THIRD DEPARTMENT NO. 524981

Court of Appeals of the State of New York

IN THE MATTER OF THE CLAIM FOR BENEFITS UNDER THE WORKER'S COMPENSATION LAW MADE BY

SANDY O'DONNELL,

Claimant-Respondent,

-against-

ERIE COUNTY, C/O FCS ADMINISTRATORS

Employer/Administrator Appellants,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

MEMORANDUM IN OPPOSITION TO LEAVE TO APPEAL RESPONDENT WORKERS' COMPENSATION BOARD

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August 1, 2018

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PRELIMINARY STATEMENT

Respondent Workers' Compensation Board ("Board") submits this memorandum in opposition to the motion of the employer Erie County ("petitioner") for leave to appeal from a decision and order of the Appellate Division, Third Department. The Third Department held that the Board properly found that a 2017 amendment to Workers' Compensation Law ("WCL") § 15(3)(w) applied retroactively to this case and obviated the need for the claimant to demonstrate a continued attachment to the labor market in order to receive wage replacement benefits subsequent to her retirement. *See* Exhibit A annexed to statement in support of motion ("Decision").

The Third Department's decision was correct and does not present any issue that merits this Court's review. In particular, petitioner does not contend that the Third Department erred in finding that the 2017 amendment applies retroactively to all pending cases where the claimants are entitled to benefits at the time of their classification as having a permanent partial disability. Rather, petitioner disputes only the application of the amendment under the particular circumstances of this case. Accordingly, petitioner's motion for leave to appeal should be denied.

STATEMENT OF THE CASE

Section 15 of the WCL applies to employees who have been disabled in the course of employment. The degree of disability (partial or total) is determined by the Board upon presentations of the facts and evidence regarding the claimant's medical condition. A disability may also be determined to be temporary or permanent. An injured employee who is classified as having a permanent partial disability is entitled to receive an award for lost wages where the employee's reduced earning capacity is shown to have resulted from the injury. *See* WCL § 15(3).

In April 2017, the Legislature amended WCL § 15(3)(w) "effective immediately." *See* L 2017, ch. 59, Part NNN. Among other things, the amendment provides that, in cases of permanent partial disability, compensation "shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market." WCL §15(3)(w). The effect of this amendment is to eliminate the former requirement that claimants who had been classified as having a permanent partial disability and who were eligible for benefits at the time of classification continually demonstrate that they were seeking employment.

In December 2010, claimant, a 28-year employee with Erie County, was injured in the course of her employment. (R. 91-92, 21, 24, 30 33-39).[1] By decision dated August 12, 2011, a WCLJ determined that she had sustained a work-related injury to her back, knees, and elbows, and an average weekly wage was set. (R. 40).

In 2012, claimant was transferred from a juvenile probation position to adult probation, without explanation. While her former job was mostly sedentary, her new job necessitated walking up and down stairs, walking to prisons and holding cells, and working on a computer outside of her work area. She requested a transfer back to juvenile probation, citing the physical nature of her new position, but this request was denied. (R. 95-97 107 97.) In March 2013, she requested, and ultimately retired with, a disability retirement and pension. (R. 100.) Claimant did not seek further employment (R. 110.)

In 2015, Dr. Bernard Beaupin testified that claimant was injured when she fell at work, leading to permanent impairment of the lumbar spine. He opined that she would only be capable of sedentary work, and

[1] Page references with the prefix "R" refer to the printed record on appeal.

she had a low expectation of actually finding gainful employment given her age and physical condition. (R. 74-85.)

By decision dated September 17, 2015, the WCLJ found that claimant had an 81.00% loss of wage earning capacity due to her work-related injury, and that she was entitled to wage loss benefits. (R. 123-124.) The WCLJ added that claimant "is excused from looking for work and in effect has a compensable retirement." (R. 124). Upon the carrier's appeal, the Board Panel modified the WCLJ decision, finding claimant had a 65% loss of wage earning capacity, was entitled to no more than 375 weeks of benefits, and had involuntarily withdrawn from the labor market. (R. 176).

The employer filed an application for discretionary full Board review. By decision dated July 19, 2017, the Board Panel denied the employer's request, but amended its prior decision to state that claimant was not obligated to demonstrate an ongoing attachment to the labor market. Among other things, the Board noted that during the pendency of the application, the Legislature had amended WCL § 15(3)(w) to eliminate the requirement that claimants found to be entitled to benefits at the time of classification must demonstrate an ongoing attachment to the labor market. Since claimant had been found to be entitled to benefits

at the time of her classification, the Board concluded that she was not obligated to demonstrate an ongoing attachment to the labor market. (R. 193).

On the employer's appeal, the Appellate Division, Third Department, unanimously affirmed. The court found that the remedial purpose, legislative history, and express language of the 2017 amendment all favored its retroactive application. In particular, the court stated that "the amendment was clearly intended to apply to claimants who have involuntarily withdrawn from the labor market and are entitled to receive wage replacement benefits having been classified with a permanent partial disability." Decision at 4. The court therefore affirmed the Board's conclusion that the 2017 amendment "obviated the need for the claimant to demonstrate a continued attachment to the labor market in order to receive wage replacement benefits subsequent to her retirement." *Id.* This motion ensued.

REASONS FOR DENYING LEAVE

Petitioner's motion for leave should be denied. Petitioner does not contend that the Third Department's decision conflicts with any other decision of the Appellate Division or with any prior decision of this Court.

Nor does this case present an issue that is novel or of public importance. *See* 22 N.Y.C.R.R. § 500.22(b)(4).

Significantly, petitioner does not take issue with the Third Department's conclusion that the 2017 amendment to WCL § 15(3)(w) applies retroactively to those claimants with pending cases and who were entitled to benefits at the time of their classification as having a permanent partial disability. Nor could it: in reaching this result, the Third Department properly relied on the remedial intent, plain language and legislative history of the amendment, all of which favor retroactive application.

Thus, the legislative history, in the form of a letter from the Board's General Counsel in support of the amendment, explains that the reform was meant to relieve "claimants from having to demonstrate ongoing attachment to the labor market when they are entitled to benefits at the time they are classified permanently partially disabled." The amendment "affects previously decided cases in which there has not been a finding that the claimant had voluntarily removed him or herself from the labor market at the time of classification." (Letter, David F. Wertheim, Bill Jacket L 2017, ch 59 at 29.)

Likewise, the court correctly concluded that the plain language of the amendment supported retroactive application. As the court noted, portions of the amendment subsequent to the provision eliminating the requirement of labor market attachment expressly state that they are applicable to claimants with a "date of accident or disablement" some period of time *after* the effective date of the amendment. The court properly reasoned that "[i]nasmuch as this language was not included in that part of the amendment addressing labor market attachment, it may be assumed that a prospective application was not intended" with respect to the labor market attachment reform. Decision at 4.

Instead, petitioner argues that the Third Department erroneously applied the 2017 amendment to this case because claimant was not "entitled to benefits at the time of classification," having failed to demonstrate her attachment to the labor market from the time of her retirement in 2013 to her September 14, 2015 hearing, at which she received a permanent disability award. (Mot. at 2-3.) Even if petitioner were correct that the Board erroneously found claimant to be entitled to benefits at the time of classification, however, it would mean no more than that the Board erred in this particular case. It would not present a broader issue warranting this Court's review.

In any event, petitioner's argument is mistaken for two reasons. First, although the leave motion does not explain why the Board erred, petitioner argued below that the Board improperly drew an inference, in contravention of *Zamora v. New York Neurological Assoc.*, 19 N.Y.3d 186 (2012), that claimant had withdrawn from the labor market because of her disability. To the contrary, the Board acted consistently with *Zamora*. In that case, this Court held that where the Board classifies the claimant with a permanent partial disability, "the Board may, but need not, infer that the claimant cannot find a suitable job because of her disability" *Id.* at 192. In this case, the Board found that "[b]efore being granted a disability retirement, the claimant's attempts to continue working periodically failed..."(R. 192). The Board thus drew the permissible inference that claimant was not working because of her work-related disability.

But even assuming petitioner is correct, and the Board's decision is deficient because it did not make an express finding as to claimant's labor market attachment at the time of classification, at most petitioner has identified one error in this case, rather than an issue of statewide importance.

Second, the 2017 amendment was intended to apply to "previously decided cases," such as claimant's, where "there has not been a finding that claimant had voluntarily removed himself or herself from the labor market at the time of classification." Decision at 4 (quoting Wertheim Letter). The Board did not find that claimant had voluntarily removed herself from the labor market at the time of her classification, and thus, under the amendment, she was not required to demonstrate ongoing labor market attachment. In this respect, the Legislature purposely made relief from the requirement of demonstration of attachment to the labor market retroactive so that claimants such as claimant here would not have to have their cases reopened, and would have finality of their claims. For these reasons, the motion should be denied.

CONCLUSION

The motion for leave to appeal should be denied.

Dated: New York, New York
August 1, 2018

Respectfully submitted,

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