GITTO & NIEFER, LLP

ATTORNEYS AT LAW

Donald R. Gitto
David L. Niefer*
John H. Snyder
Edmond F. Morreall
Jason M. Carlton*
Patrick B. Guy
Joshua M. Luce
Shane E. Armstrong

also admitted in Pennsylvania

2 Court Street, 2nd Floor
Binghamton, NY 13901
(607) 723-0600 ● Fax (607) 723-0634 ● gittolaw.com

Jason M. Carlton, Esq.
(607) 723-0600 x104
jcarlton@gittolaw.com

Utica Area Office:
605 French Road
New Hartford, NY 13413
(315)732-8661
(315)732-6289 (fax)

April, 2, 2021

New York State Court of Appeals
Attn: Clerk of the Court
20 Eagle Street
Albany, NY 12207

Re: Matter of Policarpio vs. Rally Restoration; WCB
APL-2021-00008

Dear Sirs/Madams:

Our office represents the Appellants, Rally Restoration Corp. and its carrier, the New York State Insurance Fund. We now submit this correspondence to the Court in support of the Appellants' position that the decision of the Appellate Division below erred insofar as it wrongly engaged in a *de novo* review of the Board Panel Decision's determination with regard to the question of labor market attachment; and secondarily, the Appellate Division committed reversible error as a matter of law by flipping the burden of proof and not requiring that the injured worker demonstrate his attachment to the labor market.

At the outset, we incorporate herein by reference the entire brief and all points and arguments that the Appellants submitted as Respondents to the Appellate Division below. In the interest of judicial economy, and consistent with §500.11 of the Court of Appeals' Rules of Practice, we will not repeat or reiterate the Statement of Facts that was contained in our brief below but will simply supplement them here in order to provide further context for this Court as it now decides whether the Appellate Division below committed reversible error.

SUPPLEMENTAL STATEMENT OF FACTS

This appeal comes to the Court on appeal from the Appellate Division, Third Department which hears workers' compensation appeals that are brought to that court from the Board's decisions below. (See WCL §23). Jurisdiction in the

instant case is based upon CPLR §5601, as there were two dissenting justices at the Appellate Division below. This appeal is as of right. (See CPLR §5601).

The question that was presented to the Appellate Division below is whether the evidence contained in the record would support the Board's determination that the injured worker, Mr. Policarpio, had disattached himself from the labor market from July 31, 2018 forward and thereby would be precluded as a matter of law from receiving workers' compensation benefits. The Board Panel Decision of May 9, 2019 is contained in the Record on Appeal at pages 209-215 and included approximately two pages of detailed factual analysis of the evidence followed by two and a half pages of legal analysis of the labor market attachment issue and the specific findings of fact which led to the Board Panel determination that the claimant had not demonstrated an attachment to the labor market since July 31, 2018.

The majority decision reached by the Appellate Division below expressed disagreement with regard to how the Board had decided the factual issues involved, while citing generally the same case law that the Board Panel below had relied upon in reaching its determination that the claimant had not been attached to the labor market during the relevant period of time that is in question. Reexamining, redeciding and reweighing each factual determination reached by the Board below (or at least the vast majority of those determinations), the Majority Opinion reversed the Board Panel and held that there was not substantial evidence contained in the record to support the determination reached below.

A lengthy and well-reasoned Dissenting Opinion spelled out in great detail the evidence contained in the record which did, in fact, support the factual determinations reached by the Board Panel below on the question of whether the claimant had attached himself to the labor market. In addition, the Dissenting Opinion below carefully pointed out that the majority decision had flipped the burden of proof from requiring that the injured worker show attachment to the labor market.

The Majority Opinion, in significant part, appears aimed at getting to a desired result due to the claimant's immigration status. The Majority Opinion was troubled by the fact that the claimant, who is an undocumented immigrant, had difficulty establishing attachment to the labor market. In the majority's view,

much of his difficulty in establishing attachment to the labor market was based upon his immigration status.

By contrast, the Dissenting Opinion acknowledged the claimant's immigration status while pointing out that the claimant's undocumented status and lack of a Social Security number did not absolve him of his legal obligation to show attachment to the labor market while temporarily partially disabled. Relying upon prior precedent from this Court, the Dissenting Opinion pointed to a decision where this Court confronted WCL §15(3)(v) and upheld the statutory requirements of that section of the statute even though it meant that the claimant would be ineligible for the benefits sought by virtue of his undocumented immigration status. (See Appellate Division Dissenting Opinion below at 7, citing *Ramroop* v. *Flexo-Craft Print, Inc.*, 11 N.Y.3d 160 (167) (2008)).

Following the December 10, 2020 Memorandum and Order issued by the Appellate Division below, the Appellants filed a timely Notice of Appeal dated December 29, 2020. Thereafter, on January 8, 2021, the Appellants filed the required Preliminary Appeal Statement which included the Disclosure Statement Pursuant to 22 NYCRR §500.1(f).

On February 24, 2021, this Court, on its own motion, pursuant to §500.11 of the Court of Appeals' Rules of Practice, determined that this appeal could be decided based upon the Appellate Division record, briefs and the decision reached by the Appellate Division below and directed the Appellants to submit a letter submission within 25 days. Subsequently, on March 8, 2021, the Clerk of the Court granted the Appellants an extension for good cause, giving Appellants until April 12, 2021 to submit this letter submission in support of the Appellants' position on the merits. The Appellants now make this filing in order to satisfy the Court's direction and urge the reversal of the decision reached by the Appellate Division below.

The Appellants do not object to the alternative handling of this matter pursuant to §500.11 of the Court of Appeals' Rules of Practice.

ARGUMENT

I.

THE APPELLATE DIVISION ERRONEOUSLY ENGAGED IN A *DE NOVO* REVIEW OF THE WORKERS' COMPENSATION BOARD'S DETERMINATION THAT THE CLAIMANT HAD NOT PROPERLY ATTACHED HIMSELF TO THE LABOR MARKET.

In the decision below, the Appellate Division, correctly cited case law which stands for the proposition that whether a claimant has maintained attachment to the labor market is a fact based question for the Workers' Compensation Board to resolve, and the Appellate Court should uphold the Workers' Compensation Board's decision if supported by substantial evidence (see p. 3 of the Appellate Division's decision below, citing *Matter of Zamora* v. *New York Neurologic Association,* 19 N.Y.3d 186, 192-193 (2012)); see also *Matter of Ostrzycki* v. *Airtech Lab, Inc.*, 174 A.D.3d 1255 (3rd Dept. 2019); *Matter of Garcia* v. *MCI Interiors, Inc.*, 173 A.D.3d 1575 (3rd Dept. 2019); *Matter of Wolfe* v. *Ames Department Store, Inc.*, 159 A.D.3d 1291, 1293 (3rd Dept. 2018). The decision rendered by the Appellate Division below, however, did not in fact adhere to the substantial evidence standard of review. Rather, the Appellate Division issued a decision which, in fact, utilized a *de novo* standard of review.

The biblical idiom of a "wolf in sheep's clothing" comes to mind in the case at bar where the Appellate Division was pretending to engage in a substantial evidence review while undertaking a *de novo* review. As this Court is certainly aware, a *de novo* review involves trying a matter anew as though it had never been decided before. See *Farmingdale Supermarket, Inc. v. United States,* 336 F. Supp. 534, 536 (D.C.N.J., 1971) (defining what a *de novo* standard of review means). That is what the Court below did here. When an appellate court engages in a *de novo* standard of review instead of the required substantial evidence standard of review, such actions must be recognized as a pernicious threat that disrupts and undermines how administrative agencies in New York State are intended to operate. The Workers' Compensation Board is statutorily mandated to make fact based findings. (See WCL §20).

In *Matter ofHalperin* v. *City of New Rochelle,* 24 A.D.3d 768, 769-770 (2nd Dept. 2005), the Court spent a great deal of time defining what it means to engage in a substantial evidence review. Specifically, the Court noted that "a 'substantial evidence' question is presented only where a quasi-judicial evidentiary hearing has been held…substantial evidence 'is related to the charge or controversy and involves a weighing of the quality and quantity of the proof…more than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt' *(300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180-181, 379 N.E.2d 1183, 408 N.Y.2d 54 (1978))."

When dealing with administrative agencies and the decisions that they have rendered, this Court from time to time has had to confront determinations that have been rendered by the Appellate Division which have gone beyond the boundaries of what it means to conduct a substantial evidence review. The recent case of *Bohlen* v. *DiNapoli,* 34 N.Y.3d 434, 440-441 (2020) involved a determination that had been reached by the New York State Comptroller's office which had been "annulled" by the Appellate Division. *id.* at 440. The *Bohlen* decision, like the case at bar, included two dissenting justices at the Appellate Division who would have affirmed the Comptroller's determination based upon substantial evidence contained in the record. In reviewing the determination reached by the Appellate Division, this Court reiterated that the administrator (in that case the Comptroller) had exclusive authority to determine the fact based retirement benefits issue and that the Court was limited to upholding the determination of the Comptroller if supported by substantial evidence contained in the record. {*id.* at 441). Ultimately, this Court recognized that "under this standard, where substantial evidence exists to support the administrative agency's determination, a Court may not substitute its judgment for that of the agency, even if there is evidence supporting a contrary conclusion". *id.* at 445. In support of this proposition, *Matter of Toys "R" Us* v. *Silva,* 89 N.Y.2d 411, 423 (1996) was prominently cited. *id.*

Utilizing the correct standard of review, the Dissenting Opinion in the case at bar had no trouble pointing to substantial evidence contained in the record that supported the decision reached below by the Workers' Compensation Board. Specifically, substantial evidence supported the Board's factual determination that the claimant had failed to show an attachment to the labor market after July 31, 2018. (See *id).* Rather than tripping over the elephant in the room or letting

that elephant influence the outcome, the Dissenting Opinion recognized the fact that the claimant was an undocumented worker. Yet, the dissent noted the well-established case law which confirms that his immigration status and lack of a Social Security number did not relieve him of any legal requirements, including his obligation to look for work within his medical restrictions. (See Appellate Division Dissenting Opinion of Justice Mulvey at 7 citing *Kandahar Auto,* 2009 WL 3192585, 2009 N.Y. Wr. Comp. LEXIS 14414, (Sept. 28, 2009)). And so, the fact that prior to July 31, 2018 Workforce1 had refused to assist the claimant due to the fact he lacked a Social Security number was of no moment for the dissenting justices. The Dissenting Opinion relied upon *Matter of Ramroop* v. *Flexo-Craft Print, Inc.*, 11 N.Y.3d 160, 166-167 (2008) in which this Court had recognized that within the Workers' Compensation Law there is "tension between the...objective to return an injured worker to the marketplace, and the reemployment of a worker, as in this case, who is not authorized to so participate in the first instance". The *Ramroop* decision addressed whether a claimant had statutorily complied with the requirements that must be met in order to establish an entitlement to benefits under WCL §15(3)(v) and involved an injured worker who was undocumented and who could not meet the statutory requirements because of his immigration status. (See *id).* In upholding the statute, *Ramroop* acknowledged the undocumented claimant could not comply with the required elements of WCL §15(3)(v) but nonetheless denied benefits. The tension in the statute, although a problem, was left for the policymakers in the New York State Legislature to fix.

In *Matter of Ramroop* v. *Flexo-Craft Print, Inc.*, 11 N.Y.3d at 168, this Court observed that "[although some workplace protections and primary workers' compensation benefits have been held to be available to injured workers who cannot demonstrate legal immigration status, the terms of §15(3)(v) are clear and we are constrained to give effect to their plain meaning." In *Ramroop,* applying the law meant that there would be some benefits to which the undocumented alien worker would not qualify. This holding was a key example of judicial restraint in the face of a policy that is troublesome to many. But the reason the *Ramroop* holding is on point is that it held that the New York Legislature sets policy and has the ability to make changes to the statute, not the courts. Rather than rewrite the statute or engage in a *de novo* factfinding mission to reshape and reverse the decision reached below, *Ramroop* applied the law even though members of the Court likely had policy preferences that could have led to a different result.

After acknowledging that the claimant's immigration status presented a challenge in the case at bar, as to the question of whether this worker could show attachment to the labor market, the Dissenting Opinion (in footnote 1) rightly concluded that the New York State Legislature would be the correct entity to the resolve such a policy concern. From there, the Dissenting Opinion correctly focused on whether the claimant made diligent efforts to find work within his physical limitations and, more specifically, whether the determination reached by the Board below that he had not was supported by evidence contained within the record. (Appellate Division Dissenting Opinion at 7).

The Dissenting Opinion correctly noted that the majority had wrongly cast aside the Board's determination that the claimant's job search lacked good faith because 37% of the businesses that he had allegedly sought work at had no job openings. (Appellate Division Dissenting Opinion at 8). The dissent rightly observed that the claimant's evidence is devoid of any indication that he lacked access to a computer to assist him in work search efforts and noted that public libraries offer free computer and internet access the claimant could have used to search for work. (Appellate Division Dissenting Opinion at 8). Again, pointing to the evidence actually contained in the record, the Dissenting Opinion noted that the claimant had provided "sparse testimony" on how he had gone about selecting businesses where he would seek work. (Appellate Division Dissenting Opinion at 9). The dissent observed that the claimant had not taken a logical approach to his job search since he did not seek out Spanish-based businesses for possible employment.

The Dissenting Opinion also pointed out that the claimant's resume that he utilized to try to find work only listed his prior construction experience and said that his goal was to find similar employment, even though his medical restrictions prohibited him from doing such work. (Appellate Division Dissenting Opinion at 9). In the end, the claimant did not present evidence to show that he had skills that he had gained through personal experience or avocational experiences that would make him qualified for the jobs he had actually applied for. (Appellate Division Dissenting Opinion at 9). And the Dissenting Opinion emphasized that the claimant had given testimony confirming that he simply walked around New York City stopping at certain businesses to inquire about work, without any "plan or explanation as to why" he had targeted these locations. (Appellate Division Dissenting Opinion at 9). After going

through the litany of evidence actually contained in the record and pointing out the evidence that was lacking from the claimant, the Dissenting Opinion correctly noted that substantial evidence did support the decision reached by the Board below.

In contrast, the Majority Opinion focused on the claimant's immigration status and sought out – and reached – a different result than the one reached by the Workers' Compensation Board. Rather than conducting a substantial evidence review, the Majority Opinion looked at the evidence afresh and redecided the case based upon its own policy preferences. The policy preferences of the court below may even find favor in the New York Legislature in the days ahead. To be sure, the Legislature in recent years has made amendments to the labor market attachment requirements, including the relatively recent change which preclude an insurance carrier from requiring an injured worker who is classified with a permanent partial disability from showing that they are attached to the labor market after they have been classified as having a permanent loss of wage earning capacity. (See WCL §15(3)(w); see also *Matter of O'Donnell* v. *Erie* County, 162 A.D.3d 1278, 1280 (3rd Dept. 2018)). That recent change demonstrates that the policymakers in the New York State Legislature are aware of the labor market attachment issue and have shown a recent willingness to make modifications to the law in order to better effectuate desired public policy. But to date, they have not made any such changes based upon the immigration status of the injured worker.

Early on in the majority decision below, the Court showed its cards when, as a starting point, it emphasized that the claimant is "an undocumented alien who speaks limited English and does not read or write English, testified through an inteipreter regarding his employment history since arriving in the United States and his unsuccessful efforts to obtain employment between April and December 2018." (Appellate Division Majority Opinion at 2). These are the facts that mattered above all else to the Majority Opinion below. These facts resulted in the complete reweighing of the evidence and to a *de novo* review of that evidence.

The Court decided that the claimant's "only job experience was in construction and his inability to perform heavy lifting due to the injuries he sustained while working for the employer, coupled with having limited English-speaking skills and an inability to read and write in English, claimant did not

receive any job offers during the relevant time period, despite his efforts." (Appellate Division Majority Opinion at 4). Keep in mind the Workers' Compensation Board below had determined that the claimant's efforts were not diligent and persistent as it relates to his attempt to find work within his medical restrictions. This was a fresh factual determination being made by the Court and went well beyond a substantial evidence review of the record.

The court below was not finished. It next went on to attack the Board's reliance upon the job search list that had been provided by the claimant which the Board below concluded was significant evidence, in and of itself, that the claimant's job search efforts were not diligent, persistent or bonafide. The Board had cited the claimant's job search list and the fact that over one-third of the listed businesses which had been applied to were businesses which did not have any openings for jobs or where the claimant had applied for positions that did not comport with his medical restrictions and limitations. The Board concluded these entries demonstrated a lack of good faith. But, while conducting its own *de novo* review of the same evidence, the Court substituted its preferences to reach a desired outcome and found that the Board's determinations were wrong. The Court below made a fresh factual determination that the job search list "does not support [the Board's] finding that his job search effort lacked good faith." (Appellate Division Majority Opinion at 5).

A substantial evidence standard of review is most deferential. Once the determination has been made by the Agency/Board below, the substantial evidence standard of review affirms that determination where supported by substantial evidence on the record as a whole, with the recognition that the decision reached below "is beyond further judicial review even though there is evidence in the record that would have supported a contrary conclusion." *In re Concourse Ophthalmology Associates, P.C.,* 60 N.Y.2d 734, 736 (1983).

What we have in the case at bar is a decision where substantial evidence supports the decision reached by the Board below. The fine analysis provided by the Dissenting Opinion (and by the Board Panel Decision that was being reviewed) demonstrates that there is ample evidence that would support the Board Panel Decision. The Majority Opinion reevaluated, reweighed and redecided the factual issue of whether there was labor market attachment. The Majority Opinion demonstrates that a different decisionmaker could have crafted a different decision and that the evidence "would have supported a contrary

conclusion." *(id).* But in so doing, the Majority Opinion overstepped its bounds. It conducted a *de novo* review. The decision reached below must be reversed. The court "may not weigh the evidence or reject the Board's choice simply because a contrary determination would have been reasonable." *Matter of Zamora v. New York Neurologic Association,* 19 N.Y.3d 186, 193 (2012). In short, "[a] finding of fact made by the Workers' Compensation Board is considered conclusive on the courts if supported by substantial evidence…Inasmuch as there was substantial evidence to support the determination of the board, the Appellate Division erred in reversing that determination." *Matter of Gates* v. *McBride Transp., Inc.,* 60 N.Y.2d 670 (1983).

While there may be policy considerations implicated by this case which call into question whether legislative changes are advisable concerning undocumented workers who sustain work related injuries in this State, that determination should be made by the Legislature. In the case at bar, the decision originally issued by the Workers' Compensation Board Panel should have been affirmed.

II.

THE MAJORITY OPINION BELOW FLIPPED THE BURDEN OF PROOF TO REQUIRE THAT THE APPELLANT EMPLOYER AND CARRIER SHOW THAT THE CLAIMANT WAS NOT ATTACHED TO THE LABOR MARKET.

It is well settled that the injured worker who is partially disabled must show attachment to the labor market through the production of evidence demonstrating a diligent and persistent search for work within that injured worker's medical restrictions. See *Matter of Ostrzycki* v. *Airtech Lab, Inc.,* 174 A.D.3d 1255 (3rd Dept. 2019); *Matter ofPravato* v. *Town of Huntington,* 144 A.D.3d 1354, 1356 (3rd Dept. 2016); *Matter of Cole* v. *Consolidated Edison Co. of NY, Inc.,* 125 A.D.3d 1084, 1085 (3rd Dept. 2015).

Problematically, and as pointed out by the Dissenting Opinion (see page 8), the Majority Opinion did not require the claimant to meet that burden of proof. Rather than do so, the Majority Opinion flipped the burden of proof. The dissent called attention to the misguided attempt to turn the burden of proof on its head:

> "The majority does not hold the claimant to his burden. Concluding that claimant was essentially required to conduct his job search by personally going to businesses and asking if they had any positions, the majority finds no support for the Board's finding that the claimant's search lacked good faith because 37% of the businesses from which he sought work had no positions available. The majority states that '[tjhere is nothing in the record, meanwhile, demonstrating that claimant had access to training or that there was an agency willing and able to assist with job search that claimant had access to job training or that there was an agency willing and able to assist with his job search or that he had access to a computer, let alone the computer skills necessary, to conduct a job search' (Majority Op. at 5). <u>But this statement begs the</u> question <u>of who bore the burden of submitting evidence on those</u> topics." (Emphasis added) (Appellate Division Dissenting Opinion at 8).

Indeed, it was the claimant who had the burden to demonstrate, with competent evidence, a diligent and reasonable search for work. While the Majority Opinion, in its efforts to redecide the facts, made assumptions about the evidence, the Dissenting Opinion pointed out that if the claimant did not have access to a computer or job search websites due to his lack of English skills (or simply due to the fact that he does not own a computer), he would have needed to testify to this fact or adduce other admissible evidence to show that this is true. But in fact, the claimant failed to present any evidence that he lacked access to a computer or to the internet. Insofar as public libraries have free computer access available and internet access, there is no support for the majority assuming claimant lacked a computer or access to the internet. (Appellate Division Dissenting Opinion at 8).

The dissent was also quite right in pointing to the fact that the majority decision had wrongly concluded, without any actual evidence to support it, that the claimant was forced to undertake his job search by going door to door looking for work. (Appellate Division Dissenting Opinion at 8). There is no evidence in the record to demonstrate this is true. In fact, this conclusion reached by the Majority Opinion was not simply erroneous for the reason that it was a *de novo* finding of fact, but is also erroneous because it was a complete invention of fact. On the contrary, the Dissenting Opinion was right to point out that the record did

not show the claimant lacked access to friends, relatives or other individuals who might have been able to assist the claimant by reading English language classified advertisements, and help-wanted signs in store windows. (Appellate Division Dissenting Opinion at 8-9). Once again, claimant failed to provide any evidence as to the lack of availability in terms of Spanish language advertisements or websites in the New York City area which contains a large Spanish speaking population. The claimant's lack of evidence on these points was no problem for the majority. Nor was, as the Dissenting Opinion rightly highlighted, "claimant's sparse testimony [to explain] how he had selected the businesses at which he sought work" a problem for the majority decision below. (Appellate Division Dissenting Opinion at 9).

When the correct burden of proof is applied, the claimant's evidence simply lacks what is required to show labor market attachment. In the interest of judicial economy, we will not repeat the points that were raised in the brief to the Appellate Division since we have already incorporated them herein by reference. Nonetheless, the well understood requirements necessary to show labor market attachment are highlighted at page 18 of the brief filed by the Appellants below. As was explained, 23 of the listed employers that the claimant had sought work with were not even hiring at the time the application was submitted. This accounts for 37% of the places the claimant sought employment at and, on its face, serves as a very reasonable basis for the Board to conclude that the claimant had not met his burden of proof to show a bonafide, diligent and persistent search for work within his restrictions. Moreover, 27 of the perspective employers could not hire the claimant due to a lack of Social Security number. This is very similar to the situation in the *Ramroop* decision that came before this Court, where the undocumented worker could not meet the statutory requirements that would have entitled him to additional benefits under §15(3)(v). (See *Ramroop*, 11 N.Y.3d at 168). The fact that the claimant was not a legitimate candidate for those 27 different businesses to which he applied is further evidence that he had not met his burden of proof.

Because the claimant had not actually completed an English language course, but had only been put on a waiting list and presented no evidence of follow-up after he was placed on that waiting list, the Board's determination that this was an insufficient demonstration of attachment to the labor market should not have been set aside.

The claimant's resume which also convinced the Board, on the face of it, that the claimant was not engaged in a bonafide, diligent and persistent search for work within his medical restrictions was yet another piece of evidence that went to the question of whether the claimant had met his burden of proof. In flipping the burden of proof, the majority wanted to give the claimant credit for having the resume and for utilizing that resume to try and find work within his restrictions. But as the Dissenting Opinion correctly notes, the resume in question noted the claimant's "previous work in construction and states that his goal is to gain similar employment, but his medical restrictions essentially prohibit him from performing such work." (Appellate Division Dissenting Opinion at 9). It was not irrational, or even unreasonable, for the Board below to conclude that his resume was another instance where the claimant did not meet his burden of proof. If the resume, on its face, establishes that the claimant was applying for jobs not within his medical restrictions – and that is exactly what his resume proves – it is absurd to suggest that the resume was evidence of a bonafide job search that was diligent and persistent. Quite the opposite.

When looking at the Dissenting Opinion as well as the Board Panel Decision that was being reviewed by the Appellate Division below, it is striking how the evidence that was relied upon by the Board was not only dismissed, but reevaluated and reweighed with the burden of proof having been flipped. When the burden of proof is flipped, as was done here, it is far easier to get the result that was desired by the majority. But it is not what the law requires. It is the injured worker who must meet the burden of proof and show that they have been attached to the labor market through "a diligent and persistent search for employment within their medical limitations." See *Matter of Ostrzycki* v. *Airtech Lab, Inc.*, 174 A.D.3d 1255 (3rd Dept. 2019).

It should be noted, too, that flipping the burden of proof was the only way the Court could undertake a *de novo* review as described in Argument I, *supra*, while purporting to be engaged in a substantial evidence review. This was very clever. Yet, the decision below must still be reversed. Having gotten it all wrong on the key question of who bore the burden of proof, the Court below concluded that substantial evidence would not support the Board's decision. The holding of the Court below indeed "begs the question of who bore the burden of submitting evidence on" the issue of labor market attachment. (Appellate Division Dissenting Opinion at 8). Because this impermissible flipping of the burden of

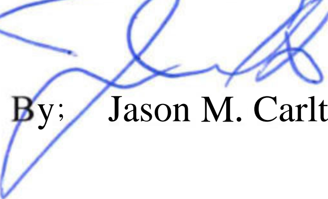
proof was a significant legal error, the decision reached below should be reversed.

CONCLUSION

The decision reached by the Appellate Division below improperly decided this case with the majority below conducting a *de novo* review rather than determining whether substantial evidence would support the decision reached by the Workers' Compensation Board Panel below. In addition, the majority decision flipped the burden of proof and did not require the claimant show attachment to the labor market. The decision reached below constitutes reversible error and has significant statewide implications. For all of the foregoing reasons, the decision reached below should be reversed, with costs.

Respectfully submitted,

GITTO & NIEFER, LLP



By; Jason M. Carlton

JMC/dak-ed(jmc)(dak)

PRINTING SPECIFICATIONS STATEMENT

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

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Dated: April 2, 2021