

## DE SUPREME COURT TO DECIDE IF CLAIMANT WHO IS ILLEGAL ALIEN QUALIFIES AS DISPLACED WORKER

DE Workers' Compensation • October 21, 2016

*Roos Foods v. Magdalena Guardado*, (Pending Before the Delaware Supreme Court – Case No. 160, 2016)

In this closely watched case, the Delaware Supreme Court recently heard oral argument on the employer's appeal. The claimant had suffered a compensable work injury on June 22, 2010, when she slipped on the floor at work and injured her left wrist. She later underwent surgery involving a fusion of the left wrist and was released to light-duty, one-handed work. The employer filed a termination petition, and the evidence before the Board was undisputed that the claimant could do the one-handed, light-duty work. However, the evidence also established that the claimant was an undocumented worker. The Board denied the petition, finding that the claimant qualified as a displaced worker based upon her undocumented legal status, and also because the employer had failed to present a Labor Market Survey showing regular employment opportunities to someone with the claimant's undocumented worker status.

On the employer's appeal, the Superior Court affirmed the Board's decision, *Roos Foods v. Magdalena Guardado* (C.A. No. S15A-05-002-ESB – Decided January 26, 2016). The Superior Court held that the Board did not commit any legal error in concluding that the claimant was a *prima facie* displaced worker and that the employer did not establish that work was available to the claimant within her restrictions and qualifications. In so doing, the Superior Court stated that, even without the claimant's undocumented worker status, the evidence certainly supported the Board's finding that she was a *prima facie* displaced worker. The court pointed out that the claimant was a 38-year-old unskilled worker who only spoke Spanish, who had the equivalent of a high school diploma from El Salvador, who could only use her right hand for light-duty work with the left hand as an "assistance hand," and who had only worked for five years.

At the recent oral argument before the Delaware Supreme Court, counsel for the employer argued that the Board's decision contained error of law and would make it virtually impossible for any employer to terminate the total disability benefits of an undocumented worker by showing that work is available. The questioning from the court did raise the question of how exactly does an employer go about showing that an undocumented worker has job opportunities. The questioning from the court challenged the employer's argument by pointing out that the vocational consultant who conducted the Labor Market Survey had been unaware of the claimant's undocumented worker status and had conceded in her testimony that this would be an important factor in any prospective employer's hiring decision. The court thereby implied that the employer's evidence was clearly deficient. Other questioning from the court also suggested that the Superior Court's decision shows that, even had the Board erred and should not have focused solely on the undocumented worker status, there were, nevertheless, many other factors making the claimant a *prima facie* displaced worker. A much anticipated decision from the Supreme Court is expected within the next few months, and an update will go out promptly at that time. ||



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