Submitted by:
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NEW YORK STATE SUPREME COURT

Appellate Division - Third Judicial Department

In the Matter
of
the Application of

JULIO POLICARPIO,

Claimant - Appellant,

v.

RALLY RESTORATION CORP. and NEW YORK STATE INSURANCE FUND,

Employer/Carrier- Respondents,

and

WORKERS' COMPENSATION BOARD,

Respondent.

Workers' Compensation Board Case No. G181 0756
Appellate Division File No: 530531

BRIEF FOR RESPONDENT RALLY RESTORATION CORP & NEW YORK STATE INSURANCE FUND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES, STATUTES & OTHER SOURCES

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board Panel Decision's factual determination that the claimant has not attached himself to the labor market?

   Suggested Answer:

   There is ample evidence in the record to support the determination made by the Board. The claimant failed to show labor market attachment consistent with the American Axle criteria which have been set forth in numerous cases decided by the Workers' Compensation Board and which have consistently been applied for the past decade to determine labor market attachment.

2. Whether the claimant failed to preserve several issues he now raises for the first time in his appeal to this Court?

   Suggested Answer:

   The Appellant-claimant failed to preserve several of his arguments for appellate review, as it well settled that where a party fails to preserve an issue for appellate review, and raises an issue for the first time on appeal to this Court, such issue will not be considered.

3. Whether Argument VIII raised by the Appellant in his Appellant's Brief is interlocutory and therefore, non-judiciable?

   Suggested Answer:

   The eighth argument contained in the Appellant's Brief is not ripe for adjudication due to the fact that an Application for Board Review with respect to that issue has still not been decided by the Board.

4. Whether the correct standard of review was used by the Board Panel below as they reviewed the factual findings of the Workers' Compensation Law Judge?

   Suggested Answer:

   The Board below applied the correct de novo standard of review in reaching the decision to modify the WCLJ's findings of fact.

NATURE OF CASE

This appeal was perfected by the Appellant, Julio Policarpio, who is a claimant in a New York workers' compensation case stemming from work related injuries he sustained on January 4, 2017. Dissatisfied with a Workers' Compensation Board Panel's determination that he was not attached to the labor market, the Appellant filed a Notice of Appeal to this Court along with an Application for Full Board Review. After his Application for Full Board Review was denied, he perfected the instant appeal. Because substantial evidence supports the factual determinations made by the Board Panel below, the Respondent, Rally Restoration Corporation, and its carrier, the New York State Insurance Fund, respectfully submit that the decision reached below should be affirmed in its entirety.

STATEMENT OF FACTS

The Appellant, Julio Policarpio (hereinafter "claimant"), sustained a work related injury while he was working for Rally Restoration Corporation on January 4, 2017. (R. 8). At a June 13, 2017 hearing, his claim was established for injuries to the left ankle and the back and the Board determined that his average weekly wage would be set without prejudice at $710.81. (R. 8-9). Subsequently, at a December 19, 2017 hearing, his file was amended to include injuries to the neck and to the left knee. (R. 14-15). At that same hearing the issue of labor market attachment was raised by the carrier and the claimant was directed to produce evidence of labor market attachment 10 days prior to the next hearing, as the file was adjourned to February 14, 2018. (R. 15).

At the February 14, 2018 hearing, the carrier was not directed to continue indemnity payments due to the fact that the claimant had "failed to demonstrate a persistent and diligent search for work within his" medical restrictions. (R. 17).

At a May 25, 2018 hearing, the Judge addressed medical treatment issues not relevant to the question of labor market attachment and adjourned the case for the claimant's testimony on labor market attachment to a hearing that was to be

held on July 30, 2018. (R. 20-21). At the July 30, 2018 hearing, the claimant again failed to submit documentation prior to the hearing to show attachment to the labor market and as a result, the Judge marked the file as requiring no further action at that time. (R. 22-23).

At an October 24, 2018 hearing, the claimant was directed to produce up-to-date evidence of reattachment to the labor market and the case was adjourned to a hearing on November 30, 2018 for the claimant to testify with regard to labor market attachment. (R. 24-25).

At the hearing on November 30, 2018, the claimant had submitted job search records but they were not submitted in English until the date of the hearing. Therefore, the carrier had had no opportunity to review the documents pertaining to the claimant's purported job search. (R. 26-27). As a result, the case was adjourned to January 11, 2019 for the claimant to testify concerning attachment to the labor market. (R. 26-27).

At the hearing held on January 11, 2019, it was the claimant's position that he had been attached to the labor market from July 31, 2018 and coming forward to date. (R. 59). While testifying at the January 11, 2019 hearing, an interpreter

was utilized in order to make sure that accurate testimony could be taken. (R. 42). During his testimony, the claimant confirmed that he had prepared a resume with the help of an agency called Workforce 1. (R. 45; R. 105). This resume only highlighted that the claimant had many years of experience in the construction and maintenance industries and was looking for a position where he could utilize these skills. (R. 105). Listed on his resume were jobs that he had done for Rally Restoration Corp. as a mechanic between 2015 and 2017 in Newark, New Jersey, as well as his work as a mechanic for IJ American Construction Corp. from 2010 to 2015 in Queens, New York. (R. 105). His resume also cited his OSHA certification in 2015. (R. 105).

The claimant also submitted three printed pages from Workforce 1 showing that he had contact with that agency and had participated at that agency on January 3 and January 5, 2018. (R. 106-109). The claimant indicated, however, that Workforce 1 could no longer provide him any assistance because he did not have a Social Security number. (R. 46). Nonetheless, he testified he attempted to find work on his own by allegedly applying for work at restaurants, laundromats and pizzerias. (R. 46-47). The claimant's job search lists several purported businesses where the claimant alleged he had attempted to find work. (R. 111-158).

The claimant also testified to going to the Adult Learning Center and being placed on a waiting list for English language courses. (R. 47). However, the actual confirmation he provided shows that he had signed up for only one session, at the Bronx Library Center and that he was only on a wait list for one particular instructor and only one class that was offered Monday and Wednesday from 6:00 to 8:00 p.m. (R. 158). The claimant also confirmed during his testimony (see R. 47-48) that he was submitting an English translation of his job search list. (See R. 159-174 for the English translated job search list). He also provided an additional job search list as evidence of an independent job search. (R. 175-180). Notably, much of this job search list is completely illegible.[1] (SeeR. 178-180).

During the claimant's testimony with regard to labor market attachment, he said some places asked him for a Social Security number and would not hire him because he did not have one. (R. 50). Other places would ask hm if he had relevant experience and when he would say he did not, they would decline to hire him. (R. 50). And still other places told the claimant that they were not hiring at the time he applied for employment. (R. 50).

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[1] It would appear that pages 175 through 180 of the Record on Appeal are duplicates of pages 181 through 186 of the Record on Appeal.

During cross-examination, the claimant indicates that he attempted to locate employment by going out into Manhattan or the Bronx and simply walking around looking for work at random. (R. 51). His applications for employment were not based upon advertisements by the companies that they actually had job openings. (R. 51). The claimant testified that when he spoke to perspective employers, none of them told him to come back (although he did leave his number with some of them). (R. 52).

The claimant confirmed his understanding that his doctor had told him not to lift anything heavy, that he should not bend and must continue therapy and chiropractic treatment due to the pain he was experiencing. (R. 52). The claimant testified that he would look for work twice a week or sometimes three times a week when able to do so. (R. 52-53).

Critically, when the claimant was asked to provide proof that he had applied for the jobs listed on his job search list such as a business card or a copy of the applications that he had filled out, he conceded that he had no documentation. (R. 53).

After hearing arguments from both parties, the Law Judge proceeded to award benefits to the claimant from July 31, 2018 and coming forward. He found that the claimant was attached to the labor market and that his job search documented proper attachment to the labor market. (R. 57-58). The Judge found it particularly important (despite the documentation that he had not worked with Workforce 1 since January 2018 – a full year prior) that Workforce 1 had declined to assist the claimant because he lacked a Social Security number. (R. 58). The Law Judge further noted that he thought the most important part of the *American Axle* test for determining labor market attachment is whether they have made a bonafide attempt to search for work actively and persistently. (R. 58-59).

The insurance carrier noted an exception to the Judge's finding that the claimant was attached to the labor market and objected to all awards that were made as a result of that finding. (R. 60). The Judge's findings and awards were memorialized in a Notice of Decision filed on January 17, 2019. (R. 28-30).

In response to this Notice of Decision, a timely Application for Board Review was then submitted by the New York State Insurance Fund. (R. 187-198). Within that Application for Board Review, the State Insurance Fund spelled out the

reasons why the claimant had not properly demonstrated attachment to the labor market. (R. 191-192).

Because of the claimant's immigration status, special care was taken in the Respondent/Carrier's Application for Board Review to explain that the claimant's immigration status did not eliminate the requirement that he remain attached to the labor market. (R. 192). Additionally, and vitally important, the insurance carrier noted within this Application for Board Review that the proper standard of review on appeals to the Workers' Compensation Board Panel level was a *de novo* review of the evidence. (R. 192).

The carrier then outlined the evidence on the question of labor market attachment and why it would not support the determination made by the WCLJ on labor market attachment. (R. 192-197).

The employer and carrier noted that the job search list contained at pages 111 through 158 of this Record on Appeal covered periods of time prior to July 31, 2018. (R. 194-195). This was important because the claimant's attorney had conceded at the January 11, 2019 hearing that the claimant had not been attached to the labor market prior to July 31, 2018 and that they were not seeking awards for

the period prior to July 31, 2018. (R. 43; 59). The English translated version of the same job search list contained at pages 159 through 174 of the Record confirm that much of this job search list was entirely irrelevant to the question of whether there had been attachment to the labor market on and after July 31, 2018 since numerous entries on the job search list pre-date July 31, 2018. (See R. 159-161).

The carrier's Application for Board Review further pointed out that the claimant's resume listed only construction and heavy labor experience and indicated that the claimant was looking to find employment where he could utilize these skills. But in fact, his restrictions established there was no chance that the claimant would be able to engage in employment that would utilize heavy labor skills that he was advertising by way of his resume. (R. 105; 195).

With regard to the claimant's referral to take English second language courses, it was pointed out that by the date of the January 2019 hearing when the claimant testified, several months had transpired since he was placed on that waiting list. Yet, he did not testify that he had ever followed up or got any status updates on those language courses. (R. 195). It was also pointed out that the claimant only had been put on the waiting list for one class, with one instructor and only was making himself available for two days per week, two hours each of those

days. (R. 195). (See also R. 149; 158). Within the Application for Board Review it was underscored that according to the claimant's own documentation, he had not been hired for several employments because he was an undocumented immigrant who did not have a Social Security number. In other instances, he had approached employers who said they were not hiring. Some potential employers allegedly said they would not hire him due to his lack of relevant experience. (R. 195-197).

The carrier's Application for Board Review brought to the Board's attention duplicate submissions by the claimant as well as several submissions where the claimant would have known that he was not able to perform the work activity he was allegedly applying for in the first place. (R. 196).

The carrier's Application for Board Review emphasized that the claimant had not attached any inquiry letters, e-mail communications or copies of applications or any other documentation to show his job search list was bonafide. (R. 196).

A timely Rebuttal of Application for Board Review was filed on March 8, 2019. (R. 199-208). Within that Rebuttal of Application for Board Review, it was asserted that the Law Judge had correctly found that the claimant was attached to

the labor market. (R. 199). The claimant sought to distinguish the instant case from the case law that had been cited in the carrier's Application for Board Review. The claimant argued that the criteria set forth in the *American Axle* decision had been met by the claimant's independent job search. (R. 203). Lastly, the claimant's Rebuttal of Application for Board Review made policy arguments pertaining to the difficulties the claimant had in attaching to the labor market and the perceived inequities that would exist due to his immigration status if lost time awards were denied. (R. 203-204).[2]

In a May 9, 2019 Memorandum of Board Panel Decision, the Board addressed the issue of labor market attachment. Citing the *American Axle* criteria that must be met in order to show labor market attachment, and relying upon prior case law, the Board reversed the finding of the Workers' Compensation Law Judge. (R. 209-215). The Board Panel held that the claimant had not produced sufficient evidence of attachment to the labor market "that was timely, diligent, and persistent to demonstrate reattachment to the labor market at the hearing held on January 11, 2019." (R. 213).

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[2] Pages 205-208 in the Record on Appeal appear to be duplicates of pages 201 through 204.

It was noted that within the claimant's job search list, there were 62 potential employers listed. (R. 213). Twenty-three of them were not even hiring according to the job search list. This means 37% of the places the claimant on the job search list were not hiring. (R. 213). As a result, the Board found that these applications for employment lacked good faith. (R. 213). It was further noted that 27 different employments would not hire the claimant because he did not have a Social Security number. (R. 213). Furthermore, several of the jobs listed on the C-258 (job search list) had openings which did not comport with the claimant's medical restrictions. (R. 213). Based upon the preponderance of the evidence the Board did not deem the claimant's job search list sufficient to show attachment to the labor market. The Board rescinded awards for the period from July 31, 2018 to January 11, 2019 as well as the continuing payment direction. (R. 213).

Although the Board Panel Decision was dated as having been filed on May 9, 2019, it was already in possession of the parties and was discussed at a hearing that was held a day prior on May 8, 2019. (R. 67-72). At that May 8, 2019 hearing, it was announced that the claimant had undergone surgery in February 2019 and the claimant's attorney sought lost time awards. (R. 67-69). Despite the Judge being familiar with the determination of the Board Panel, and despite the

lack of any evidence to show the claimant had reattached himself to the labor market, the Workers' Compensation Law Judge deliberately disregarded the Board Panel. (R. 70). The WCLJ made clear that she, as the Workers' Compensation Law Judge, was not (in her view) bound by the Board Panel Decision because it was dated May 9, 2019 and the date of the hearing was May 8, 2019. (R. 70). Therefore, she made awards from January 11, 2019 to the date of the claimant's surgery at a partial rate of $189.55 per week. From the date of surgery, she made awards at the total disability rate. (R. 69-70). A timely objection was taken in response. (R. 70).

This defiant decision by the WCLJ was memorialized in a May 13, 2019 Notice of Decision. (R. 5-7). In response to that May 13, 2019 Notice of Decision, a timely Application for Board Review was then filed on May 30, 2019 by the employer and carrier. (R. 216-223). Thereafter, a timely Rebuttal of Application for Board Review was submitted on June 5, 2019. (R. 225-229). No decision has ever been rendered by a Board Panel in response to the carrier's Application for Board Review that was filed on May 30, 2019. That Application is still pending.

On June 5, 2019, a timely Notice of Appeal was filed by the Appellant Claimant. (R. 2-4). Simultaneous to the filing of the Notice of Appeal, the claimant also filed an Application for Full Board Review. (R. 224-229). This Application for Full Board Review reiterated the arguments that had been made in the claimant's earlier Rebuttal of Application for Board Review.

The Application for Full Board Review was denied on July 25, 2019. (R. 234-235). Following the denial of the Application for Full Board Review, the Appellant Claimant perfected this appeal.

ARGUMENT

I. THERE IS SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD TO SUPPORT THE DECISION REACHED BY THE WORKERS' COMPENSATION BOARD BELOW AND AS A RESULT, THE DECISION SHOULD BE AFFIRMED.

It is well settled that temporarily partially disabled claimants have a duty to remain attached to the labor market and that their failure to do so will disqualify them from receiving wage replacement benefits. See *Matter ofPeluso* v. *Fairview Fire District*, 269 A.D.2d 623 (3rd Dept. 2000); *Matter of Holman* v. *Hyde Park Nursing Home*, 268 A.D.2d 705 (3rd Dept. 2000); *Matter of Phelps* v. *Phelps*, 277 A.D.2d 736 (3rd Dept. 2000). Moreover, in order to establish an entitlement to benefits a claimant with a temporary partial disability has the burden to show that

they have looked for work within their medical limitations and that the limitations on their employment due to the work related disability were a cause of their inability to obtain employment. See *Matter ofDudlo* v. *Polytherm Plastics*, 125 A.D.2d 792 (3rd Dept. 1986); see also *Matter of Hare* v. *Champion International*, 303 A.D.2d 799 (3rd Dept. 2003). The Workers' Compensation Board has also held that "the mere fact that the claimant is an illegal alien does not eliminate the need" for them to be attached to the labor market. *Matter of Kandahar Auto*, 2009 N.Y. Work. Comp. 0025 5773 (2009). In fact, the Workers' Compensation Board has held that a Workers' Compensation Law Judge acts correctly in finding that a "claimant voluntarily withdrew from the labor market by not searching for work despite the Board directive to do so. Although a claimant who is an undocumented alien shall not be precluded from benefits merely because of the undocumented status, that same claimant must comply with the requirements that all other claimants must comply with, regardless of their documented status". *Matter of Deb El Food Products, LLC*, 2016 N.Y. Work. Comp. G074 4337 (2016).

In the instant case, this claimant at the time of his testimony on January 11, 2019 was partially disabled. Consistent with the case law, he had an obligation to be attached to the labor market.

> "In order to be attached to the labor market or to show reattachment to the labor market as was the case here, a claimant must demonstrate 'by credible documentary evidence…that the claimant is actively seeking work, within medical restrictions, through an independent job search that is timely, diligent, and persistent; is actively participating in a job location service such as (1) The New York State's Department of Labor's Re-Employment Services, (2) One-Stop Career Centers, or (3) a job search commonly utilized to secure work within a specific industry; is actively participating in vocational rehabilitation through Adult Career and Continuing Education Services-Vocational Rehabilitation (ACCES-VR) f/k/a VESID or other Board approved rehabilitation programs; is actively participating in a job retraining program; or is attending an accredited educational institution full-time to pursue employment within the work restrictions'". *Matter of America Axle*, 2010 N.Y. Work. Comp. 8030 3659 (2010).

These well understood criteria for showing labor market attachment have been further refined for those wishing to show attachment to the labor market by presenting a job search list to the Board. For these claimants the law requires job application confirmation e-mails or reference numbers, or at a minimum they must document the date contact was made, the position applied for, the name of the person they made contact with or provide a copy of the application that they filed so that the Board and carrier can verify the job search alleged. See *Matter of Suffolk County Health Services*, 2016 N.Y. Work. Comp. G071 3095 (2016).

The issue of labor market attachment is a fact based decision for the Board to resolve and will not be disturbed on appeal if supported by substantial evidence. See *Matter of Garcia* v. *MCI Interiors, Inc.*, 173 A.D.3d 1575 (3rd Dept. 2019).

The determination made below in the case at bar is supported by substantial evidence. As explained by the Board Panel, this claimant simply failed to present sufficient evidence to show a timely, diligent and persistent effort to remain attached to the labor market. (R. 213). The Board Panel is correct in finding that the job search lists presented demonstrated that of the places he alleged having applied for employment, 23 of these employers were not hiring. This means that 37% of the places the claimant sought jobs at had no openings. This finding by the Board came directly from the claimant's evidence. It was certainly not unreasonable for the Board to find that the claimant's application for employment at places of business that were not even hiring evinced a lack of good faith by the claimant. (R. 213).

The same job search list, as was astutely noted by the Board Panel below contained 27 entries with perspective employers who could not hire the claimant due to the fact that he lacked a Social Security Number. Once again, this demonstrates that it was not the claimant's work restrictions which kept him from obtaining employment. Instead, it was something entirely separate from his disability which kept him from finding a new job at these places of business. See *Matter of Dudlo* v. *Polytherm Plastics*, *supra*.

The Board also noted that the claimant had attempted to enroll in an English language course but had not actually undertaken the course. At the point of his testimony in January 2019, he was still apparently on the waiting list. All of this convinced the Board Panel that there was insufficient attachment to the labor market to justify the reinstatement of awards to this claimant who had previously disattached himself from the labor market. (R. 213).

Much is made of employers not being able to hire this claimant due to his lack of Social Security number and Workforce 1 not being able to provide services to the claimant because of his lack of a Social Security number. While this is certainly interesting, it is not dispositive to the question of whether he was attached to the labor market. As noted above, his lack of a Social Security number is not something related to his disability. The *Dudlo* line of cases holds that when something other than the work related disability is the reason why subsequent employment cannot be obtained, the claimant will not be entitled to benefits. The reason for this is that a claimant is only entitled to workers' compensation benefits in the event they are able to show that it is their work related disability which is causing them to lose wages. See *Id*.

Next, during the short period of time that the claimant worked with Workforce 1, there are very serious questions as to the sincerity of the efforts the claimant made through that agency to find suitable employment. The resume he created demonstrates that he only put on his resume heavy manual construction type labor as the skills that he would have for possible employment. (R. 105). He indicates within the resume that he is looking for a position where he could utilize the skills referenced on his resume. Even were the claimant to be offered a job consistent with the skills on his resume, such employment would not be consistent with his medical restrictions. This a problem because the law requires that the claimant's search for work must be a search for work within his medical limitations. See *Matter of Peluso* v. *Fairview Fire District*, 269 A.D.2d 623 (3rd Dept. 2000).

According to the documents the claimant presented, the other difficulty with the information from Workforce 1 is that the documents show that his involvement with that agency did not even take place during the time period that is at issue. Specifically, at pages 106 through 108 of the Record, the claimant's documentation from Workforce 1 pertains to activities he participated in during the month of January 2018. Importantly, at the January 11, 2019 hearing the claimant conceded that he was only seeking a finding of labor market attachment beginning on July

31, 2018. Therefore, the activities he may have engaged in with Workforce 1 in January of 2018 are not relevant to whether he was attached to the labor market on and after July 31, 2018.

The one type of training and/or educational endeavor the claimant did look into was an English language course. But the evidence contained in this record shows that the claimant was referred to the Adult Learning Education Center for English language classes (see R. 149-150). Unfortunately, he never completed those courses but was only placed on a waiting list. Notably, he was only placed on the waiting list for one specific course, with one specific instructor, offered only on two specific days during two hours of each of those days. (R. 158). Hence, even the limited efforts the claimant made to pursue further educational endeavors that might have helped him to find suitable employment were extremely limited and can hardly be called diligent, timely or persistent. It appears the claimant, in the Fall of 2018 got put on a waiting list. There is no evidence of any follow-up after he was put on that waiting list. Thus, the Board's determination that being put on a waiting list for an English language course was not sufficient attachment to the labor market under these circumstances is also fully supported by this record.

Because the determination of the Workers' Compensation Board is fully supported by the evidence contained in this record, it should be affirmed.

II. MULTIPLE ARGUMENTS CONTAINED IN THE APPELLANT'S BRIEF HAD NEVER BEEN RAISED BEFORE THE WORKERS' COMPENSATION LAW JUDGE OR BEFORE THE WORKERS' COMPENSATION BOARD PANEL BELOW AND THEREFORE, SHOULD BE DISMISSED.

The Workers' Compensation Law has created a system for the adjudication of workers' compensation claims in the State of New York. Specifically, WCL §20 outlines how claims are to be determined. In addition, WCL §23 provides an appellate process which includes an initial appeal to a Workers' Compensation Board Panel after the WCLJ has issued a decision a party is dissatisfied with. WCL §23 also provides for further appeals to be taken to this Court and also allows for the New York State Court of Appeals to hear cases when appropriate.

However, it is well settled that where a party has not "argued [an] issue before the WCLJ or the Board, the Board cannot be faulted for not addressing it, and this Court will not do so for the first time on appeal". *Matter ofTenecela* v. *Vrapo Construction*, 146 A.D.3d 1217, 1219 (3rd Dept. 2017). Indeed, this Court has reiterated on many occasions that where an argument was not raised before the Workers' Compensation Law Judge or before the Board Panel during the

administrative appeal, such arguments are unpreserved for appellate review by the court. See for example, *Matter ofPilacikv. Jacsa, LLC*, 161 A.D.3d 1463, 1465 (footnote 2) (3rd Dept. 2018); *Matter of Bond* v. *Suffolk Transp. Serv.*, 68 A.D.3d 1341, 1342 (3rd Dept. 2009); *Matter of Martin* v. *New York Tel.*, 46 A.D.3d 1136 (footnote 1) (3rd Dept. 2007).

Several of the arguments made by the claimant were never raised before either the Workers' Compensation Law Judge or the Board Panel who decided this matter below.

First, Argument II asserts that the Board's actions in this case violated the claimant's 14th Amendment rights and are therefore unconstitutional. This theory was not preserved for appellate review. This alleged depravation of the claimant's constitutional rights was certainly not raised at the hearing held January 11, 2019. (R. 41-65). Neither did the Appellant Claimant raise any such issue in his Rebuttal of Application for Board Review that was submitted to the Board Panel on March 8, 2019. (See R. 199-208). Even within the claimant's Application for Full Board Review filed with the Board on June 5, 2019, he did not raise any 14th Amendment arguments. (See R. 224-229). Because this argument was not preserved for appellate review, this argument should be dismissed.

Next, Argument IV in the Appellant's Brief argues that the Workers' Compensation Board has created a specific standard in the *American Axle* decision which has consistently been increased to create a greater burden on claimants than they should have to meet in order to satisfy labor market attachment standards. Once again, this argument was nowhere to be found in the claimant's Rebuttal of Application for Board Review. Nor did the claimant raise this issue in his Application for Full Board Review. In fact, in the claimant's Rebuttal of Application for Board Review, the claimant seems to argue just the opposite. Stated plainly, the claimant averred in his Rebuttal of Application for Board Review that the claimant had fully satisfied the criteria set forth in *Matter of American Axle*, 2010 N.Y. Work. Comp. 8030 3659 (2010) and said "the requirements of American Axle are not so exacting." (R. 207). It is only now, when coming to this Court, that the claimant complaints about purported burdens that claimants have to face in proving their attachment to the labor market. Such arguments were not preserved for appellate review.

Additionally, Argument V contained in the Appellant's Brief again raises a question never raised below. This argument asserts that the Board relying on an outside agency called Workforce 1 (as well as the Department of Labor and other

agencies) somehow creates an internal discrepancy and that the Board's policy regarding labor market attachment should therefore require an explicit referral to the Office of Vocational Rehabilitation. This interesting new argument is largely one advocating public policy changes which should either be addressed to the Board or perhaps the New York State Legislature. Nonetheless, to the extent it is raised for the first time here in the Appellant's Brief, we would respectfully submit that it should be rejected for reason that the claimant "did not raise [Argument V] before the Workers' Compensation Law Judge or the Board…it is accordingly unpreserved for [this Court's] review". *Matter of Bond* v. *Suffolk Transportation Service*, 68 A.D.3d at 1342.

Next, Argument VI was also never raised before the Workers' Compensation Law Judge, in the claimant's Rebuttal of Application for Board Review nor in the claimant's more recently filed Application for Full Board Review. This is an argument essentially in favor of the Board creating a mechanism whereby claimants who have not been found to have a permanent disability could nonetheless be found to have a temporary total industrial disability. This is plainly something that would have to be provided by the New York State Legislature inasmuch as WCL §15 dealing with both permanent disability and temporary levels of disability were created by the New York State Legislature and could

therefore only be added to by the New York State Legislature. (See Generally, §1 of Article III of the New York State Constitution granting legislative authority to the New York State Senate and New York State Assembly; see also *Matter of Darweger* v. *Staats*, 267 N.Y. 290, 305 (1935) (holding that legislative powers cannot be passed on to other entities). Whether the ideas and arguments expressed in Argument VI of the Appellant's Brief have merit is something for Legislature to decide in Albany, as the argument is not one that would appear to be justiciable. In any event, even if this argument were justiciable, we would respectfully submit that such issue was not preserved for appellate review.[3]

Argument VIII contained in the Appellant's Brief is another argument that was not preserved for appellate review. At the time the Board Panel Decision that is currently under review (dated May 9, 2019) was decided, this argument had never been brought to the Board Panel for consideration. Subsequently, this issue

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[3] It is noted that the Appellant's Brief at 22 misrepresents this Court's finding in *Matter of Bowers* v. *New York City Tr. Auth.*, 178 A.D.3d 1172 (3rd Dept. 2019). Respondents contend that when this Court in *Bowers* referred to "permanent" partial disability it likely meant a partial disability finding that is "permanent" as opposed to "tentative." In other words, labor market attachment requirements continue to apply to non-tentative findings of less than total disability (other than cases where the 2017 amendment to WCL Section 15(3)(w) applies because the claimant was entitled to benefits at the time of permanent partial disability classification). It is also noted that this Court has conclusively found that vocational factors are not applied to temporary partial disabilities. *See, e.g., Matter of Canales* v. *Pinnacle Foods Group LLC*, 117 A.D.3d 1271 (3rd Dept. 2014).

was brought to the Board's attention in an Application for Board Review and Rebuttal of Application for Board Review that were then filed by the New York State Insurance Fund and the claimant respectively. (R. 216-223 and R. 230-233). To date, the Workers' Compensation Board has not yet issued a Board Panel Decision addressing this issue. Therefore, this issue not only was never raised below; but presently this issue is not ripe for adjudication by this Court. (See *Matter of DiPaola* v. *McWane, Inc.*, 172 A.D.3d 1863, 1865 (3rd Dept. 2019) (holding that the Court will not address a legal challenge made by an appellant where the Board has not fully developed the record as to that issue and where a final determination of a Board Panel has not been reached due to the fact that such an issue would be interlocutory). See also *Matter ofZaldivar* v. *S&S Org.*, 119 A.D.3d 1134, 1135 (3rd Dept. 2014) (declining to address an interlocutory issue before the record has fully been developed and a Board Panel has not yet ruled on that issue).

This argument contained in the Appellant's Brief (Argument VIII) may well be an issue that needs to be addressed by this Court at a later date. But, until such time as a Board Panel Decision is handed down in response to the Application for Board Review that was filed on May 30, 2019 and which remains outstanding as of this date, it would be premature for this Court to rule.

And so, Arguments II, IV, V, VI and VIII should all be dismissed due to the fact that they were not raised properly before the Board below and/or are interlocutory and still pending before the Board below.

III. THE WORKERS' COMPENSATION BOARD PANEL PROPERLY CONDUCTED A *DE NOVO* REVIEW OF THE EVIDENCE AND HAD THE AUTHORITY TO RESCIND THE FINDINGS OF FACT REACHED BY THE WCLJ.

The Appellant argues in his brief that the Board lacks the authority to make factual determinations which overrule the Workers' Compensation Law Judge with regard to questions of fact and credibility. (See Appellant's Brief at 12). This argument is simply incorrect as a matter of law.

It is well settled that when a party files an Application for Board Review in a workers' compensation proceeding following the determination reached by the WCLJ the Workers' Compensation Board Panel is to conduct a *de novo* review. See *Matter of Joyce* v. *European Auto*, 226 A.D.2d 952 (3rd Dept. 1996); see also *Matter of Perk Developmental Corporation*, 2001 N.Y. Work. Comp. LEXIS 92593 (6/11/01) (holding "that the standard of review at the Board Panel level of appeal is a *de novo* review of the record and is not based on a substantial evidence standard.").

Bearing this in mind, the entire premise of Argument III in the Appellant's Brief is misplaced. The entire argument is based upon an incorrect *a priori assumption* that a Board Panel is bound by the findings of fact reached by the WCLJ and that a Board Panel may only conduct a substantial evidence review.

Worse still, however, is that the Appellants incorrectly cite case law from this Court in a misguided attempt to assert that the Board below lacked authority to conduct a *de novo* review. In the Appellant's Brief this patently incorrect quotation of legal authority is made:

> "'As the trier of fact, the WCLJ's 'assessment of the credibility of witnesses and the inferences to be drawn from the evidence presented…are conclusive if supported by…evidence on the record…' *Matter of Billings* v. *Dime Savings Bank of New York, FSB*, 236 A.D.2d 649, 653 N.Y.2d 190 (3rd Dept. 1997)." (Appellant's Brief at 12).

Unfortunately, this is not an accurate quotation of this Court's holding in *Billings*. Truth be told, in *Billings* this Court held as follows:

> "As with any administrative determination of fact the Board's assessment of the credibility of witnesses and the inferences to be drawn from evidence presented at the hearing are conclusive if supported by substantial evidence". *Billings v. Dime Savings Bank of New York, FSB*, 236 A.D.2d at 650.

The language in Appellant's Brief (and wrongly attributed to this Court) is simply not accurate. There is no reference to the WCLJ making determinations of fact or assessing credibility that would be binding on a Board Panel in *Billings*. See *Billings*, *supra*. Instead, *Billings* was making reference to the Workers' Compensation Board as being a trier of fact and was outlining this Court's substantial evidence standard of review when hearing appeals from a Board Panel. *Billings* did not hold a Board Panel lacked authority to overturn the factual determinations reached by the WCLJ. It was inaccurate to attribute such a holding to this Court.

Based upon this inaccurate statement of the law, the Appellant went on to suggest it is the WCLJ alone that makes factual determinations and that a Board Panel cannot disturb such findings if supported by substantial evidence. (Appellants' Brief, 12-13). Similarly, the Appellants complain that the Board Panel Decision was improper insomuch as "the WCLJ's opinion was clearly supported by the substantial evidence presented in the claimant's work search and each and every finding of the Board is based on picking apart the Judge's decision." (Appellant's Brief at 13).

We might begin with the general observation: "picking apart" the decision of a lower court or an Administrative Decision is precisely what appellate courts and other quasi-judicial appellate bodies (such as a Board Panel of the Workers' Compensation Board) do. If they do not dissect the decision and see what lies beneath, it is difficult to envision how they could correctly measure the accuracy and reliability of a decision. Can anyone reasonably doubt that an appellate body has the right – and indeed the duty ~ to go about "picking apart" the decision they have been asked to review in order to measure whether it should be affirmed or reversed? To ask this question is to answer it.

It also bears emphasis that WCL §23 mandates that when the Board responds to an Application for Board Review the "Board shall render its decision upon such application in writing and shall include in such decision a statement of the facts which form the basis of its action on the issues raised before it on such application.…The Board may in its sole discretion review and affirm, modify or rescind such decision or determination in the same manner herein above provided for an award or decision of a [WCLJ]." This legislative mandate compels the Board to make findings of fact and to include in its decision statements of fact. This statute gives the Board Panel explicit authority to modify or rescind decisions

and to make determinations just as a WCLJ would. This dovetails very nicely with what it means to conduct a *de novo* review or to hear an appeal *de novo.*

Black's Law Dictionary defines *de novo* as being "the same as if it had not been heard before and as if no decision had been previously rendered." Black's Law Dictionary, 6th Edition, 1990 at p. 435.

Because the Board is empowered to conduct a *de novo* review as confirmed in the case law and within WCL §23, the entire premise behind the third argument contained in the Appellant's Brief is incorrect. The Board Panel Decision should be affirmed.

IV. THE BOARD'S HOLDING BELOW WITH REGARD TO LABOR MARKET ATTACHMENT DID NOT VIOLATE THE CLAIMANT'S CONSTITUTIONAL RIGHTS.

In the Appellant's Brief, Argument II boldly asserts, without any support or case authority (or even any real explanation as to the argument) that the claimant's 14th Amendment rights were violated by the Board below due to its determination that he was unattached to the labor market.

The argument the Appellant raises, is tied to the idea that because the claimant was unable to seek assistance from Workforce 1 his rights were violated.

Importantly, the Board Panel Decision did not hold against the claimant that he did not participate in the Workforce 1 program. Instead, under the criteria spelled out in the *American Axle* decision, *supra*, a claimant need not participate with Workforce 1 to satisfy attachment to the labor market. There are many claimants who do not utilize the services of Workforce 1 and instead engage in an independent job search that is sincere, persistent and diligent. The assertion that the claimant could not be selective and actually make applications for employment at places that are actually hiring without participation in Workforce 1 is false. There are numerous publications such as newspapers, magazines and weekly advertisements that list job openings throughout the State of New York (and specifically, in the New York City area where the claimant resides). He certainly could have looked at these job listings in order to determine where he might apply.

Public libraries throughout New York State are also available and have computers that are linked to the internet which would have allowed the claimant to search for jobs at places that actually have openings and might actually fit within his medical restrictions.

To be sure, his lack of English language skills may pose a challenge, but the internet is now used globally by people of all different languages and the notion that his immigration status and limited English language skills make him unable to search for work is incorrect. The fact that he did work – and found a job before he was injured – further shows he is able to meaningfully search for work despite any language barrier.

But most of all, his constitutional rights were not violated because the Board never discriminated against him. The Court of Appeals has addressed a similar situation where a claimant was found to be ineligible for workers' compensation benefits due to the fact that he was ineligible to work with a Board approved rehabilitation program as a result of his illegal immigration status. See *Matter of Ramroop* v. *Flex-Craft Printing*, 11 N.Y.3d 160 (2008). In *Ramroop*, benefits were denied due to the fact that under WCL §15(3)(v) the claimant was not eligible to fulfill the statutory requirement of participating in a Board approved rehabilitation program. Despite this, the Court held "because claimant was ineligible for work in the United States, claimant did not, and could not, participate in a 'Board approved rehabilitation program.' Moreover, even if we assume that claimant cooperated to the extent he could, his inability to participate was not

because rehabilitation was not feasible – the Board never made a feasibility determination – but because no rehabilitation program is available to those who are not illegally employable". *Id*. at 167. There was no hint in *Ramroop* that a claimant's inability to participate in a Board sponsored vocational rehabilitation program due to his immigration status would violate the 14th Amendment.

In the instant case, the claimant was not caught in a legally recognizable "catch-22" as he alleges. While it is true that the claimant is ineligible to show labor market attachment by way of participation in Workforce 1, this is not a deprivation of his constitutional rights. Nor was it the reason he was found to be unattached to the labor market. He was denied benefits on the basis of the job search list he had provided. It was inadequate. There was no violation of the 14th Amendment.

V. THE DECISION BELOW DID NOT CREATE AN INCENTIVE FOR EMPLOYERS TO HIRE ILLEGAL IMMIGRANTS AS ALLEGED BY THE CLAIMANT.

Appellant wrongly suggests that the ruling below was one which denied an undocumented worker compensation benefits and is therefore a perverse incentive to employers to hire illegal immigrants in an effort to lower their workers' compensation costs. (See Appellant's Brief at 23). The decision reached below

was not one which limited an undocumented worker's ability to collect workers' compensation benefits. Instead, the decision below requires temporarily partially disabled injured workers, regardless of their immigration status, be attached to the labor market.

The decision below had nothing to do with the claimant's immigration status. It had everything to do with his job search list – which was a farce. His job search list consisted of random places that he had applied for work while walking around Manhattan and the Bronx. His job search list was comprised of places that legally could not hire him, places that did not even have job openings, or jobs for which he was not qualified either by skill or by his medical restrictions.

There is nothing about the decision reached below that would create any incentive for employers to hire undocumented immigrants. In fact, the practice of hiring individuals who are unable to provide government issued documentation such as a Social Security number is already prohibited by Federal Law. See 8 U.S.C. §1324a(a)(1). To suggest that the Workers' Compensation Board requiring both citizens, documented immigrants and undocumented immigrants to show attachment to the labor market in order to be eligible for benefits when temporarily partially disabled will somehow create an incentive for employers to violate

Federal Law is a baseless assertion. The entire premise of this argument assumes an animus by the Workers' Compensation Board against undocumented immigrants. Such a serious assertion, which has not been proven, must not be assumed. Indeed, the Appellant's argument seems to be a hollow argument that seeks to create a rule whereby undocumented immigrants would not have to show attachment to the labor market at all. There is not any logical connection between the hiring practices of businesses who employ undocumented immigrants and the decisions rendered by the New York State Workers' Compensation Board on labor market attachment. There is no evidence contained in the record showing that this employer (or any other) has decided to hire more undocumented immigrants due to the fact that they believe it less likely they will be able to show labor market attachment when they are out of work.

In the end, there was nothing done by the Board below that would encourage employers to violate Federal Law and face civil and criminal charges in order to hire undocumented immigrants. It is, at best, specious to argue any connection exists between hiring decision of employers who decide to hire undocumented workers and the Board's holding on the question of labor market attachment. We would respectfully submit that such assertions also ascribe to these businesses that regularly hire undocumented workers a level of sophistication and Machiavellian

cunning that they really do not deserve (and which the claimant clearly has not proven). If the Appellant is really going to assert that these types of businesses make hiring decisions based upon the anticipation that these hires will get injured but will be less likely to receive weekly compensation benefits due to lack of labor market attachment, there would need to be at least some modicum of evidence offered to support this novel theory. Since there is none, such argument should be rejected. The decision reached below should be affirmed.

CONCLUSION

The Board's determination that this claimant is not attached to the labor market, and that his job search list was not offered in good faith and lacked sincerity, persistence and diligence should be affirmed. The record supports the determination reached below by the Board Panel inasmuch as the claimant applied for jobs that did not meet his medical restrictions, applied for jobs for which was not qualified, or applied to employers who did not have job openings. Because the decision reached below was not irrational and is supported by substantial evidence contained in the record, it should be affirmed. The additional arguments presented for the first time on appeal to challenge the determination reached by the Board below should be rejected due to the fact that they were not preserved for appellate review and for the further reason that they lack merit. The decision reached below should be affirmed.

Respectfully submitted,

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 8,499.

Dated: March 12, 2020