BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JAMES J. MAGGIO, SR.,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1445756
	)	
ROBIN DRIVE AUTO,	)	
	)	
Employer.	)	

DECISION ON PETITION TO TERMINATE BENEFITS and PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on March 8, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

MARK MUROWANY

VINCENT D'ANNA

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Christian G. Heesters, Attorney for the Employee

Joseph Andrews, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

James J. Maggio, Sr. ("Claimant") injured his neck and head in a compensable work accident on February 11, 2016, while he was working for Robin Drive Auto ("Employer"). The injury was found compensable and surgery at C4-5 was approved. *See Maggio v. Robin Drive Auto*, Del. IAB, Hearing No. 1445756, at 37 (September 28, 2017). Claimant was placed on an open agreement for total disability since November 9, 2017, at the compensation rate of $321.60 per week, based on an average weekly wage of $482.30.

On June 18, 2018, Employer filed a Petition to Terminate Benefits, alleging that Claimant was no longer totally disabled as a result of the work accident. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision.

On June 25, 2018, Claimant filed a Petition to Determine Additional Compensation Due, alleging that he has also sustained a compensable injury to his right shoulder as a result of the work accident and seeking payment of related medical expenses.

A hearing was held on these petitions on March 8, 2019. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified that he is a high school graduate and has been doing auto repair for most of his life. He did auto repair for Employer.

Claimant was questioned about posts on his Facebook page since the work accident. On July 13, 2016, he posted a photo of himself line dancing. Claimant explained that the photo had been taken about a year earlier. On November 23, 2016, he replied "yes" to a post asking if he was sure he was working the next day. Claimant explained that that was a joke because the person

asking the question knew he could not work. On January 8, 2017, Claimant posted that he had been plowing that day. Claimant explained that he was actually showing his girlfriend's nephew how to plow--so Claimant just sat on the plow while the nephew did the plowing. On January 11, 2017, he posted that he was "tired of working like a dog." At the time, he was arguing with his girlfriend and referring to having worked his whole life. On March 14, 2017, he posted that "we" have been plowing all day. Again, he meant that Alec (his girlfriend's nephew) did the plowing while Claimant gave guidance. On May 29, 2017, he posted that he had two days left "to clean out shop." Once again, he just supervised the cleaning. He was not paid for it. Two days later, on May 31, 2017, he posted that he had "a lot to do today." Claimant was uncertain, but he thinks that he probably meant housework because his girlfriend had been away. On October 15, 2017, Claimant referenced taking a "bike ride." He rode on his girlfriend's motorcycle as a passenger. He has no license to operate a motorcycle. Claimant confirmed that, in December of 2017, he went to DisneyWorld. In February of 2018, he and his girlfriend went on a "Line/Couples Dance Cruise" to the Grand Bahamas. In March of 2018, they went to see NASA. In June of 2018, he was "[l]iving it up in Nashville" with his girlfriend. In June of 2018, he attended a stadium concert. In September of 2018, there is a photo of him on another cruise, with his right arm on the ship railing. He and his girlfriend went to Alaska. In December of 2018, they were in Orlando. On December 31, 2018, he posted a photo of a joke sign about being "self employed."

Claimant denied that he received a full copy of Employer's labor market survey. He did do a job search on his own and prepared a log of it. It was not produced to Employer's counsel and Claimant's own attorney only got it a day or so ago.

Claimant stated that all those vacations referenced on Facebook covered a total time of maybe about a month. His girlfriend travels for her job and he has never gone traveling before.

When they were not traveling, he looked for work. Just because he went traveling does not mean that he was not hurting. He took his medication and had good days and bad.

Claimant testified as to his job search. This testimony was given over Employer's objection, which will be discussed later in this decision. He applied to Sears' automotive department; a couple Jiffy Lube locations; a couple Meineke locations; Pete's Garage (in Newark); the Newark U-Haul; a couple Pep Boys locations; and one auto dealership (Porter Chevrolet). He estimates that he went to 15 different places and went to some two or three different times. Many of the places he went to were not looking for people. Others he left an application but has not heard back. One place (a Meineke in Elkton) informed him that they were leery of hiring him because he could not do heavy mechanical work due to his injuries. He also looked for positions on the computer.

Claimant believed that he was restricted to light duty work. He can lift a maximum of fifty pounds and he cannot do anything heavy overhead. He is limited in his ability to raise the right arm (only slightly above shoulder height). He could work on small engines but cannot keep his head bent over.

Dr. Robert Smith, an orthopedic surgeon, testified by deposition on behalf of Employer. He examined Claimant on November 28, 2016, and July 16, 2018, and he has reviewed pertinent medical records. In his opinion, Claimant's right shoulder problem is unrelated to the 2016 work accident and Claimant is capable of returning to work in a medium-duty capacity.

Dr. Smith understood that, in February of 2016, Claimant stood up, hit his head and was knocked unconscious. He woke up on the floor. It does not appear that anybody saw him fall and there is no objective data (such as an x-ray or clinical finding) to suggest that there was any blunt trauma to the right shoulder. Claimant had neck problems with some radiating pain in his arm.

Diagnostic testing showed disk herniations at C4-5 and C5-6. Claimant then had cervical surgery performed by Dr. Rudin, which took care of the disk herniation and nerve compression. Claimant reported after the surgery that his arm symptoms and neck symptoms were both better.

Dr. Smith examined Claimant in November of 2016. The major focus of the examination was on the neck and neurological findings. Claimant had no specific findings with respect to the right shoulder that day. Dr. Smith examined Claimant again in July of 2018. Claimant reported that he was happy with the surgical result to his neck, but that he had bad pain in the right shoulder and had difficulty lifting his arm. On examination, Claimant had limited motion, but no evidence of a full thickness rotator cuff tear. There was no evidence of atrophy, scapular winging, adhesions, instability or crepitation. He complained of pain when the arm was lifted, consistent with bony impingement. Dr. Smith concluded that Claimant was capable of medium duty work (50-pound lifting limit). Claimant had had a full and complete recovery with respect to the neck injury. Claimant himself described his neck pain and radicular arm pain as being resolved by the surgery. In Dr. Smith's opinion, Claimant could return to his regular work as a mechanic and he could perform the jobs listed on Employer's labor market survey.

In Dr. Smith's opinion, Claimant did not injure his right shoulder in the work accident. The doctor reviewed a 2018 MRI of Claimant's right shoulder, which showed extensive arthritis in the shoulder joint and AC joint.[1] Subcondylar cysts were on both sides of the AC joint, but there was no evidence of AC separation. There was spurring under the acromion. Claimant had glenohumeral arthrosis of the right shoulder prior to the work accident. These are degenerative findings. There was a small, interstitial rotator cuff tear mostly on the undersurface. It was

[1] The doctor noted that an earlier MRI of the right shoulder had been taken in June of 2013, which also showed acute and chronic degenerative findings. In his opinion, there was not much difference in the 2018 MRI. Claimant complained of right shoulder pain in 2013 and 2015.

reported by Dr. Crain as being only ten percent of the tendon. Partial thickness rotator cuff tears do not become significant until they reach fifty percent. In addition, the tear was on the undersurface, not the upper surface that is closest to the surface of the body. In Dr. Smith's opinion, trauma from falling on the shoulder would be expected to cause a superior surface tear, not down in the undersurface. There was also no evidence that Claimant sustained trauma to the right shoulder in the work accident. There was no finding of any contusion, ecchymosis or swelling over the shoulder. When a person loses consciousness, that person loses muscle tone. Thus, even if one assumes (without evidence) that Claimant fell on his right shoulder after being knocked unconscious, it is not the kind of mechanism that would produce a rotator cuff tear.

In addition to the above, Dr. Smith observed that Claimant did not go to an emergency room after the work accident on February 11, 2016. When he finally did seek medical care, he did not register a lot of complaints about his shoulder *per se*. He mostly had neck and radiating pain into the arm. Shoulder specific issues did not arise until much later. A medical record from April 18, 2016, references the right side of the neck/shoulder and trigger points in the trapezius and posterior shoulder region, but that would be symptoms from the neck injury. On June 1, 2016, Dr. Rudin documented neck pain radiating to the right trapezius and right shoulder, but that again is reflective of the cervical radiculopathy. In Dr. Smith's opinion, Claimant's shoulder pain is just arthritis that has been there for a long time.

Dr. Smith agreed that, if a person fell onto their right shoulder, it could cause swelling of the AC joint, but that would not put pressure onto the rotator cuff. Claimant had a degenerative bone spur and that put pressure on the rotator cuff and is probably what is causing his shoulder pain.

Barbara Riley, EdD, CRC, NCC, a vocational rehabilitation expert, testified that she prepared a labor market survey of jobs available to a person with Claimant's educational and vocational background and physical restrictions. She was aware that Claimant was a high school graduate and his work history consisted primarily of being an automotive mechanic. She used the physical restrictions proposed by Dr. Smith (medium duty with a fifty-pound lifting restriction). She primarily looked for jobs available in New Castle County. She identified a total of thirty-two jobs available between June 8, 2018, and January 17, 2019. She spoke with the prospective employers, viewed the jobs being performed and prepared job analysis forms for the positions. She confirmed with the employers that the jobs were available and that Claimant would be a viable candidate. In her opinion, Claimant would be suitable for the listed job.

Dr. Riley stated that the wages of the listed jobs ranged from a low of $380.00 per week to a high of $720.00 per week. The average wage range was from $497.54 to $543.16 per week, with an overall average wage of $520.35 per week. The listed jobs are just a representative sample of jobs available in the marketplace. She checked the job availability within the last few weeks and about one-third of them are still available and accepting applications. Most of the jobs do not require significant overhead work and what there is can be done with Claimant's unaffected arm or he can ask for assistance from team members.

Dr. Evan Crain, an orthopedic surgeon, testified by deposition on behalf of Claimant. He began to provide treatment to Claimant in February of 2018, and he has reviewed pertinent medical records. In his opinion, Claimant's right shoulder problem is causally related to the February 2016 work accident.

Dr. Crain confirmed that the medical records reflect that Claimant received treatment for left shoulder problems in 2013 and 2014 (including a left rotator cuff repair). A December 2013

record mentioned right shoulder pain, too. In February of 2015, Claimant was seen for bilateral shoulder pain and bilateral rotator cuff weakness. Claimant had glenohumeral arthrosis and x-rays in February of 2018 showed 50% reduced joint space, so it would not be surprising if Claimant had right shoulder soreness at times.

Dr. Crain was aware that the work accident happened on February 11, 2016. Claimant saw his family doctor on March 9, 2016, and complained of neck pain and headaches. On April 11, 2016, Claimant went to the Christiana Hospital emergency room for head pain, with no specific shoulder complaint. On April 18, 2016, Claimant returned to his family doctor referencing headaches, right-sided neck pain and shoulder pain. Claimant saw a chiropractor on April 25, 2016, for post-concussive syndrome, numbness, head discomfort, and neck pain radiating down both arms, including scapular regions. On May 4, 2016, Claimant reported to Vascular Specialists of Delaware that he had hit his head at work and had headache, neck pain and temporal (facial) pain on the right side. On May 5, 2016, Claimant saw a neurologist (Dr. Kishor Patil) with complaints of right-sided head pain and neck pain (predominantly on the right side). Dr. Patil found tenderness and spasm over the right paraspinal muscles extending to the right trapezius muscle. There was some right upper extremity weakness. An EMG was taken showing an acute C5-6 radiculopathy and bilateral carpal tunnel syndrome.

Dr. Crain agreed that Claimant saw Dr. Bruce Rudin on June 1, 2016. Claimant's symptoms were right-sided neck pain with pain radiating down to the trapezius with tingling down the right arm and weakness in the right trapezius and hand. Dr. Rudin administered three cervical injections, but Claimant continued with some shoulder pain. Thus, while Claimant clearly had cervical radiculopathy, there was also a shoulder problem untreated by the injections. Dr. Rudin eventually performed cervical fusion surgery on November 9, 2017. That surgery relieved

Claimant's neck pain and neurologic complaints, but Claimant continued to have right shoulder complaints. This is what brought Claimant to Dr. Crain in February of 2018. The doctor observed that it can be difficult to discern the location of symptoms when those symptoms are severe. Once the neck pain was treated, however, it became evident that the symptoms were coming from the shoulder.

Dr. Crain examined Claimant on February 19, 2018. Claimant just had a mild reduction of range of motion. There was pain with rotator cuff testing and some anterior capsular soreness. X-rays were taken on February 19 and those showed about a 50% reduction in joint space and an inferior humeral head spur. This was indicative of mild arthrosis. An injection was administered and Claimant, in April, reported that it diminished his pain by half, but that he still had difficulty with overhead lifting. The success of the injection suggested that the right shoulder was the source of Claimant's symptoms. Likewise, a March 2018 functional capacity evaluation ("FCE") discovered specific shoulder disability. By May 30, 2018, the benefit of the injection was wearing off and Claimant had severe pain with abduction as well as pain on lateral raising and rotator cuff testing. An MRI was done on June 18, 2018. It showed a partial rotator cuff tear involving the anterior aspect of the supraspinatus. There was swelling of the AC joint with downward pressure on the superior surface of the supraspinatus tendon and fluid tracking along the bicipital groove.

In Dr. Crain's opinion, Claimant had mild underlying arthrosis of the shoulder but that the symptoms in the front of the shoulder were related to the partial rotator cuff tear. Swelling of the AC joint was causing pressure on the cuff. The doctor related that to the February 2016 work accident. They were consistent with his symptoms since the work accident.

Dr. Crain performed shoulder surgery on Claimant on July 19, 2018. The post-operative diagnosis was right shoulder acromioclavicular arthrosis, partial rotator cuff tear, labral tear,

glenohumeral arthrosis and posttraumatic impingement syndrome. The partial tear and labral tear were both in the underside of the joint. The doctor denied that Claimant had a severe bony impingement. Claimant was totally disabled for four to six weeks as a result of the surgery. Dr. Crain opined that, by October 8, 2018, Claimant could return to work with restrictions of avoiding heavy lifting from mid-chest level or higher.[2]

Claimant was recalled to provide further testimony. He is sixty-five years old. He denied having prior right shoulder problems, although he may have strained the shoulder in the past. Despite the medical records, he did not have a history of right shoulder problems. His shoulder was fine prior to the work accident.

Claimant confirmed that, in the work accident, he stood up, hit his head and blacked out. He woke up on his back. When he woke, he was drowsy or woozy and had tingling down his right side. He believes that he developed right shoulder problems about three days later. Neck surgery helped the neck complaints and, while on pain medication, he thought the shoulder was better, too. However, the shoulder symptoms then persisted. He has had shoulder surgery and he does not feel that it has brought any improvement. The shoulder feels worse, if anything.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Causation

The first issue to address is whether Claimant's right shoulder problems (for which he had surgery in July of 2018) are causally related to his February 2016 work accident. On this issue, Claimant has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c). "The claimant has the burden of proving causation not to a certainty but only by a preponderance of the evidence." *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889

[2] Dr. Crain noted that Claimant had been released to return to work following the March 2018 FCE. Claimant could have worked up until the shoulder surgery in July.

at *2 (October 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). When, as here, there is a distinct and identifiable work accident, the "but for" standard of causation must be applied. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). *See also State v. Steen*, 719 A.2d 930, 932 (Del. 1998)("[W]hen there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the 'but for' standard of proximate cause.")(emphasis in original). The "but for" standard does not require "sole" or even "substantial" causation. "If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910. The Board finds that Claimant has not met his burden of proof.

The acknowledged injury is to Claimant's neck, as a result of hitting his head and knocking himself unconscious. This event was unwitnessed and there is no direct evidence that the right shoulder was involved in any way. Nobody saw Claimant land on his shoulder. As Dr. Smith points out, the medical records shortly after the work accident do not document any shoulder contusion, ecchymosis or swelling. Claimant himself testified to the Board that, when he woke up after the accident, he was on his back. He did not testify that he was lying on his right side or shoulder.

Claimant attempts to establish causation by arguing that he clearly has right shoulder problems (for which he underwent surgery in 2018) and that his complaints since the work accident included shoulder symptoms. A closer review of the medical records does not support that conclusion. As Dr. Crain confirmed in his deposition, Claimant's work accident occurred on February 11, 2016. Claimant did not immediately seek medical care. He went to his family doctor on March 9, 2016. Claimant did not have right shoulder complaints at that time. He was complaining of neck pain and headaches. On April 11, Claimant appeared at the Christiana

Hospital emergency room. He was documented with head pain, but no specific shoulder complaints were recorded. It was not until April 18 that Claimant's family doctor recorded shoulder pain along with headaches and right-sided neck pain. Thus, although Claimant testified that he had shoulder pain about three days after the work accident, it does not actually appear in the medical records until over two months after the accident.

This brings up the next issue. Claimant's neck injury involved radicular systems that went down the right upper extremity. The medical experts agree that it can be difficult to distinguish true shoulder symptoms from cervical radicular symptoms. Dr. Smith opined that the "shoulder" symptoms in the 2016 medical records were really radiating symptoms from the neck injury. Dr. Crain argues that those complaints were actually shoulder symptoms that were mistakenly thought to be related to the cervical injury. In this regard, Dr. Crain references findings of right trapezius and scapular symptoms in 2016 as being evidence of a shoulder problem. However, the Board notes that, after Claimant had cervical surgery in November of 2017, those scapular and trapezius symptoms disappeared. When Dr. Crain examined Claimant for the first time in February of 2018, he noted mildly restricted shoulder range of motion, rotator cuff pain and anterior capsular soreness. He did not make any findings of trapezius or scapular symptoms. Thus, the belief that those symptoms (in 2016) were evidence of the shoulder problem is incorrect. They clearly were symptoms from the neck problem, as Dr. Smith testified, and they resolved with the neck surgery.

The Board does not deny that Claimant had shoulder complaints when he saw Dr. Crain in February of 2018. However, the issue is whether those complaints were causally related to the 2016 work accident. It is agreed by both medical experts that Claimant has degenerative findings in the shoulder. While Claimant denies any prior right shoulder issues, the medical records reflect that he did, in fact, have periodic right shoulder complaints, including bilateral shoulder pain in

February of 2015. As Dr. Crain observed, in light of the degenerative arthritic condition in Claimant's shoulder, he would be expected to have periodic right shoulder soreness. The medical records establish that he did.

Dr. Crain also references that Claimant had a partial rotator cuff tear and labral tear, both on the underside of the joint. The Board agrees with Dr. Smith that that location is not likely if the tears were the result of trauma on the shoulder. In any event, as discussed earlier, there is nothing to suggest that Claimant received shoulder trauma in the work accident.

Thus, the mere fact that Claimant had right shoulder soreness following the cervical surgery in November of 2017 does not lead to the conclusion that that soreness was present since the work accident or caused by the work accident. The symptoms noted in 2016 as being possible shoulder complaints have been shown to actually have been the result of the cervical problem and were resolved by the cervical surgery. There is no substantial basis to relate Claimant's shoulder problems in 2018 to the 2016 work accident.

Claimant has the burden of proof on this issue and he must establish causation by a preponderance of the evidence (i.e., more likely than not). It is legally insufficient to just raise a possibility of causation. Weighing the evidence, the Board finds that Claimant has not met his burden of establishing that his right shoulder problems (and, thus, his right shoulder treatment and surgery) are causally related to the 2016 work accident. Claimant's petition is denied.

Termination

Employer has filed a petition alleging that Claimant's total disability status has terminated. Normally, in a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314

A.2d 915, 918n.1 (Del. 1973). In response, the claimant may rebut that showing, show that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actual displacement). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities. *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

In this case, once the shoulder issue has been excluded, the medical issue as to disability is simple. No doctor has Claimant medically totally disabled because of the neck complaint. Dr. Smith found that Claimant could work with restrictions and Dr. Crain agreed that, following the neck surgery, Claimant was released to return to work following the March 2018 FCE.

Therefore, having found that Claimant is physically capable of working in some capacity, the next issue is whether he qualifies as a displaced worker. "A displaced worker is a partially disabled claimant who is deemed to be totally disabled because he is unable to work in the competitive labor market as a result of a work-related injury." *Watson v. Wal-Mart Associates*, 30 A.3d 775, 777 (Del. 2011). 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, generally elements such as the degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age are considered. *Duff*, 314 A.2d at 916-17. As a practical matter, to qualify as a *prima facie* displaced worker, one must normally have only worked as an unskilled laborer in the general labor field. *See Vasquez v. Abex Corp.*, Del. Supr., No. 49, 1992, at ¶ 9 (November 5, 1992); *Guy v. State*, Del. Super., C.A. No. 95A-08-012, Barron, J., 1996 WL 111116 at *6 (March 6, 1996);

Bailey v. Milford Memorial Hospital, Del. Super., C.A. No. 94A-03-001, Graves, J., 1995 WL 790986 at * 7 (November 30, 1995). In Claimant's case, he is a high school graduate. His work history is primarily as an automotive mechanic. He is sixty-five years old, and thus near a traditional retirement age. However, his work restrictions from the compensable neck injury (medium duty work) are not burdensome. Claimant appears to have a normal mental capacity. He mentioned being able to use a computer. As such, he is certain not limited to only doing heavy duty work. He is trainable and can physically handle tasks of a light to medium duty character. While Claimant's age is a factor, age alone does not render one a displaced worker. As such, the Board concludes that Claimant is not a *prima facie* displaced worker.

The next question is whether Claimant is actually displaced. The general rule in workers' compensation is that when a claimant is physically capable of working to some degree, the claimant (not the employer) has the *primary* burden to show that reasonable efforts were made to secure suitable employment within the claimant's restrictions. *Hoey v. Chrysler Motors Corp.*, Del. Supr., No. 85, 1994, Hartnett, J., at ¶ 7 (December 28, 1994). Thus, a "claimant who is not *prima facie* displaced, has the burden to prove that he made a reasonable job search, but was unable to obtain employment because of his disability." *Watson*, 30 A.3d at 777-78. In conducting a reasonable job search, the claimant must make a "diligent, good faith effort to locate suitable employment in the vicinity." *Bernier v. Forbes Steel Ensign Wire Corp.*, Del. Super., C.A. No. 85A-FE-17, Taylor, J., 1986 WL 3980 at *2 (March 5, 1986), *aff'd*, 515 A.2d 188 (Del. 1986). In determining the reasonableness of a claimant's job search, "[t]he Board cannot find against the claimant simply because the claimant did not do everything he could have done. Its task is to determine whether the claimant's efforts were reasonable, not whether they were perfect." *Watson*, 30 A.3d at 779. Nevertheless, if a claimant fails to take certain obvious, common-sense

(*i.e.*, reasonable) efforts to find work, that failure should be considered as evidence against the reasonableness of the search. In deciding issues of displacement, the Board must "use objective standards." *Watson*, 30 A.3d at 778.

This brings the Board to Employer's objection during the hearing. Employer had submitted to Claimant's counsel a request for production of all Claimant's job search logs and information. None were produced. The Board understands that Claimant's counsel was unaware of the existence of such records until just shortly before the hearing, but that is not the issue. Claimant is the one who has the duty and responsibility to comply with requests for production. Claimant cannot evade a proper request by the simple expedient of not producing it to his own attorney until just before the hearing. Claimant certainly was aware of his own job search activities and improperly failed to comply with Employer's production request.

While, at the hearing, the Board took the matter under advisement and allowed Claimant to testify as to his job search activities, the Board on consideration agrees with Employer that Claimant's testimony should be struck for failure to properly disclose his job search efforts. Such production was essential to allow Employer a fair chance to investigate Claimant's efforts. Superior Court has already addressed a similar situation in *Delaware Home & Hospital v. Martin*, Del. Super., C.A. No. K11A-07-001, Young, J., 2012 WL 1414083 (February 21, 2012), *aff'd*, Del. Supr., No. 232, 2013 (September 24, 2013). In that case, the employer twice requested production of documents concerning the claimant's job search efforts. Because her job search was not memorialized in any document, the claimant did not disclose any information. At the hearing, she testified as to making a job search. The employer objected and the claimant's position was that she was not "required" to produce anything because she had not "documented" the search. Claimant asserted that making any other response would be similar to answering an interrogatory,

which was not provided for in the *Board Rules*. The Board allowed the testimony. On appeal, Superior Court reversed. Concerning the distinction between a request for production and an interrogatory, the Court observed that "[t]his sort of razor thin distinction could appear to border on what was once referred to as 'unhandsome dealing.' Not having the information in some formalized, written form is decidedly not the equivalent of not having the information." *Delaware Home & Hospital*, 2012 WL 1414083 at *2. The Court discussed the relaxed rules of evidence under which the Board routinely operates and noted that the claimant's failure to be candid about her job search efforts when asked by the employer effectively hampered the ability of employer to cross-examine her on a significant issue. As such, the Court found that the claimant should have disclosed the requested information to prevent unfair prejudice to the employer. "Claimant's characterization of the request as an interrogatory may be fair. Claimant's suggestion that Appellant is not entitled to an answer thereof, however, is not." *Delaware Home & Hospital*, 2012 WL 1414083 at *3.

Accordingly, the Board strikes Claimant's testimony concerning his job search efforts.[3] As such, Claimant has failed to establish that he is a displaced worker. Employer has proven that Claimant is no longer physically totally disabled as a result of the work accident and Claimant is

[3] Even if the Board allowed the testimony in, the Board notes that it was insufficient to establish displacement. A claimant needs to make a good faith effort to find employment. Claimant's search was unduly limited to automotive-related work. While Claimant's work history has been in automotive work, he certainly is not limited to such work. He is physically and educationally capable of general retail work, security work, and the like. The term "total disability" is not to be interpreted as the "inability to continue in the same employment or the same line of work." *Federal Bake Shops, Inc. v. Maczynski*, 180 A.2d 615, 616 (Del. Super. 1962). Rather, "total disability" is defined as the inability to perform any services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *See M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967). While a claimant is not required to conduct a "perfect" job search, the search must be a reasonable one. It is not reasonable to ignore the large field of suitable jobs in the marketplace while limiting one's search to just a small specialty field. In any event, Employer's labor market survey (to be discussed next) adequately disproves any claim of displacement with respect to Claimant. Suitable employment is available.

not a displaced worker. As such, his total disability status is deemed ended as of the date of fling of Employer's petition.

The next question is whether Claimant is entitled to compensation for partial disability. The threshold question is whether Claimant still has work restrictions related to the work injury that could reasonably affect his earning capacity. *See Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983)(burden to prove claimant is not partially disabled is on employer when "there is evidence that in spite of improvement, there is a continued disability, and such disability could reasonably affect the employee's earning capacity").

Dr. Smith did propose some medium duty restrictions on Claimant, which the Board accepts. A labor market survey was produced. The survey lists 32 employment opportunities, being a mix of sedentary, light duty and medium duty positions. The lists contains a variety of jobs, including customer service, assembly, security, restaurant related, mail processor, pest control, mainteance, cashier and more. Reviewing the job descriptions, the listed positions are appropriate for Claimant. The full wage range of the listed jobs goes from a low of $380.00 per week to a high of $720.00. Some of the listed jobs provide a wage range for the position. Looking at the low end of those ranges, the average wage reflected by the survey is $497.54 per week. The overall average wage reflected on the survey is $520.35 per week. Claimant's average weekly wage at the time of injury was $482.30 per week. As such, the survey demonstrates that Claimant, even with the physical restrictions from his work accident, could return to work at no loss of wages. As such, Claimant is not entitled to compensation for partial disability. *See* DEL. CODE ANN. tit. 19, § 2325.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant has not shown by a preponderance of the evidence that his right shoulder problems are causally related to the 2016 work accident. Claimant's Petition to Determine Additional Compensation Due is denied. Employer's termination petition is granted as of the date of filing and Claimant is not entitled to compensation for partial disability.

IT IS SO ORDERED THIS 4th DAY OF APRIL, 2019.

INDUSTRIAL ACCIDENT BOARD

Mark Murowany /SD
MARK MUROWANY

Vincent D'Anna /SD
VINCENT D'ANNA

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

Mailed Date: 4-5-19

OWC Staff