented status being taken into account as a factor. It follows that where an injured claimant attempts to show that she is an actually

²⁷ *Id.* at 576.

²⁸ *Id.* at 572.

²⁹ *Duff*, 314 A.2d at 916-17.

³⁰ 107 A.3d at 572.

displaced worker because reasonable efforts to secure suitable employment have been unsuccessful, her status as an undocumented worker should be taken into account as a factor in determining whether she has made reasonable, but unsuccessful, efforts to secure suitable employment.

In its oral argument, the employer argues that it is impossible to present evidence that an undocumented worker can obtain employment because that would require presenting affidavits from employers willing to say that they flout the law and knowingly employ undocumented workers. Although we understand this fear, we do not believe it is warranted. The uncomfortable reality that gives rise to societal debate is that there are large numbers of undocumented workers in our midst.³¹ Using reliable social sciences methods, there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions, and combining that with more specific information about actual jobs in those categories.³² So long as the evidence meets the useful tests of reliability

³¹ JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR.'S HISPANIC TRENDS PROJECT, UNAUTHORIZED IMMIGRANT TOTALS RISE IN 7 STATES, FALL IN 14: DECLINE IN THOSE FROM MEXICO FUELS MOST STATE DECREASES, 29 tbl.A3 (2014) http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf. In 2012, there were 8.1 million undocumented immigrants working or looking for work in the U.S., comprising 5.1% of the nation's labor force. *Id.* In Delaware, there were 20,000 undocumented immigrants working or looking for work, totaling 3.8% of the state's labor force. *Id.*

³² JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., IMMIGRANT WORKERS IN PRODUCTION, CONSTRUCTION JOBS FALLS SINCE 2007: IN STATES, HOSPITALITY, MANUFACTURING AND CONSTRUCTION ARE TOP INDUSTRIES, (2015) http://www.pewhispanic.org/files/2015/03/2015-03-26_unauthorized-immigrants-passel-testimony_REPORT.pdf. For example, using data collected

and relevancy,³³ the Board has to give it weight in making the ultimate determination whether an injured worker has employment available to her. Roos Food's argument that there are many employers now facing claims from undocumented workers they employed underscores the reality that employers can present market evidence regarding employment of undocumented workers in specific categories within the specific geographic areas. Nothing in *Campos*,³⁴ *Ramirez*,³⁵ or the decision of the Superior Court in this case suggests that employers must present affidavits from employers confessing to their willingness to knowingly violate the law by employing undocumented workers. And although the Board's decision has some language that

from the Census Bureau's American Community Survey and Current Population Survey, a Pew Research Center study outlined the top occupations for undocumented workers in Delaware, and found that 44% of the undocumented labor force was employed in the service industry, 13% in construction, and 10% in transportation. *Id.* at 16 tbl.A1. The study also determined the occupations with the highest shares of undocumented workers in Delaware, and found that 33% of workers in farming were undocumented, 10% in construction, and 8% in the service industry. *Id.* at 18 tbl.A2. Using this type of data, employers can map job openings in their region against the prevalence of undocumented workers in that region by sector.

³³ See *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1268 (Del. 2013) (explaining that "the trial court must act as a gatekeeper to determine whether the expert opinion testimony is both (i) relevant and (ii) reliable" (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999))); *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 521 (Del. 1999) (stating expert testimony must be "not only relevant, but reliable" (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95 (1993))); see also D.R.E 702 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.") (emphasis added).

³⁴ *Campos*, 107 A.3d at 570.

³⁵ *Delaware Valley Field Servs. v. Ramirez*, 105 A.3d 396 (Del. Super. 2012), *aff'd sub nom. Delaware Valley Field Servs. v. Melgar-Ramirez*, 61 A.3d 617 (Del. 2013).

can be read as hinting toward a requirement that an employer demonstrate that specific employers exist who hire undocumented workers and have jobs within the claimant's ability that are open,³⁶ we clarify that no such requirement exists. Rather, what is required is that an employer who has a burden of showing that jobs are actually available for an undocumented worker address that reality by presenting reliable market evidence that employment within the worker's capabilities is available to undocumented workers. That burden is not an unreasonable one for employers to bear, particularly when they hired an undocumented worker in the first place.

CONCLUSION

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

³⁶ See *Guardado*, I.A.B. Hearing No. 1405006, at 11 ("Because Ms. Lock was unaware of Claimant's undocumented legal status when she prepared the survey, the jobs on the Labor Market Survey cannot be considered reliable evidence of jobs that are actually 'within reach' to Claimant").

status as an undocumented worker. Since we have concluded that the Board's finding that the claimant is a *prima facie* displaced worker on the basis of her undocumented status alone is legal error, the judgment of the Superior Court is reversed and the matter is remanded to the Superior Court with instructions that it remand the matter to the Board for a rehearing.

CURRICULUM VITAE

JOSE R. CASTRO, JR., M.S., C.R.C., L.P.C., L.R.C., A.B.D.A.

EDUCATION

- M.S. Florida State University – Rehabilitation Counseling – 1973
B.S. University of South Alabama – Secondary Education – 1969

CERTIFICATIONS

- C.R.C. Certified Rehabilitation Counselor, Board for Rehabilitation Certification, Chicago, Illinois, 1975
R.C.C. Rehabilitation Counselor Certification, U.S. Department of Labor, Office of Workers' Compensation Programs, 1983, 1996
A.B.D.A. Senior Disability Analyst & Diplomat, American Board of Disability Analysts, 1996
VR 4759 Registered Practitioner, State of Maryland, Workers' Compensation Commission 1997
V.E. Approved by Pennsylvania Department of Labor and Industry as Expert in Earning Power Assessments

LICENSURE

- L.P.C. Licensed Professional Counselor, State of Pennsylvania, 2002
L.R.C. Licensed Rehabilitation Counselor, State of New Jersey, 1999
L.E.C. Licensed Employment Counselor, State of Pennsylvania, 1988
L.M.H.C. Licensed Mental Health Counselor, State of Florida Department of Professional Regulations, Tallahassee, Florida, 1982

PROFESSIONAL EXPERIENCE

- 11/01 to present **Vocational Consultant – Jose R. Castro, Vocational Services –PO Box 1186 Edgemont, PA 19028**
Provide all facets of vocational services that include vocational assessments to determine wage earning capacity, vocational counseling, job placement, job analyses and expert vocational testimony. Accepted as vocational expert before Federal, Superior, Family and the Court of Common Pleas, as well as worker's compensation judges and boards in Pennsylvania, Delaware, New Jersey and Maryland.
- 01/92 to 11/01 **Associate Manager, Vocational Department/Senior Rehabilitation Consultant**
DEL-VAL Care Management, Wilmington, Delaware. Responsible for program development and management for clients. Evaluation, counseling, testing and job placement of disabled clients. Consult with physicians, physical therapists, psychologists and others in coordinating the medical and treatment needs of clients. Conducting vocational assessments, wage earning capabilities and provision of expert testimony. Supervise Rehabilitation Consultants and job developers.
- 04/89 to 01/92 **Director of Case Management Services/Senior Specialist**
Hamilton & Jordan, Inc., West Chester, Pennsylvania. Provide vocational counseling and assessment, job placement, and comprehensive case management for individuals with work-related injuries. Facilitate medical coordination to determine injured worker's current physical capacity. Supervise Rehabilitation Specialists and job developers. Provision of vocational testing and expert vocational testimony.

- 03/88 to
04/89 **Senior Rehabilitation Coordinator**
Wenmar Associates, Inc., King of Prussia, Pennsylvania. Vocational counseling, job development, job placement and case management for individuals with work-related disabilities. Provide vocational testing and expert testimony.
- 10/83 to
12/87 **Senior Rehabilitation Coordinator**
Continental Rehab Resources, York, Pennsylvania. Counseling and evaluation of the injured worker. Assessing medical treatment plans and determining suitable therapy and/or work hardening programs. Assisting the injured worker in obtaining employment or re-employment that is within their vocational and physical capabilities.
- 02/69 to
10/83 **Rehabilitation Counselor II**
State of Florida Vocational Rehabilitation, Pensacola, Florida. Assisting physically, mentally and emotionally handicapped individuals in obtaining proper medical or psychological treatment. Assisted these clients to obtain suitable training and/or job placement.

PROFESSIONAL AFFILIATIONS

National Rehabilitation Association (N.R.A.)
National Association of Rehabilitation Professionals in the Private Sector, (NARPPS)
Philadelphia Workers' Compensation Claims Association
Delaware Claims Association
Pennsylvania Self Insurers Association
American Board of Disabilities Analysts

ADDITIONAL TRAINING

Seminars – “Counseling with Severely Disabled” – held at various National Rehabilitation Counseling Association Conferences
Counselor certification training activities including seminars related to vocational rehabilitation of severely injured workers through N.R.A.
U.S. Department of Labor – Employment Standards Administration – Office of Workers' Compensation – Programs Counselor Certification – Workshops, 1983-1996
Delaware – Division of Industrial Affairs “Workers' Compensation Seminars”
Pennsylvania – Various seminars and training programs relating to the rehabilitation of workers' compensation recipients through Pennsylvania Claims Association
Vocational Evaluation of Traumatic Brain Injury – through Commission of Work Adjustment and Vocational Evaluation Specialists (CCWAVES)

PRESENTATION/PUBLICATIONS

Several articles pertaining to Disability Management for Pennsylvania Self-Insured Professional Publications.

Co-authored article for Delaware Trial Lawyers Publication pertaining to use of Vocational Rehabilitation Consultants for Personal Injury cases.

Presentations before Workers' Compensation organizations and carriers in Pennsylvania and Delaware regarding Disability Management and the provision of Rehabilitation Services. Seminars on Act 57, Pennsylvania Legislation, July 1996 – “Rehabilitation Earning Capacity and Job Availability under Senate Bill 801 (Act 57).

Presentation to employers regarding job restructuring and return to work strategies.

Ellen Lock, CDMS

CURRICULUM VITAE

EHLock@cvty.com (fax)-302-764-5012 (ph)302-598-3783

EXPERIENCE

April 2007 Coventry, formerly known as Concentra Wilmington, DE

Vocational Case Manager

- Job Development
 - Placement and testing of clients, counseling, follow-up with employers
 - Recruitment activities: identifying area employers, cultivating relationships, identifying appropriate employment opportunities, acting as liaison between clients and employers
 - Conducting Labor Market Research on behalf of defense counsel/carrier in Worker's Compensation cases
 - Provide expert testimony at Industrial Accident Board Hearings to bring about successful resolution of matter
 - Superior Court and Family Court-expert testimony (Personal Injury and Divorce Cases)
-

May 2005- Perry & Associates Hockessin, DE
April 2007

Senior Vocational Consultant

- Job Development
 - Placement and testing of clients, counseling, follow-up with employers
 - Recruitment activities: identifying area employers, cultivating relationships, identifying appropriate employment opportunities, acting as liaison between clients and employers
 - Conducting Labor Market Research on behalf of defense counsel/carrier in Worker's Compensation cases
 - Provide expert testimony at Industrial Accident Board Hearings to bring about successful resolution of matter
 - Personal Injury Cases and Litigation/Testimony
-

May 2005- Pepco/PHI Holdings, Inc. Wilmington, DE
October 2005

Onsite Disability Case Manager

- Provide case management for employees out on FMLA, Short-term Disability, Long-term Disability leave
- Communicate and coordinate with vendor providing case management for FMLA, STD, and LTD
- Generate proper paperwork relevant to change of status for employees and ensure proper personnel receive same
- Obtain documentation from physicians and employees, ensuring proper leave procedures are carried out and adhered to
- Generate weekly reports regarding sick time and payroll
- Interface with employees, supervisors, HR Business Partners, Disability Coordinator, Payroll

Ellen Lock

department, timekeepers, physicians and vendors

October 2001-
December 2005

PRO Physical Therapy

Wilmington, DE

Industrial Rehabilitation Case Manager/Coordinator

- Act as liaison between physical therapists, doctors, nurse case managers, employers, attorneys and patients in case management/resolution capacity
- Generate invoices and engage in collection activities for special accounts
- Market services to potential clients
- Consult with and obtain job descriptions/analyses and pertinent information regarding employment status
- Compile statistics and track on-site programs and services
- Schedule WorkPRO services, such as Ergonomic evaluations and Functional Capacity Evaluations

September 1995-
October 2001

Del Val Care Management

Wilmington, DE

Vocational Case Manager/Rehabilitation Consultant

- Job Development
- Placement and testing of clients, counseling, follow-up with employers
- Recruitment activities: identifying area employers, cultivating relationships, identifying appropriate employment opportunities, acting as liaison between clients and employers
- Conducting Labor Market Research on behalf of defense counsel/carrier in Worker's Compensation cases
- Provide expert testimony at Industrial Accident Board Hearings to bring about successful resolution of matter
- Personal Injury and Litigation cases

September 1990-
September 1995

YWCA/Youth Residential Program

Wilmington, DE

Senior Program Manager/Supervisor

- Was responsible for supervising 18 full and part time Youth Care Workers in a non-secure detention setting for adolescent females
- Provided group and individual counseling to pre-adjudicated youth in several areas
- Acted as liaison between youth and case workers, police officers, attorneys, court personnel, and schools
- Created and carried out programming and schedule for incarcerated youth
- Engaged in home visits and met with parents regarding youth welfare and case direction
- Provided Service Planning for youth and followed through with various parties involved

Ellen Lock

Education

6/96 Wilmington College Wilmington, DE

Bachelor of Arts, Behavioral Science

- Graduated **Summa Cum Laude**
-

1992 Delaware Technical and Community College Wilmington, DE

Associate of Science, Criminal Justice

- Graduated **Summa Cum Laude**

Numerous courses and seminars/training in Vocational Rehabilitation, Worker's Compensation, Personal Injury, Disability Management and Family Law

Certification CDMS Certified Disability Management Specialist March 2011

- Presenter, Inns of Family Court , 2009 "Vocational Evaluations and Family Court Issues"

Desmond J. Toohey

University of Delaware

Curriculum Vitae

February 2017

Department of Economics
University of Delaware
420 Purnell Hall
Newark, DE 19716

Tel: (302) 831-3809
dtoohcy@udel.edu
<http://sites.google.com/site/desmondtoohey>

Education

| | |
|---|------|
| Ph.D. Public Policy and Economics, University of Michigan | 2015 |
| B.A. Economics (with honors), University of Maryland | 2006 |
| B.A. Government and Politics, University of Maryland | 2006 |

Professional Experience

| | |
|--|--------------|
| University of Delaware: Assistant Professor of Economics | 2015-present |
| Urban Institute, Income and Benefits Policy Center: Research Associate II | 2008 |
| Research Assistant | 2006-2007 |

Fields

Labor Economics, Economic Demography, Economics of Aging

Working Papers

"The Effectiveness of Work-Search Requirements over the Business Cycle:
Evidence for Job Rationing" (*submitted*)

"Changes in Nutrient Intake at Retirement" with Melvin Stephens, Jr. (*submitted*)

"Social Security Offsets and the Labor Force Attachment of the Late-Career Unemployed"

"The Added Worker Effect in Late Career"

"Short-Time Compensation Programs: Implications for Labor Hoarding"

"The Impact of Health on Labor Market Outcomes:
Evidence from MRFIT" with Melvin Stephens, Jr.

Work in Progress

"Directed Search, Occupation Switching, and Unemployment Duration"

Non Peer-reviewed Publications

"Diversity in Retirement Wealth Accumulation," (with Gordon Mermin and Sheila R. Zedlewski),

- The Urban Institute, The Retirement Policy Program, Brief Series, No. 24, December 2008.
- "Boomers at the Bottom: How Will Low Income Boomers Cope with Retirement," (with Barbara Butrica and Eric Toder), AARP Public Policy Institute, #2008-07, April 2008.
- "Children's Savings Accounts: Why Design Matters," (with Barbara Butrica, Adam Carasso, and C. Eugene Steuerle), The Urban Institute, Opportunity and Ownership Project, Report No. 4, May 2008.
- "Rising Health Care Costs Lead Workers to Delay Retirement," (with Richard W. Johnson and Rudolph G. Penner), The Urban Institute, The Retirement Policy Program, Report No. 16, May 2008.
- "Do Out-of-Pocket Health Care Costs Delay Retirement?" (with Richard W. Johnson and Rudolph G. Penner), The Urban Institute, The Retirement Policy Program, Discussion Paper 08-02, March 2008.
- "Meeting the Long-Term Care Needs of the Baby Boomers: How Changing Families Will Affect Paid Helpers and Institutions," (with Richard W. Johnson and Joshua M. Wiener), The Urban Institute, The Retirement Project, Discussion Paper 07-04, May 2007.

Teaching

University of Delaware:

| | |
|--|--------------------------|
| Econometric Methods and Models II (Econ 423) | Fall 2015 |
| Quantitative Microeconomic Theory (Econ 301) | Spring 2016, Spring 2017 |
| Graduate Labor Economics (Econ 880) | Fall 2016 |

Fellowships, Prizes, and Awards

| | |
|--|------|
| Center for Retirement Research at Boston College Dissertation Fellowship | 2012 |
| Population Studies Center Training Fellowship for Aging Studies (Michigan) | 2011 |
| Peter and Julie Borish Fellowship (Michigan) | 2008 |
| Dudley and Louisa Dillard Prize in Economics (Maryland) | 2006 |

Citizenship: U.S.

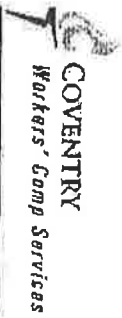
References

Melvin Stephens, Jr.
 Department of Economics
 University of Michigan
 (734) 647-5606
 mstep@umich.edu

Jeffrey Smith
 Department of Economics
 University of Michigan
 (734) 764-5359
 econjeff@umich.edu

John Bound
 Department of Economics
 University of Michigan
 jbound@umich.edu

Kevin Stange
 Ford School of Public Policy
 University of Michigan
 (734) 615-6990
 kstange@unich.edu



LABOR MARKET SUMMARY SHEET

Injured Worker: Magdalena Guardado
Insured/Employer: Roos Foods.
Date of Hearing: 4/27/17 at 9:00 a.m. in Dover, Delaware
Number of Jobs Identified: 17

| EMPLOYER | TITLE | LOCATION | PAY | COMMENTS |
|-----------------------------------|----------------|---------------------|-------|-----------------|
| El Mercadito Cony Store | Clerk | New Castle, De. | \$330 | Light |
| La Consenida Grocery Store | Clerk | New Castle, De. | \$330 | Light |
| Margarita's Restaurant | Crew Kitchen | Wilmington, De. | \$330 | Light |
| Mi Rancho Mexican Grocery | Clerk | Newark, De. | \$330 | Light |
| Newark Farmers Market | Clerk | Newark, De. | \$330 | Light |
| Taqueria Camieria La Estrella | Crew Kitchen | Bear, De. | \$330 | Light |
| Taqueria Los Compadres Restaurant | Crew Kitchen | Newark, De. | \$330 | Light |
| Taqueria Los Primos Restaurant | Crew | Wilmington, De. | \$330 | Light |
| Hanover Foods | Production | Clayton, De. | \$330 | Light |
| Giorgia Fresh | Packer | Avondale, Pa. | \$330 | Sedentary-light |
| Modern Mushrooms | Picker | Avondale, Pa. | \$330 | Light |
| Needham's Mushroom Farms | Picker | West Grove, Pa. | \$330 | Light |
| Embassy Suites | Cleaner | Newark, De. | \$330 | Light |
| Working Solutions Recruitment | Cleaner | Wilmington, De. | \$330 | Light |
| Ioannoni's Bullroasters | Sandwich Maker | New Castle, De. | \$330 | Light |
| Taqueria el Taco Loco | Crew | Wilmington, De. | \$330 | Light |
| Phillips Mushroom Farms | Picker | Kennett Square, Pa. | \$330 | Light |

Average AWW: \$330

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER El Mercadito Convenience Store
 450 Moores Lane
 New Castle, De.

CLAIMANT Magdalena Guardado
DATE

TITLE Store Clerk

WAGE \$330 **HOURS** 40 **EDUCATION:** No high school required
OJT: Training provided.
REQUIREMENTS: N/A

ENVIRONMENT
 Inside

EQUIPMENT
 Food Drinks, merchandise, cigarettes, cash register,
DESCRIPTION

Employee will work in store waiting on customers, may use cash register and provide change, keep store appearance clean, stock shelves

EMPLOYER INFORMATION
 544-5038 Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|--------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |
| | | |

(d) with discretion
 (i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | F/C | di | 0 to 5 | O | O | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | N | N | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | M/F | i | | | | |
| Handling | M/F | I | | | | |
| Fingerling | O/M | d | | | | |
| Feeling | R | | | | | |

Overhead R. R
 May use either upper extremity to perform essential functions and the other as a guide.

Comments _____

 Physician's signature

Ellen Lock CDMS
 Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER La Consentida Grocery Store
1509 N Dupont Hwy
New Castle, De.

CLAIMANT Magdalena Guardado
DATE

TITLE Store Clerk

WAGE \$330
HOURS 40

EDUCATION: No high school required
OJT: Training provided.
REQUIREMENTS: N/A

ENVIRONMENT
Inside

EQUIPMENT
Food Drinks, merchandise, cash register,

DESCRIPTION
Employee will work in grocery market waiting on customers, may use cash register and provide change, keep store appearance clean, stock shelves.

EMPLOYER INFORMATION
322-1110 Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|--------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |
| | | |

(d) with discretion
(i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|-----------------|--------------|-------------|---------------|-------------|--------------|------------------|
| Standing | F/C | di | 0 to 5 | O | O | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | O | O | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | M/F | i | | | | |
| Handling | M/F | I | | | | |
| Fingering | O/M | d | | | | |
| Fceling | R | | | | | |

Overhead R. R
May use either upper extremity to perform essential functions and the other as a guide.

Comments _____

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Margaritas Restaurant
 Old Capitol Trail
 Wilmington, De.

CLAIMANT Magdalena Guardado
DATE

TITLE Kitchen Help

WAGE \$330 **HOURS** 40 **EDUCATION:** No high school required
OJT: Training provided.
REQUIREMENTS: N/A

ENVIRONMENT

Inside

EQUIPMENT

Food Drinks, kitchen equipment, utensils, plates, knives, cutting board, ingredients for menu items

DESCRIPTION

Employee will work in restaurant kitchen preparing food items, cutting vegetables, making sauces, etc

EMPLOYER INFORMATION

. Rosa Owner Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|---------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | (d) with discretion |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | (i) intermittently |
| | (C) Continuously [67-100%] | |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|-----------------|--------------|-------------|---------------|-------------|--------------|------------------|
| Standing | F/C | di | 0 to 5 | C | R | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | O | O | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | F | i | | | | |
| Handling | F | I | | | | |
| Fingering | O/M | d | | | | |
| Feeling | R | | | | | |

Overhead R. R

May use either upper extremity to perform essential functions and the other as a guide.

Comments _____

 Physician's signature

Ellen Lock CDMS
 Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Mi Ranchito Mexican Food and Grocery
13 N. Chapel St.
Newark, De.

CLAIMANT Magdalena Guardado
DATE

TITLE Clerk

WAGE \$330 HOURS 40 EDUCATION: No high school required
OJT: Training provided.
REQUIREMENTS: N/A

ENVIRONMENT

Inside

EQUIPMENT

Food Drinks, merchandise, cash register, kitchen equipment

DESCRIPTION

Employee will work in store/eatery and may stock shelves, serve patrons. Sells groceries as well as clothing, knick knacks, sundries, etc

EMPLOYER INFORMATION

894 0322 Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|---------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | (d) with discretion |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | (i) intermittently |
| | (C) Continuously [67-100%] | |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | M/F | di | 0 to 5 | C | R | N/R |
| Walking | O | di | 6 to 10 | O/M | O | N |
| Sitting | O/M | di | 11 to 20 | O | O | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O | | | | | |
| Reaching | F | i | | | | |
| Handling | F | I | | | | |
| FingerIng | O/M | d | | | | |
| Feeling | R | | | | | |

Overhead R. O
May use either upper extremity to perform essential functions. Chair provided.

Comments

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Newark Farmers Market
Kirkwood Hwy.
Newark, De.

CLAIMANT Magdalena Guardado
DATE

TITLE Clerk

WAGE \$330 HOURS 40 EDUCATION: No high school required
OJT: Training provided.
REQUIREMENTS: N/A

ENVIRONMENT
Inside

EQUIPMENT
Food Drinks, merchandise, Bags

DESCRIPTION
Employee will work in farmers market that sells food, clothing, cell phones, and other novelty items. May work in specific department such as clothing.

EMPLOYER INFORMATION
. Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|--|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY (d) with discretion (i) intermittently |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | F/C | di | 0 to 5 | C | R | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | O | O | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | F | i | | | | |
| Handling | F | l | | | | |
| Fingering | O/M | d | | | | |
| Feeling | R | | | | | |

Overhead R. O
May use either upper extremity to perform essential functions.

Comments _____

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Taqueria Carniceria La Estrella
793 Pulaski Hwy
Bear, De.

CLAIMANT Magdalena Guardado
DATE

TITLE Crew person/kitchen help

WAGE \$330

HOURS 40

EDUCATION:
OJT:
REQUIREMENTS:

No high school required
Training provided,
N/A

ENVIRONMENT
Inside

EQUIPMENT
Food Drinks, kitchen equipment, utensils,

DESCRIPTION:
Employee will work in restaurant kitchen preparing food items, cutting vegetables, making sauces, etc

EMPLOYER INFORMATION
3227070 Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | |
|------------------------|----------------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] |
| | (C) Continuously [67-100%] |

VARIABILITY
(d) with discretion
(i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | F/C | di | 0 to 5 | O | O | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | N | N | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | M/F | i | | | | |
| Handling | M/F | I | | | | |
| Finger/Ing | O/M | d | | | | |
| Feeling | O | | | | | |

Overhead R. R
May use either upper extremity to perform essential functions and the other as a guide.

Comments _____

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Taqueria Los Compadres Restaurant
2675 Kirkwood Hwy
Newark, De.

CLAIMANT Magdalena Guardado
DATE

TITLE Crew person/kitchen help

WAGE
\$330

HOURS
40

EDUCATION:
OJT:
REQUIREMENTS:

No high school required
Training provided.
N/A

ENVIRONMENT
Inside

EQUIPMENT

Food Drinks, merchandise, cigarettes, cash register,

DESCRIPTION

Employee will work in store waiting on customers, may use cash register and provide change, keep store appearance clean, stock shelves

EMPLOYER INFORMATION

. 544-5038 Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|--------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |
| | | |

(d) with discretion
(i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|-----------------|--------------|-------------|---------------|-------------|--------------|------------------|
| Standing | F/C | di | 0 to 5 | O | O | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | N | N | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | M/F | i | | | | |
| Handling | M/F | I | | | | |
| Fingering | O/M | d | | | | |
| Feelling | R | | | | | |

Overhead R. R

May use either upper extremity to perform essential functions and the other as a guide.

Comments

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Taqueria Los Primos Restaurant
3322 Old Capitol Trail
Wilmington, Dc.

CLAIMANT Magdalena Guardado
DATE

TITLE Crew Member

WAGE
\$330

HOURS
40

EDUCATION:
OJT:
REQUIREMENTS:

No high school required
Training provided.
N/A

ENVIRONMENT
Inside

EQUIPMENT

Food Drinks, kitchen equipment, utensils, napkins, cups

DESCRIPTION

Employee will work in restaurant either preparing food items, seating patrons, maintaining cleanliness of tables, or serving.

EMPLOYER INFORMATION

Hires Non English Speaking

PHYSICAL REQUIREMENTS

(N) Never [0%]
(I) Incidentally [<1%]
(R) Rarely [1-5%]

(O) Occasionally [5-20%]
(M) Moderately [21-33%]
(F) Frequently [34-66%]
(C) Continuously [67-100%]

VARIABILITY

(d) with discretion
(i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | F/C | di | 0 to 5 | C | R | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | O | O | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | F | i | | | | |
| Handling | F | I | | | | |
| Fingering | O/M | d | | | | |
| Feeling | R | | | | | |

Overhead R. R

May use either upper extremity to perform essential functions.

Comments _____

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Hanover Foods
 1-, 99 Duck Creek Rd, Clayton, DE 19938
 Phone: (302) 653-9281

CLAIMANT Magdalena Guardado

DATE

TITLE Production

WAGE \$330 HOURS 40 EDUCATION: No high school required
 OJT: Training provided.
 REQUIREMENTS: N/A

ENVIRONMENT

Inside

EQUIPMENT

Vegetables, cans, bags machinery

DESCRIPTION

Employee will work in Production of food products including fresh and frozen vegetables for canning and bagging.

EMPLOYER INFORMATION

Hires Non English Speaking Independent food processor grows, freezes and cans vegetables and beans, and produces other items. Includes history, products, brands, outlets and recipes.

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|--|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY (d) with discretion (i) intermittently |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | F/C | di | 0 to 5 | O | O | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | N | N | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | M/F | i | | | | |
| Handling | M/F | I | | | | |
| Fingering | O/M | d | | | | |
| Feeling | O | | | | | |

Overhead R. R

May use either upper extremity to perform essential functions and the other as a guide.

Comments

Physician's signature

Ellen Lock CDMS
 Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Giorgio Fresh
1320 Newark Rd
Avondale, Pa.

CLAIMANT Magdalena Guardado
DATE

TITLE Mushroom Packer

WAGE \$330
HOURS 40

EDUCATION: No high school required
OJT: Training provided.
REQUIREMENTS: overtime available

ENVIRONMENT
Inside

EQUIPMENT
Mushrooms, boxes, packaging materials, gloves, wrap

DESCRIPTION
Employee will pack mushrooms of all types by placing into boxes and wrapping.

EMPLOYER INFORMATION
Marco Lopez Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|-----------------------------|----------------------------|---------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [$<1\%$] | (M) Moderately [21-33%] | (d) with discretion |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | (i) intermittently |
| | (C) Continuously [67-100%] | |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | M/F | di | 0 to 5 | C | R | N/R |
| Walking | O | di | 6 to 10 | O/M | O | N |
| Sitting | M/F | di | 11 to 20 | N | N | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O | | | | | |
| Reaching | F/C | i | | | | |
| Handling | C | l | | | | |
| Fingering | O | d | | | | |
| Feeling | F | | | | | |

Overhead R. N
May use either upper extremity to perform essential functions.

Comments _____

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Modern Mushroom Farms
1320 Newark Rd
Avondale, Pa.

CLAIMANT Magdalena Guardado
DATE

TITLE Mushroom Harvester

WAGE \$330 Piece meal work
HOURS 40

EDUCATION:
OJT:

No high school required
Training provided.

REQUIREMENTS:

Reliable, overtime available

ENVIRONMENT
Inside /Outside

EQUIPMENT
Mushrooms, boxes, soil, packaging materials, gloves, knives, scale

DESCRIPTION
Employee will harvest mushrooms of all types by selecting mature mushrooms, cutting stems, and placing in boxes for shipment.

EMPLOYER INFORMATION
6102683535 Jacqueline Lugo HR Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|---------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |
| | | |
| | | (d) with discretion |
| | | (i) intermittently |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|-----------------|--------------|-------------|---------------|-------------|--------------|------------------|
| Standing | M/F | di | 0 to 5 | C | R | N/R |
| Walking | O | di | 6 to 10 | O/M | O | N |
| Sitting | R/O | di | 11 to 20 | R | R | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | R | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | N | | | | | |
| Reaching | F | i | | | | |
| Handling | C | I | | | | |
| Fingering | N | d | | | | |
| Feeling | F | | | | | |

Overhead R. R
May use either upper extremity to perform essential functions.

Comments _____

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Needham's Mushroom Farms
155 Valley Rd
West Grove, Pa.

CLAIMANT Magdalena Guardado
DATE

TITLE Mushroom Harvester

WAGE \$330 Piece meal work
HOURS 40

EDUCATION: No high school required
OJT: Training provided.

REQUIREMENTS: Reliable, overtime available

ENVIRONMENT
Inside /Outside

EQUIPMENT
Mushrooms, boxes, soil, packaging materials, gloves, knives, scale

DESCRIPTION
Employee will harvest mushrooms of all types by selecting mature mushrooms, cutting stems, and placing in boxes for shipment.

EMPLOYER INFORMATION
. 869-9735 Hires Non English Speaking

PHYSICAL REQUIREMENTS

(N) Never [0%] (O) Occasionally [5-20%]
(I) Incidentally [<1%] (M) Moderately [21-33%]
(R) Rarely [1-5%] (F) Frequently [34-66%]
(C) Continuously [67-100%]

VARIABILITY
(d) with discretion
(i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | M/F | di | 0 to 5 | C | R | N/R |
| Walking | O | di | 6 to 10 | O/M | O | N |
| Sitting | R/O | di | 11 to 20 | R | R | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | R | | 51 + | N | N | N |
| Knceling | N | | | | | |
| Twisting | N | | | | | |
| Reaching | F | i | | | | |
| Handling | C | l | | | | |
| Fingering | N | d | | | | |
| Feeling | F | | | | | |

Overhead R. R
May use either upper extremity to perform essential functions.

Comments _____

Physician's signature _____

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER
Embassy Suites Hotel
654 South College Avenue
Newark, DE 19713

CLAIMANT Magdalena Guardado

PHONE: (302) 737-0990
DATE: 2/5/17

Position:
 Housekeeper

WAGE
 \$330

HOURS
 Hours Vary

EDUCATION:
OJT:
REQUIREMENTS:

No specific education required
 OJT
 Previous experience a plus, but not required
 Work with a diverse, dynamic group of
 associates! Must be friendly with an out-
 going, can-do attitude. Must be able to work a
 flexible schedule, which includes weekends
 and holidays.

ENVIRONMENT

Inside

EQUIPMENT

Cleaning cart, cleaning supplies, toiletries

DESCRIPTION

Clean guest rooms as assigned, ensuring the hotel's established standards of cleanliness. Responsible for reporting any maintenance deficiencies and handling guest requests or complaints. Ensures the confidentiality and security of all guest rooms.

EMPLOYER INFORMATION

E.O.E. Benefits provided. Hires Spanish speaking individuals.

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|--------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |
| | | |

(d) with discretion
 (i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|-----------------|--------------|-------------|---------------|-------------|--------------|------------------|
| Standing | O | dii | 0 to 5 | O | O | O |
| Walking | M | di | 6 TO 10 | O | O | O |
| Sitting | O | di | 11 to 20 | O | O | R |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | O | di | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | I | di | | | | |
| Twisting | O | di | | | | |
| Reaching | O | di | | | | |
| Handling | F | di | | | | |
| Fingering | F | di | | | | |
| Feeling | R | | | | | |

Overhead R. N di

* Alternating sit, stand, and walk.

Vacuum/Mop weighs less than 20 lbs.

Ellen Lock CDMS

Signature _____ Date _____

Senior Vocational Case Manager

Approved _____ Not Approved _____
Physician's Signature _____ Date _____
Comments _____ Date _____

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER
Working Solutions Recruitment
Wilmington, De.
Rick Castillo

CLAIMANT Magdalena Guardado

PHONE: 210-504-3560
DATE: 2/13/17

Position:
Housekeeper

WAGE S330 HOURS Hours Vary EDUCATION: No specific education required
OJT: OJT
REQUIREMENTS:

ENVIRONMENT
Inside

EQUIPMENT
Cleaning cart, cleaning supplies, Mop vacuum

DESCRIPTION
Cleaning homes, offices, medical establishments, and other locations.

EMPLOYER INFORMATION
E.O.E. Benefits provided. Hires Spanish speaking individuals. AL Correo

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|---------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | (d) with discretion |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | (i) intermittently |
| | (C) Continuously [67-100%] | |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|-------------|-------|------|----------|------|-------|-----------|
| Standing | O | dii | 0 to 5 | O | O | O |
| Walking | M | di | 6 TO 10 | O | O | O |
| Sitting | O | di | 11 to 20 | O | O | R |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | O | di | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | I | di | | | | |
| Twisting | O | di | | | | |
| Reaching | O | di | | | | |
| Handling | F | di | | | | |
| Fingerling | F | di | | | | |
| Feeling | R | | | | | |
| Overhead R. | N | di | | | | |

* Alternating sit, stand, and walk.
Vacuum/Mop weighs less than 20 lbs.

Ellen Lock CDMS
Senior Vocational Case Manager

Signature _____ Date _____

Approved _____ Not Approved _____

Physician's Signature _____ Date _____

Comments _____ Date _____

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Ioannoni's specialty sandwiches
 Bullroasters
 624 E Basin Rd, Wilmington Manor, DE 19720

CLAIMANT Magdalena Guardado

DATE:
 2/22/17

TITLE Crew person/kitchen help/sandwich maker

WAGE \$330 **HOURS** 40 **EDUCATION:** No high school required
OJT: Training provided.
REQUIREMENTS: 18 yrs old

ENVIRONMENT
 Inside

EQUIPMENT
 Grill sandwich makings, utensils,

DESCRIPTION
 Employee will work in restaurant kitchen preparing food items, making sandwiches, cheese steaks, etc

EMPLOYER INFORMATION
 3227070 Hires Non English Speaking

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|---------------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | (d) with discretion |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | (i) intermittently |
| | (C) Continuously [67-100%] | |

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|-----------------|--------------|-------------|---------------|-------------|--------------|------------------|
| Standing | F/C | di | 0 to 5 | O | O | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | N | N | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | M/F | i | | | | |
| Handling | M/F | I | | | | |
| Fingering | O/M | d | | | | |
| Feeling | O | | | | | |

Overhead R. R
 May use either upper extremity to perform essential functions and the other as a guide.

Comments _____

 Physician's signature

Ellen Lock CDMS
 Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Taqueria el Taco Loco
800 W Newport Pike
Wilm., De.

CLAIMANT Magdalcna Guardado
DATE

TITLE Crew person/kitchen help

WAGE \$330 HOURS 40 EDUCATION: No high school required
OJT: Training provided.
REQUIREMENTS: N/A

ENVIRONMENT

Inside

EQUIPMENT

Food Drinks, kitchen equipment, utensils,

DESCRIPTION

Employee will work in restaurant kitchen preparing food items

EMPLOYER INFORMATION:

Hires Non English Speaking 999-7595

PHYSICAL REQUIREMENTS

| | | |
|------------------------|----------------------------|-------------|
| (N) Never [0%] | (O) Occasionally [5-20%] | VARIABILITY |
| (I) Incidentally [<1%] | (M) Moderately [21-33%] | |
| (R) Rarely [1-5%] | (F) Frequently [34-66%] | |
| | (C) Continuously [67-100%] | |
| | | |

(d) with discretion
(i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | F/C | di | 0 to 5 | O | O | N/R |
| Walking | O/M | di | 6 to 10 | O/M | O | N |
| Sitting | R | di | 11 to 20 | N | N | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | N | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | O/M | | | | | |
| Reaching | M/F | i | | | | |
| Handling | M/F | l | | | | |
| Fingerling | O/M | d | | | | |
| Feeling | O | | | | | |

Overhead R. R
May use either upper extremity to perform essential functions and the other as a guide.

Comments

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

COVENTRY HEALTH CARE WORKERS COMPENSATION SERVICES

EMPLOYER Phillips Mushroom Farms
1011 Kaolin Rd, Kennett Square, PA 19348
Phone: (610) 925-0520

CLAIMANT Magdalena Guardado
DATE

TITLE Mushroom Harvester

WAGE \$330 Piece meal
work
HOURS 40

EDUCATION: No high school required
OJT: Training provided.

REQUIREMENTS: Reliable, overtime available

ENVIRONMENT
Inside /Outside

EQUIPMENT
Mushrooms, boxes, soil, packaging materials, gloves, knives, scale

DESCRIPTION
Employee will harvest mushrooms of all types by selecting mature mushrooms, cutting stems, and placing in boxes for shipment.

EMPLOYER INFORMATION
Hires Non English Speaking

PHYSICAL REQUIREMENTS

(N) Never [0%] (O) Occasionally [5-20%]
(I) Incidentally [<1%] (M) Moderately [21-33%]
(R) Rarely [1-5%] (F) Frequently [34-66%]
(C) Continuously [67-100%]

VARIABILITY
(d) with discretion
(i) intermittently

| CAPACITY | FREQ. | VAR. | POUNDS | LIFT | CARRY | PUSH/PULL |
|------------|-------|------|----------|------|-------|-----------|
| Standing | M/F | di | 0 to 5 | C | R | N/R |
| Walking | O | di | 6 to 10 | O/M | O | N |
| Sitting | R/O | di | 11 to 20 | R | R | N |
| Driving | N | | 21 to 35 | N | N | N |
| Bend/Squat | R | | 36 to 50 | N | N | N |
| Climbing | R | | 51 + | N | N | N |
| Kneeling | N | | | | | |
| Twisting | N | | | | | |
| Reaching | F | i | | | | |
| Handling | C | I | | | | |
| Fingering | N | d | | | | |
| Feeling | F | | | | | |

Overhead R. R.
May use either upper extremity to perform essential functions.

Comments

Physician's signature

Ellen Lock CDMS
Vocational Case Manager

REPORT ON THE DISTRIBUTION OF UNAUTHORIZED IMMIGRANTS ACROSS JOBS IN THE DELAWARE LABOR MARKET

Desmond Toohey, Ph.D.*

March 27, 2017

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*Assistant Professor of Economics, Alfred Lerner College of Business and Economics, University of Delaware. dtoohey@udel.edu, 420 Purnell Hall, Newark DE 19716. Large portions of this report, including the empirical results, appear in related documents describing unauthorized immigrants in the Delaware labor market.

1 Introduction

This report provides estimates of the prevalence of unauthorized immigrants across different occupations and industries in Delaware. It interprets the relevant labor market survey in the context of these estimates, indicating the estimated number of unauthorized immigrants in the kinds of jobs surveyed. I conclude that thousands of unauthorized immigrants are employed in Delaware in jobs similar to those in the survey. I reach this conclusion using methods that represent the state of the art in studying the unauthorized immigrant population. I generate the estimates in this report with data from the 2015 American Community Survey (ACS) five-year sample, the 2004 and 2008 panels of the Survey of Income and Program Participation (SIPP), and administrative data published by various federal agencies. The results show that there are some 20 to 25 thousand unauthorized immigrants working in Delaware. These workers are most concentrated in “production, transportation, material moving” occupations and service occupations. They are dispersed across a number of industries including construction, manufacturing, retail trade, and the broader industry category containing food services.

I estimate the prevalence and distribution of unauthorized immigrants across jobs using a two-step procedure. The first step estimates the total number of unauthorized immigrants in Delaware. The second step uses the SIPP and a multiple imputation method to identify a sample of ACS respondents who are likely unauthorized immigrants and are representative of the total population of estimated in the first step. Analysis of this sample provides a description of unauthorized immigrants participating in the Delaware labor market. The results are consistent with existing estimates from multiple other sources. This report proceeds by describing the methods used in estimation. It then briefly outlines the estimated distribution of unauthorized immigrants across job types before applying these estimates to an analysis of the labor market survey. The data sources are described in an appendix.

2 Methods

The unauthorized immigrant population in the US has long been difficult to study, but recent advances in data and methodology allow researchers to produce reliable estimates of this population's characteristics. Two steps are required to generate the results presented in this report. The first step uses a residual methodology to estimate the size of the unauthorized immigrant population by state. The second step identifies a sample of likely-unauthorized immigrants in survey microdata who are representative of the total population described in the first step. This sample is used to further study the unauthorized immigrant population at the level of occupation and industry.

2.1 Estimation of the Unauthorized Immigrant Population Size

The first fundamental question surrounding the population of unauthorized immigrants concerns its size. This report employs a residual methodology in which the unauthorized immigrant population is measured as the part of the foreign-born population that is not accounted for by legal immigration. Residual procedures of this type have been used in studying the unauthorized immigrant population since at least Warren and Passel (1987). These methods are employed regularly in reports generated by the Department of Homeland Security (DHS) and Pew Research Center (see, e.g., Baker and Rytina 2013; Passel and Cohn 2014).¹

The residual estimation procedure is a multi-step process that first involves estimating the number of foreign-born individuals, in this case using the ACS. Among these foreign-born respondents, some are assumed to be legally resident or naturalized, including those who immigrated prior to 1980² and those who have been resident for more than three years and are married to natural born citizens. Among the remaining population, the goal is to

¹A related but more complex procedure by Warren and Warren (2013) combines residual estimates with estimated flows of both legal and unauthorized immigrants. This technique yields estimates that are particularly reliable for studying changes in the population over time, but that is not the focus of this report. Regardless, the overall conclusions, including point-in-time state-level estimates, appear similar to those reached using standard residual methods.

²These individuals were likely eligible for legal status under the Immigration Reform and Control Act of 1986 (IRCA).

estimate the number that are likely legal. The legally-resident population is made up of individuals given Lawful Permanent Resident (LPR) status (a “green card”), refugees and asylees who have not yet adjusted to LPR status, and nonimmigrant residents including students, temporary workers, diplomats, and their families.

The number of newly-assigned lawful permanent residents by state is published by DHS and, formerly, the Immigration and Naturalization Service (INS). These numbers are readily available going back to 1988. National totals are available before that year and are assumed to be distributed across states in the distribution observed in 1988. LPR individuals are assumed to remain in the country and living using the emigration and mortality rates described by Warren and Warren (2013). Refugees-by-state are reported annually by the Office of Refugee Resettlement (ORR) and are assumed to remain as refugees for 2.2 years before becoming lawful permanent residents and appearing in the number of adjustments to LPR status. The number of asylees (a smaller group than refugees) is only observed in DHS reports at the national level but is assumed to be distributed yearly across states in the same way as refugees. Asylees are assumed to remain in status for 3.9 years before becoming LPRs.³ Refugees and asylees are assumed to face mortality at the same rate as new LPRs but are assumed to not emigrate. It should be noted that the number of refugee resettlements to Delaware is extremely small, even accounting for the state’s population, so all of these assumptions have limited impact on the Delaware estimates.

Nonimmigrant admissions by state are reported by the DHS from I-94 form data. These admissions are assumed to remain legally in the country for the average durations reported by Grieco (2005), all of which are less than one year.⁴ These assumptions yield an estimated number of legally-resident foreign-born individuals who entered the country after 1980. Subtracting these legally-resident individuals from the ACS estimate of all post-1980 immigrants

³The average durations for refugees and asylees are drawn from Baker and Rytina (2013) who apply them to a residual procedure in a similar way.

⁴There is very limited data on the duration of nonimmigrant stays because their departures are poorly measured. More recent estimates of the size of this population appear in Baker (2016), but their durations of stay are not provided.

yields a national estimate of 10.7 million unauthorized immigrants in 2015 and a Delaware estimate of approximately 25,000.⁵ After applying commonly-assumed ACS undercount rates for unauthorized immigrants of just over 10 percent (Warren and Warren 2013), these numbers are inflated to 11.8 million nationally and 28,000 in Delaware. Estimates produced in the next section indicate that about 80 percent of this population, or 20,000 to 25,000 unauthorized immigrants, is employed in the state.

The national estimate of 11.8 million is marginally higher than, but broadly in line with, the recent national total provided in Passel and Cohn (2016) (11.1 million) and that posted online by the Migration Policy Institute (11 million). It is also very near the 11.4 million estimated by Baker and Rytina (2013) for 2012, especially accounting for the years that have passed since then. The Delaware total can be compared to the 21,000 estimated by Warren and Warren (2013) for 2010, the 23,000 estimated by the Migration policy institute for 2014,⁶ and the 25,000 estimated by Passel and Cohn (2016) for 2014. While 28,000 is larger than any of these, it is also the most recent estimate. Given that there is some imprecision associated with any of these estimates, there is even less reason to think that there are inconsistencies across them. Passel and Cohn (2016) suggest that their estimate has a range of plus-or-minus 5,000, indicating that all of these estimates are about the same from their perspective. More importantly, the results found in the next subsection can be adjusted to match any of these totals without having meaningful effects on the qualitative results.

⁵As in the existing literature, I round these numbers to avoid the appearance of unwarranted precision in the estimates.

⁶These estimates do not seem to appear in any particular published report, but are available at <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/DE> and are drawn from "Migration Policy Institute (MPI) analysis of U.S. Census Bureau data from the 2014 American Community Survey (ACS), 2010-2014 ACS pooled, and the 2008 Survey of Income and Program Participation (SIPP) by James Bachmeier of Temple University and Jennifer Van Hook of The Pennsylvania State University, Population Research Institute."

2.2 Imputation of Unauthorized Immigrant Status in ACS Microdata

If one is interested in more than the total number of unauthorized immigrants, it is necessary to have more disaggregated data than can be created using the methods described in the previous subsection. The common method for acquiring such disaggregated data is to apply some procedure assigning immigration status to survey respondents. An early example of this methodology appears in Passel and Clark (1998), in which the authors used a series of logical rules to assign immigration status to respondents. For example, pre-1980 immigrants were assigned as legal under the Immigration Reform and Control Act of 1986 (IRCA), immigrants arriving from countries with high refugee inflows in particular years were assigned as legal refugees, and certain occupations were assigned as definitely legal (e.g., law enforcement professions). The remaining foreign-born population was identified as potentially-illegal and assigned as unauthorized or not using probabilistic imputation procedures. The imputations were checked to match internal consistency within families and aggregate estimates generated with residual methods. The probabilistic imputations were a function of occupation and other demographics based on the results of a survey of formerly-unauthorized immigrants who were legalized in 1986 under IRCA. More recent estimates of the unauthorized population by Passel and coauthors appear to employ a similar methodology, although the details are generally not as clear. These types of estimates are widely cited in policy circles.

The limitations of these methods are highlighted in recent research by Van Hook et al. (2015) that indicates these estimates are difficult to replicate and statistically biased. Van Hook et al. (2015) show that more statistically-based imputation techniques yield greater reliability. Therefore, I use a multiple imputation technique highlighted by these authors and used in other reports (e.g., Capps et al. 2013). This technique exploits the availability of observed legal immigration status in a relatively small dataset (the SIPP) to impute immigration status in a larger dataset that otherwise lacks it (the ACS). The imputation procedure ensures that the statistical relationship with other observed variables is maintained across both datasets in the imputation. In practice, I impute 10 replications of unauthorized status in

the ACS using a logit model for legal status in the SIPP. The logit is a function of region of birth, years in the US, English-speaking proficiency, a quadratic in age, sex, marital status, parental status, household size, homeownership, state of residence, educational attainment, broad occupation categories, and broad industry categories. Individuals are then also assigned as legal if they are within two years of arrival from a likely-refugee country-year arrival or if they are likely a nonimmigrant as identified in Passel and Clark (1998).⁷ My work satisfies the main condition for validity emphasized by Van Hook et al. (2015): the variables of interest, which are state of residence, occupation, and industry, appear in both datasets and are used as covariates in the imputation procedure.

Legal status in the SIPP is elucidated with two questions asked of foreign-born respondents. The first asks if they had lawful permanent resident status upon arrival in the US. The second asks those who did not if they have acquired this status since arrival. Respondents whose status was not LPR on arrival and whose status has not changed are taken to be unauthorized immigrants. As these questions are less direct than a straightforward question about legality, green cards, or naturalization, they are more likely to induce truthful response. The validity of SIPP responses is examined by Bachmeier, Van Hook, and Bean (2014), who provide evidence that data derived from them are consistent with other external estimates of the unauthorized population.

There is one potential concern with using these methods to draw inference about the current unauthorized immigrant population in Delaware, but it is unlikely to have meaningful effects on the results. It is possible that the statistical relationship between legal status and the observed covariates has changed between the SIPP panels and the ACS surveys that are the target of imputation. However, there is no specific reason to believe this is the case. Further, the assumption that the statistical relationships are constant is much more likely to hold in this case than if legality is inferred from an older source like a survey of individuals legalized by IRCA in the 1980s, which is the implicit assumption made in some

⁷These changes are applied independently of the imputation procedure because they represent statuses that would not be identified by the SIPP imputation.

older estimates.

3 Estimated Prevalence of Unauthorized Immigrants

Two major features of jobs are discussed in this report: occupation and industry. Occupation describes the tasks performed by an employee in the completion of their job. Industry describes the business in which the employer operates. For example, aircraft manufacturing and software publishing are industries: they describe the operations completed by firms. A human resources manager could work for firms in either one of these industries: human resources management describes an occupation.⁸ I provide estimates of the unauthorized worker distribution in Delaware across five broad occupation groups and seven broad industry groups that are defined by the Census Bureau.⁹ All of the jobs in the relevant labor market survey fall into one of these occupation groups and one of these industry groups. Additional industry groups appear in the data, but they are too small for generating estimates and are not relevant for the labor market survey regardless. The occupation estimates appear in Table I and the industry estimates appear in Table II.

4 Analysis of Labor Market Survey

This section discusses each of the positions appearing in the labor market survey, identifying the relevant occupation and industry groups and the number of unauthorized immigrants estimated to be working in each. In every case, it is found that many unauthorized immigrants are employed in the occupations and industries of the surveyed jobs. In general, there are several thousand unauthorized immigrants in each. The smallest occupational group (sales and office) is still estimated to employ some 1,000 unauthorized immigrants. In the analysis that follows, jobs that would clearly fall into the same category of occupation and industry at the highest level of detail are discussed together. The conclusions are summarized in Table

⁸Unless this management was outsourced to an external consulting or management firm that performed HR management for multiple clients.

⁹These are coded in the 2015 ACS according to 2010 Census occupation classifications and 2012 Census industry codes. At the level of aggregation examined in this report, the codings are equivalent in the 2004 and 2008 SIPP panels.

III.

4.1 El Mercadito Convenience Store, Clerk

The position at El Mercadito Convenience Store involves waiting on customers, working a cash register, stocking shelves, and performing cleaning tasks. The first two tasks clearly fall into the specific occupation categories of either “cashiers” or “counter and rental clerks.” Other aspects of the job may be associated with “stock clerks and order fillers.” Regardless, these are all part of the “sales and office” occupation category, in which approximately 1,000 unauthorized immigrants are employed in Delaware. As a convenience store, El Mercadito is located in the retail trade industry, which employs 4,000 unauthorized immigrants in Delaware.

4.2 La Consentida Grocery Store, Clerk

Overall, the job characteristics at La Consentida are very similar to those at El Mercadito. The occupation is that of a “cashier” or “stock clerk” and is a sales position in the “sales and office” occupation category with its 1,000 unauthorized immigrants employed in Delaware. La Consentida has aspects of both a grocery store and, because it also has a focus on serving prepared food to be immediately consumed, a food service operation. Depending on the relative importance of these two parts of the business, it could be coded as being in either the retail trade industry or the “arts, entertainment, and recreation, and accommodation, and food services” industry. The conclusion is the same regardless, both of these industries employ some 4,000 unauthorized immigrants.

4.3 Margarita’s Restaurant, Crew Kitchen; Taqueria Carniceria La Estrella, Crew Kitchen; Ioannoni’s Bullroaster’s, Sandwich Maker; Taqueria el Taco Loco, Crew

All four of these positions specifically describe work in a kitchen at a food service establishment. There is little ambiguity here as they do not imply customer interaction or retail. The specific occupations are “food preparation,” a subset of service occupations. These occupa-

tion account for approximately 5,000 unauthorized immigrant jobs in Delaware. The “arts, entertainment, and recreation, and accommodation, and food services” industry employs 4,000 of these workers.

4.4 Mi Ranchito Mexican Grocery, Clerk

The overall characteristics of the job at Mi Ranchito are similar to the characteristics of the job at La Consentida. The establishment’s online presence appears to lean slightly more in the direction of food service and delivery, but straightforward retail and clerk operations are in play as well. Overall, a conservative assumption is that the job is a sales occupation and the appropriate industry is retail trade. As with El Mercadito and La Consentida, these categories represent 1,000 employed unauthorized immigrants and 4,000 employed unauthorized immigrants, respectively.

4.5 Newark Farmer’s Market, Clerk

The Farmer’s Market as described is a retail trade operation. These are associated with some 4,000 employed unauthorized immigrants. In general, such a clerk position would fall into a the “sales and related” category under sales and office occupations (1,000 employed unauthorized immigrants). The specifics here seem to cover multiple types of activities, so it is possible this position would be in a different occupational category.

4.6 Taqueria Los Compadres Restaurant, Crew Kitchen; Taqueria Los Primos Restaurant, Crew

The job titles for these two positions are similar to those discussed earlier restaurant crew subsection. However, both of these jobs are more general, with the tasks describing customer interaction and establishment cleaning. A brief study of both establishments’ online presences suggests that they are slanted toward food service in comparison to other retail activities. Therefore, it is reasonable to conclude that the jobs are service occupations (5,000 employed unauthorized immigrants) once again in the broader category containing food service (4,000 total unauthorized immigrants).

4.7 Hanover Foods, Production; Giorgio Fresh, Packer

The mushroom-packing job at Giorgio Fresh is in the occupation category of “packers and packagers, hand” under the broader umbrella of production, transportation, and material moving, which employs 8,000 unauthorized immigrants in Delaware. This type of packaging is a part of the food manufacturing industry. The entire manufacturing industry, of which food manufacturing is a subset, employs 5,000 unauthorized immigrants in Delaware. While the exact product and task differ slightly for Hanover Foods, the occupation and industry categories remain the same. For the purposes of this analysis, the Giorgio Fresh job located in Pennsylvania is analyzed as if it were located in the nearby and closely-integrated Delaware labor market.

4.8 Modern Mushrooms, Picker; Needham’s Mushroom Farms, Picker; Phillips Mushroom Farms, Picker

The three mushroom-picking positions are quite similar to the previously-discussed packing jobs. They clearly also include picking responsibilities, but this simply makes them “picking and packing” jobs that fall into the same “packers and packagers, hand” category. Therefore, these are production occupations, represented by 8,000 employed unauthorized immigrants in Delaware. The firms are food manufacturing firms in the manufacturing industry. This industry employs 5,000 unauthorized immigrants in Delaware. All three of these establishments are located in neighboring Chester County, Pennsylvania. Given the level of economic interaction and labor market integration between this area and Delaware, it is reasonable to conclude that unauthorized immigrants are similarly represented in these jobs.

4.9 Embassy Suites, Housekeeper

Housekeeping and cleaning workers in hotels are in the “maids and housekeeping cleaners” occupational category, which is a subset of service occupations. As previously noted, 5,000 unauthorized workers are employed in these occupations in Delaware. As a hotel, Embassy Suites is in the “arts, entertainment, and recreation, and accommodation, and food services”

industry, which employs 4,000 unauthorized immigrants.

4.10 Working Solutions Recruitment, Housekeeper

The described position is in the “maids and housekeeping cleaners” occupational category of service occupations, employing 5,000 unauthorized workers. The industry for this firm is somewhat less clear. To the extent that it provides cleaning services to buildings and dwellings, it falls into the “professional, scientific, and management, and administrative, and waste management services.” This industry employs an estimated 2,000 unauthorized immigrants.

5 Conclusion

A review of the labor market survey finds that thousands of unauthorized immigrants are employed in Delaware in each of the occupations and industries that appear. The same can be said for the jobs appearing in the highly-integrated labor market of southeastern Pennsylvania. Service, production, and sales occupations make up all of the jobs in the survey. These account for an estimated 14,000 employed unauthorized immigrants in Delaware. The four industry groups in the survey collectively employ an estimated 15,000 unauthorized immigrants. In short, the unauthorized immigrant population is well-represented in the surveyed positions.

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Table I
Delaware Distribution of Unauthorized Immigrants Across Occupations

| Occupation | Number |
|--|--------|
| Management, Business, Science and Arts | 4000 |
| Service | 5000 |
| Sales and Office | 1000 |
| Natural Resources, Construction, and Maintenance | 4000 |
| Production, Transportation, Material Moving | 8000 |

Notes: Estimates are generated from ACS data using a multiple imputation procedure and the SIPP as described in the text. Total numbers are deflated approximately 30 percent to align with the total number of unauthorized immigrants estimated in this paper. If an alternate total estimate is preferred, estimates can be further adjusted multiplicatively. Estimates are rounded independently. Estimates may not sum to logical totals due to this rounding.

Table II
Delaware Distribution of Unauthorized Immigrants Across Industries

| Industry | Number |
|--|--------|
| Construction | 4000 |
| Manufacturing | 5000 |
| Retail Trade | 4000 |
| Finance, Insurance, Real Estate, Rental, Leasing | <1000 |
| Professional, Scientific, Mgmt, Administrative, and Waste Mgmt | 2000 |
| Educational Services, Health Care Social Assistance | 2000 |
| Arts, Entertainment, Recreation, Accommodation, Food Services | 4000 |

Notes: Estimates are generated from ACS data using a multiple imputation procedure and the SIPP as described in the text. Total numbers are deflated approximately 30 percent to align with the total number of unauthorized immigrants estimated in this paper. If an alternate total estimate is preferred, estimates can be further adjusted multiplicatively. Estimates are rounded independently. Estimates may not sum to logical totals due to this rounding. A number of industries: agriculture, wholesale trade, transportation and warehousing and utilities, information, other services, and public administration have estimates less than 500 and are not reported.

Table III
Labor Market Survey Summary

| Employer | Title | Occupation | Number | | Industry | Number | |
|-----------------------------------|----------------|-----------------|---------|---------|------------------------|---------|---------|
| | | | Unauth. | Unauth. | | Unauth. | Unauth. |
| El Mercadito Conv Store | Clerk | Sales & Office | 1000 | | Retail Trade | 4000 | |
| La Consentida Grocery Store | Clerk | Sales & Office | 1000 | | Retail Trade | 4000 | |
| Margarita's Restaurant | Crew Kitchen | Service | 5000 | | Arts, ..., Food Serv. | 4000 | |
| Mi Rancho Mexican Grocery | Clerk | Sales & Office | 1000 | | Retail Trade | 4000 | |
| Newark Farmer's Market | Clerk | Sales & Office | 1000 | | Retail Trade | 4000 | |
| Taqueria Carniceria La Estrella | Crew Kitchen | Service | 5000 | | Arts, ..., Food Serv. | 4000 | |
| Taqueria Los Compadres Restaurant | Crew Kitchen | Service | 5000 | | Arts, ..., Food Serv. | 4000 | |
| Taqueria Los Primos Restaurant | Crew | Service | 5000 | | Arts, ..., Food Serv. | 4000 | |
| Hanover Foods | Production | Production, ... | 8000 | | Manufacturing | 5000 | |
| Giorgio Fresh | Packer | Production, ... | 8000 | | Manufacturing | 5000 | |
| Modern Mushroom | Picker | Production, ... | 8000 | | Manufacturing | 5000 | |
| Needham's Mushroom Farms | Picker | Production, ... | 8000 | | Manufacturing | 5000 | |
| Embassy Suites | Housekeeper | Service | 5000 | | Arts, ..., Food Serv. | 4000 | |
| Working Solutions Recruitment | Housekeeper | Service | 5000 | | Prof., ..., Waste Mgmt | 2000 | |
| Ioannoni's Bullroasters | Sandwich Maker | Service | 5000 | | Arts, ..., Food Serv. | 4000 | |
| Taqueria el Taco Loco | Crew | Service | 5000 | | Arts, ..., Food Serv. | 4000 | |
| Phillips Mushroom Farms | Picker | Production, ... | 8000 | | Manufacturing | 5000 | |

A Data Appendix

This appendix briefly lays out the sources of data that are used in the development of this report's estimates. The methods themselves are outlined in Section 2.

A.1 American Community Survey (ACS)

The ACS is a major product of the US Census Bureau designed to provide yearly data on the US population and many of its characteristics. The ACS is large for a regularly-fielded survey, sampling approximately one percent of the population—more than three million people—each year. For particularly-specific population groups, like unauthorized immigrants in Delaware, even this sample size is not large enough for making meaningful inference. Fortunately, the Census Bureau releases multi-year data products that are reweighted to be representative of the population in a particular year. This report uses the 2015 five-year ACS sample, some 15 million observations in total. This sample combines the actual single-year ACS samples from 2011 to 2015, but is weighted by the Census Bureau to be representative of the population in 2015. It is commonly understood by many researchers that, despite the Bureau's best efforts, certain populations are underrepresented in the ACS. This issue is addressed in Section 2.

A.2 Survey of Income and Program Participation (SIPP)

The SIPP is short-panel longitudinal survey that is also fielded periodically by the Census Bureau. For the purposes of this analysis, the key feature of the SIPP is that immigrant respondents are asked about their immigration status upon entry to the country and whether their status has changed since arrival. This report combines this useful data from the 2004 and 2008 SIPP panels with the size of the ACS to produce meaningful estimates. This procedure, which is described in Section 2, is possible because the SIPP and ACS include many of the same key variables.

A.3 Administrative Immigration Data

Estimates of the legally-resident population are derived from administrative data published by the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services, the Department of Homeland Security (DHS), and, formerly, the Immigration and Naturalization Service (INS). These data are created by these agencies from caseload tracking and filings of official immigration forms. The ORR's annual report to congress provides annual refugee resettlement totals by state. Lawful permanent resident, asylee, and nonimmigrant admissions are published in the DHS and INS yearbooks of immigration statistics.

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KATELYN HUFÉ

Attorney at Law

✉ [_ \(mailto:katelyn@gthpc.com\)](mailto:katelyn@gthpc.com) ☎ [_ \(tel:215-437-0392\)](tel:215-437-0392)

[katelyn@gthpc.com \(mailto:katelyn@gthpc.com\)](mailto:katelyn@gthpc.com)

[215-437-0392 \(tel:215-437-0392\)](tel:215-437-0392)

Katelyn joined Gian-Grasso, Tomczak, & Hufe, P.C. as a partner in June 2015. She is a member in good standing of the Pennsylvania Bar and the New Jersey Bar. She is also admitted to the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the District of New Jersey. Katelyn focuses her practice exclusively on immigration law but also has experience in the area of family law.

Katelyn focuses a significant portion of her practice on deportation defense, litigation, appeals, and protecting clients with final orders of removal. She focuses largely on complex litigation cases. She has successfully litigated cases before the Board of Immigration Appeals, the U.S. Court of Appeals for the Third Circuit, and the U.S. Court of Appeals for the Sixth Circuit. She has experience successfully representing clients in Immigration Court in Philadelphia, Newark, New York City, Minnesota, Buffalo, and Arlington. Katelyn handles various types of litigation cases including asylum, cancellation of removal, adjustment of status, waivers, motions to reopen and motions to suppress evidence. In the detained setting, she has successfully obtained bond, parole, and stays of removal for clients. She has succeeded in reopening final orders of deportation before the Board of Immigration Appeals and the Immigration Courts.

Katelyn has also brought to GTH Law her knowledge and experience in the business immigration sector. She helps companies with various types of business immigration petitions such as L-1 visas for intra-company transferees, E-2 investor visas, E-1 trade visas, H-1B visas, and national interest waivers. Katelyn is an active member of the Italy America Chamber of Commerce of Greater Philadelphia and has a particular interest in working with start-ups and entrepreneurs.

Katelyn also has extensive experience with humanitarian-based relief. She has experience assisting victims of crimes and victims of domestic violence to obtain legal status through the U-visa program. She also has experience advocating for domestic violence victims through applications under the Violence Against Women Act ("VAWA"). She has represented clients at marriage interviews, asylum interviews, and naturalization interviews

and has experience with various other immigration applications including fiancé visas, F-1 student visas, B1/B2 visitor visas, applications for Special Immigrant Juvenile Status, and applications for Deferred Action for Childhood Arrivals (“DACA”).

Katelyn is an active member of the Philadelphia Chapter of the American Immigration Lawyers Association (“AILA”) and has attended the annual conference in 2013, 2014, and 2015. She served as the Conference Committee Co-Chair in 2014, planning the Philadelphia AILA Annual Conference. Currently, Katelyn is serving as the Philadelphia Ambassador for the American Immigration Council (“AIC”). She is also a member of AILA’s Pro Bono Committee, the Berks County Pro Bono Collaborative Committee, and has mentored non-immigration attorneys in pro bono asylum cases.

Katelyn is an active member of the Philadelphia Bar Association and serves as the Immigration Law Liaison for the Young Lawyers Division. Katelyn has served as a speaker at Temple University and Villanova University School of Law. She has also presented on a Waivers Panel at the Welcoming Center for New Pennsylvanians.

Katelyn received her BA from the University of Delaware’s Honors Program, and graduated cum laude from the Earle Mack School of Law at Drexel University in 2011. During her time at Drexel, she focused her coursework in areas such as Immigration Law, Refugee and Asylum Law, and Immigration Litigation. After majoring in Foreign Languages & Literature and completing study abroad programs in Spain and Italy, she is proficient in Spanish and Italian. After graduating from the University of Delaware in 2007, Katelyn worked as a bilingual paralegal at Doroshow, Pasquale, Krawitz, and Bhaya in Wilmington, Delaware. She worked with Spanish-speaking clients in the Workers Compensation and Personal Injury departments.

Throughout her final year at Drexel, Katelyn interned for the Executive Office for Immigration Review at Philadelphia Immigration Court. She drafted decisions for the immigration judges on topics such as asylum, fraud, I-601 waivers, crimes involving moral turpitude and adjustment of status. She had the opportunity to work with each immigration judge and the Court’s judicial law clerk.

After graduating from Drexel, Katelyn was accepted into the 2011-2012 Law Clerk Program at Berner, Klaw, and Watson, LLP in Philadelphia. She worked primarily on family law cases involving divorce, support, custody, and protection from abuse orders. She presented on the subject of the applicability of the I-864 Affidavit of Support in spousal support cases at a joint meeting of the Family Law Section and the Immigration Law Committee of the Philadelphia Bar. Following her time at Berner, Klaw, and Watson, Katelyn practiced immigration law for three years prior to joining Gian-Grasso, Tomczak, & Hufe, P.C.

GTH P.C.



Gian-Grasso, Tomczak, & Hufe P.C.

111 S. Independence Mall E, Suite # 815 Philadelphia , PA 19106

Phone: (215) 437-0392 (tel: 1-215-437-0392)

Fax: (215) 437-0490

722 Yorklyn Road, Suite 200 Hockessin, DE 19707

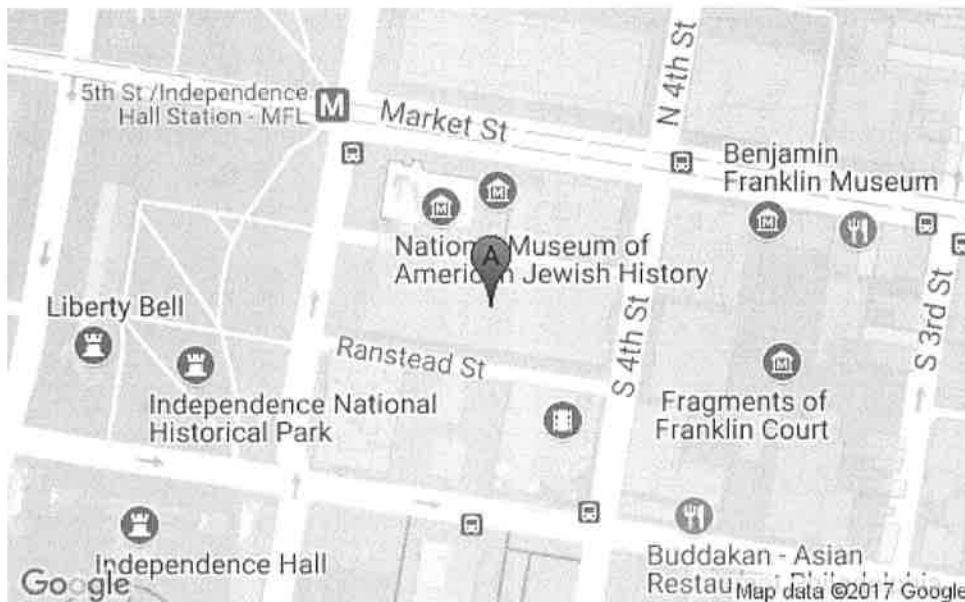
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