New York State
Court of Appeals

In the Matter of the Claim for Compensation Benefits
under the Workers' Compensation Law made by,

SANDY O'DONNELL,
Claimant-Respondent,

-vs-

ERIE COUNTY, EMPLOYER C/O FCS ADMINISTRATORS,
Employer and Administrator Appellants,

and

WORKERS' COMPENSATION BOARD,
Respondent.

WCB Case No.: G0360932
Index No. 524981

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Claim for Compensation Benefits
under the Workers' Compensation Law made by,

Sandy O'Donnell,

Claimant-Respondent,

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

-vs-

WCB Case No. G0360932
Appellate Division No. 524981

Erie County and
FCS Administrators,

Employer and Carrier Appellants,

and

Workers' Compensation Board,

Respondent.

WCB Case No.: G0360932

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Matthew M. Hoffman, Esq. dated July 20, 2018, and upon the Exhibits attached hereto, and the additional documents required by Rules 500.21 and 500.22 of this Court, the Employer-Appellant, Erie County, will move this Court, at the Court of Appeals Hall, Albany New York, on the 6th day of August 2018 for an order granting leave to appeal to this Court from the order of the Appellate Division, Third Department, entered in Office of the Clerk of the Appellate Division on June 14, 2018, and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 500.22[d] of the Rules of this Court, answering papers, if any, must be served and filed on the Court of Appeals with proof of service on or before the return date of the motion.

PLEASE TAKE FURTHER NOTICE that there is no oral argument of motions and no personal appearances are permitted.

DATED: July 18, 2018

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COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Claim for Compensation Benefits
under the Workers' Compensation Law made by,

Sandy O'Donnell,

Claimant-Respondent,

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

-vs-

WCB Case No. G0360932
Appellate Division No. 542981

Erie County and
Erie County,

Employer and Carrier Appellants,

and

Workers' Compensation Board,

Respondent.

WCB Case No.: G0360932

SIRS:

Matthew M. Hoffman, an attorney admitted to practice law before the courts of the State of New York, affirms the following under penalty of perjury:

(1) I am an attorney duly licensed to practice in the State of New York and am an associate in the law firm of Hamberger & Weiss, attorneys for the employer and its third party administrator. As such, I am fully familiar with the facts and circumstances set forth herein.

- **Procedural history of claim including outline of timeliness of motion pursuant to Rule 500.22**

(2) This motion for leave arises from a 6/14/2018 order of the Appellate Division, Third Department, which was provided to the Appellant via a Notice of Entry dated 6/20/2018 sent by First Class Mail within the State of New York. (Notice of Entry and Decision and Order, attached hereto as **Exhibit A**). Pursuant to the enclosed service affidavit, this motion was served on 7/20/2018 and, therefore, the Appellant's motion is timely pursuant to CPLR 5513 and CPLR 2103.

(3) Moreover, the record is fully preserved as timely notice of appeals were filed to each decision of the Workers' Compensation Board on September 16, 2017 and July 24, 2017. R at 3-12. With the permission of the Appellate Division, Third Department, both appeals were consolidated and addressed via a joint record and brief. (Decision and Order dated 9/14/2017, attached hereto as **Exhibit B**). The Appellant and Respondent each timely submitted briefs in response, which are attached hereto in addition to the record on appeal. Oral argument was heard on 4/24/2018, with argument presented by the Appellant only.

- **The Court of Appeals has jurisdiction over this claim pursuant to CPLR Section 5602[1]**

(4) The order of the Appellate Division dated 6/14/2018 is a final order pursuant to CPLR § 56202 and Rule 500.22[b][3] as it stems from an appeal taken from a decision of the Workers' Compensation Board dated 8/18/2016 (R. at 170-177), and amended 7/19/2017 (R. at 186-195), pursuant to Section 23 of the Workers' Compensation Law. As such, there is no counterclaim, cross claim, or other request for relief pending that would disturb the finality of the Appellate Division's decision. Further, the Appellate Division's decision does not implicate any basis for mandatory appeal to this Court, and therefore, the Appellant's remedy is the instant motion for leave to file an appeal.

- **Brief synopsis of the claim of O'Donnell v. Erie County (WCB No. G0360932)**

(5) The instant workers' compensation case is an accepted and established claim for accidental injuries to the back, knees, and elbows occurring on 12/14/2010. The issue before the Appellate Division below was whether the claimant was entitled to wage-replacement benefits following her retirement on 3/9/2013, and whether the April 2017 amendment to Section 15[3][w] had any impact on the claimant's entitlement to post-retirement wage-replacement benefits.

(6) It is undisputed the claimant received a disability retirement effective 3/9/2013 from the employer, and that the retirement was granted in part due to the injuries sustained on 12/14/2010. As such, the employer has conceded that the claimant's retirement was involuntary. It also undisputed that since the retirement, the claimant has failed to search for any work or attempt to retrain for a less physically demanding profession. R. at 110. Further, it also undisputed that all times following the 3/9/2013 retirement the claimant was partially disabled. See R. at 48-68, 123-124. Accordingly, the relevant facts in this claim were never disputed and are as follows: (1) the claimant is partially disabled; (2) the claimant ceased working for the Appellant as a result of that partial disability; and (3) the claimant did not demonstrate an attachment to the labor market following her cessation of employment with the Appellant.

(7) A hearing was held before the Workers' Compensation Board on 9/14/2015 for the purpose of classifying the claimant with a permanent partial disability. R. at 87-125. At this hearing the employer contended that the claimant was not entitled to post-retirement wage replacement benefits as she was partially disabled and not searching for any work. R. at 115-116. The employer relied on the Court of Appeals decision in Zamora v New York Neurologic Assoc., 19 NY3d 186 [2012] in furtherance of its position that the claimant was

not entitled to post-retirement wage replacement benefits as a result of her failure to search for work following her retirement. R. at 115-116. The Law Judge distinguished the case of Zamora, by finding the disability retirement granted by the employer "excused the claimant from looking for work." R at 118-119. Awards for wage replacement benefits were made from 3/9/2013 to the classification hearing at a rate of $408.09 per week, and the employer was directed to commence paying permanent partial disability benefits pursuant to Section 15[3][w] at weekly rate of $661.07. R at 123-124.

(8) The employer then filed an Application for Board Review contending the Law Judge erred by making lost time awards based on the claimant's concession she failed to search for any employment following her 3/9/2013 cessation of employment. R. at 126-132. The employer also contended the level of permanent partial disability found by the Law Judge was excessive. Id.

(9) On 8/18/2016 the Board Panel addressed the employer's appeal, and reduced the claimant's loss of wage earning capacity finding pursuant to Section 15[3][w] from 81% to 65% and directed a corresponding reduction in the weekly benefit rate. R. at 170-177. However, the Board did not address the employer's argument that awards were altogether inappropriate based on the claimant's failure to search for employment following her 3/9/2013 retirement. Id. The Board's analysis ceased at its conclusion that the claimant's cessation of employment was involuntary, a fact conceded by the employer in its appeal. Id. The Board never addressed the employer's contention that the claimant's failure to search for work following her involuntary cessation of employment required a reversal of the Law Judge's decision to award wage-replacement benefits. Id.

(10) Therefore, on 9/16/2016 the employer filed an Application for Discretionary Full Board

Review and a Notice of Appeal to the Appellate Division, Third Department regarding the Board's failure to address the claimant's lack of a post-retirement job search. R. at 8, 178-185.

(11) While the Application for Full Board Review was outstanding, Section 15[3][w] of the Workers' Compensation Law was amended in relevant part to read:

> Compensation under this paragraph 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... Workers' Compensation Law § 15[3][w].

(12) In a decision dated, 7/19/2017, the Workers' Compensation Board denied the employer's Application for Full Board Review; however, on its own motion, the Board amended its decision to find the aforementioned amendment to Section 15[3][w] provided a further basis to affirm the Law Judge's decision to excuse the claimant from searching work. R. at 186-195. Specifically, the Board held that as the Law Judge excused the claimant from looking for work at the time of the classification hearing, the claimant was not obligated to search for work following the classification hearing. R. at 193. However, the Board never addressed whether the Law Judge erred by excusing the claimant from searching for work in the first instance. Id.

(13) The employer then filed a second Notice of Appeal, and with the Third Department's permission addressed both the 8/8/2016 and 7/19/2017 decisions in same brief. In its brief and at oral argument the employer noted that the amendment to Section 15[3][w] is not implicated in the case at bar as it only applies in claims where the claimant is "entitled to benefits at the time of classification."

(14) Following oral argument the Appellate Division issued a decision dated 6/14/2018 affirming the Board which was served upon the appellant on 6/20/2018 via first class mail. (Exhibit A). In its decision the Court declined to address whether the Board erred by failing to address the claimant's lack of a post-retirement job search. Id. Instead the Court held that the aforementioned amendment to Section 15[3][w] obviated any such failure by virtue of its retroactive application. Id. However, the Court never addressed the employer's argument that the amendment did not apply to the case at bar as the claimant was not entitled to compensation in the first instance. Id. This motion for leave to appeal follows.

THEREFORE, and based on the enclosed memorandum, I respectfully urge this Court to grant Appellant's motion for leave to appeal to the Court of Appeals.

DATED: July 18, 2018

Buffalo, New York

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COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Claim for Compensation Benefits under the Workers' Compensation Law made by,

Sandy O'Donnell,

Claimant-Respondent,

MEMORANDUM IN SUPPORT OF NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

-vs-

WCB CASE: G0360932
APPELLATE DIVISION NO: 521899

Erie County and
Erie County,

Employer and Carrier Appellants,

and

Workers' Compensation Board,

Respondent.

WCB Case No.: G0360932

Questions Presented for Court of Appeals:

(1) Did the Appellate Division err by finding the April 2017 amendment to Section 15[3][w] applicable to this claim despite declining to address whether the claimant was entitled to benefits at the time of classification?

(2) Did the Workers' Compensation Board err by finding the claimant entitled to benefits at the time of classification?

The Court of Appeals must grant leave to hear the instant appeal as the Appellate Division declined to address the threshold question of whether the claimant was entitled to wage-replacement benefits at the time of classification. This was an error as the amendment, by

its plain language, only relieves permanently partially disabled claimants of demonstrating an ongoing attachment to the labor market if they are "entitled to benefits at the time of classification." Workers' Compensation Law Section 15[3][w]. Accordingly, before determining if the amendment has any bearing on the case at bar, the Board and the Court must first determine if the claimant was entitled to benefits at the time of classification.

This requires definition of the term "classification." Classification is the time at which awards are no longer defined "temporary" pursuant to Section 15[2][1] or 15[5-a][2], and are deemed permanent pursuant to Section 15[1][3] or 15[3][4]. See Canales v Pinnacle Foods Group LLC, 117 AD3d 1271, 1273 [3d Dept 2014] (defining classification as the process in which the Board considers both medical and vocational factors to determine the length of permanent partial disability awards pursuant to Section 15[3][w]). In Canales the Third Department specifically used the phrase "at the time of classification" to refer to the moment awards were made based on Section 15[3][w] as opposed to Section 15[5-a]. Id. at 1274. Further, in Rosales v Eugene J. Felice Landscaping, 144 AD3d 1206 [3d Dept 2016] the court again referred to classification as the time when a permanent disability award is made pursuant to Section 15[3][w] as opposed to Section 15[5-a]. Therefore, "at the time of classification" refers to the date in which the Board makes a permanent disability award pursuant to Section 15[3][w] or Section 15[1].

Accordingly, the amendment to Section 15[3][w] only obviates claimants from demonstrating an ongoing attachment to the labor market if they are entitled to awards at the time their level of permanent disability is addressed. In the case at bar the "time of classification" was the hearing held on 9/14/2015 when the claimant's level of permanent disability pursuant to Section 15[3][w] was adjudicated. Therefore, for the amendment to be implicated, the claimant

1 Defining benefits for periods of temporary total disability.
2 Defining benefits for periods of temporary partial disability.
3 Defining a permanent total disability.
4 Defining a permanent partial disability and outlining the limitations of benefits for a permanent partial disability.

would have to be entitled to benefits as of 9/14/2015. As revealed by the hearing minutes and the subsequent decision, the claimant's entitlements to benefits following her 3/9/2013 retirement had never been fully adjudicated. As such, and assuming the amendment is retroactive, it would only apply if the claimant was entitled to benefits on 9/14/2015. However, as argued by the employer in both appeals to the Board and its brief to the court below, the claimant's failure to search for work following her 3/9/2013 cessation of employment precluded an award of indemnity benefits. Accordingly, the claimant was not entitled to benefits on 9/14/2015 (the time of classification) and, therefore, the amendment does not apply to this case, and the Appellate Division misapplied Section 15 of the Workers' Compensation Law.

Moreover, both the applicability of the amendment to Section 15[3][w], and the threshold question of the claimant's entitlement to benefits following her retirement are preserved for review. The amendment was only enacted following the submission of both the Application for Board Review and the Application for Full Board Review and, therefore, was addressed for the first time in the Appellant's brief on page 10. The claimant's entitlement to benefits at the time of classification was raised below at the hearing held on 9/14/2015 (R. at 87-123), the employer's first Application for Board Review dated 10/15/2015 (R. at 126-132), the employer's Application for Discretionary Full Board Review dated 9/19/2016 (R. at 178-183), and the employer's brief to the Appellate Division at pages 6-9. Therefore, the issues are fully preserved pursuant to Rule 500.22[b][4].

Further, the interpretation of the amendment to Section 15[3][w] will impact all workers' compensation claims where a claimant is classified with a permanent partial disability. The Appellate Division decision marks the first time the courts have addressed the amendment to Section 15[3][w] and, therefore, this presents an issue of first impression for the Court. Failure to address the error of the Appellate Division below will result in a faulty application of Section

15[3][w] for cases past and present. Moreover, as the Third Department is the only Appellate Division to address Workers' Compensation appeals, it is unlikely there will be another opportunity for the courts of this State to rectify this error of statutory interpretation. Accordingly, the Court must hear this claim pursuant to Rule 500.22[b][4].

Therefore, the Court must grant leave to appeal as the Third Department specifically declined to address whether the Board erred in awarding benefits in the first instance. However, the entitlement to benefits at the time of classification is a threshold issue that must be decided in favor of the claimant before the amendment is implicated. Accordingly, the claimant's entitlement to benefits following her involuntary retirement on 3/9/2013 must first be addressed.

Wherefore, we move this Court to grant leave to address the following issues:

(1) Did the Appellate Division err by finding the April 2017 amendment to Section 15[3][w] applies to this claim without first addressing whether the claimant was entitled to benefits at the time of classification?

(2) Did the Workers' Compensation Board err by finding the claimant entitled to benefits at the time of classification?

DATED: July 18, 2018

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of the Claim of
SANDRA L. O'DONNELL

Respondent, Docket No. 524981
NOTICE OF ENTRY

-against-

ERIE COUNTY, et al.

Appellants,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

PLEASE TAKE NOTICE that the annexed is a true and correct copy of a memorandum and order of the Supreme Court of the State of New York, Appellate Division, Third Department entered in the office of the Clerk of that Court on June 14, 2018.

Dated: New York, New York
June 20, 2018

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EXHIBIT A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 14, 2018 524981

In the Matter of the Claim of
SANDRA L. O'DONNELL,
Claimant,

v

MEMORANDUM AND ORDER

ERIE COUNTY et al.,
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: April 24, 2018

Before: Lynch, J.P., Devine, Mulvey, Aarons and Pritzker, JJ.

Hamberger & Weiss, Buffalo (Matthew M. Hoffman of counsel), for appellants.

Barbara D. Underwood, Attorney General, New York City (Marjorie S. Leff of counsel), for Workers' Compensation Board, respondent.

Pritzker, J.

Appeals (1) from a decision of a panel of the Workers' Compensation Board, filed August 18, 2016, which ruled, among other things, that claimant involuntarily withdrew from the labor market, and (2) from an amended decision of said Board panel, filed July 19, 2017, which ruled, among other things, that claimant was not required to demonstrate an ongoing attachment to the labor market.

Claimant, a probation officer, worked for the municipal employer for approximately 28½ years. On December 14, 2010, she slipped and fell on a wet floor at work, injuring her back, knees and elbows. She was absent from work as a result and returned in January 2011 to light duty. She subsequently filed a claim for workers' compensation benefits and a Workers' Compensation Law Judge (hereinafter WCLJ) established her case for injuries to her back, bilateral knees and bilateral elbows. After claimant returned to work, she continued to experience problems related to her injuries causing her to be periodically absent. In addition, her job had changed and she was now required to work with adults instead of juveniles, which entailed increased physical demands and required considerably more walking. Consequently, in March 2013, claimant retired from her position and began receiving disability retirement and Social Security benefits.

Thereafter, claimant's workers' compensation case was continued to ascertain the permanency of her injuries. In September 2015, the WCLJ, among other things, classified claimant as having a permanent partial disability with an 81% loss of wage-earning capacity and found that she had a compensable retirement excusing her from continuing to look for work. A panel of the Workers' Compensation Board modified the WCLJ's decision by reducing claimant's loss of wage-earning capacity to 65%. Consistent with the WCLJ's decision, it found that claimant's retirement constituted an involuntary withdrawal from the labor market. The employer and its workers' compensation carrier (hereinafter collectively referred to as the employer) filed an application for discretionary full Board review of this decision on the basis that the Board panel failed to address the issue of claimant's postretirement attachment to the labor market pursuant to the Court of Appeals' decision in Matter of Zamora v New York Neurologic Assoc. (19 NY3d 186 [2012]). The Board panel denied the application for full Board review, but issued an amended decision finding, among other things, that claimant was not required to demonstrate an ongoing attachment to the labor market following her retirement given the recent amendment to Workers' Compensation Law § 15 (3) (w). The employer appeals from both decisions.

The employer contends that the Board panel erred in awarding claimant postretirement wage replacement benefits based on a reduction in earnings without determining whether the inference recognized in Zamora applied so as to relieve her of the need to demonstrate an attachment to the labor market following her retirement. Assuming without deciding that the Board panel so erred, it issued an amended decision finding that claimant was not required to demonstrate an attachment to the labor market based upon a recent amendment to Workers' Compensation Law § 15 (3) (w) (see L 2017, ch 59, part NNN, subpart A, § 1). That amendment states, in relevant part, that in cases such as claimant's, "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" (Workers' Compensation Law § 15 [3] [w]). It further provides that it is to "take effect immediately" upon its passage, which was on April 10, 2017 (L 2017, ch 59, part NNN, subpart A, § 4).

Contrary to the employer's claim, we find that the amendment is applicable here and relieves claimant from the need to demonstrate a continued attachment to the labor market. Although it is generally preferable to construe a statute in a prospective manner, a retroactive application is warranted if the statutory language expressly or by necessary implication so provides (see Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 584 [1998]; Matter of Thomas v Bethlehem Steel Corp., 63 NY2d 150, 154 [1984]; see also McKinney's Cons Laws of NY, Book 1, Statutes, § 52 at 101-102). Moreover, a retroactive application is appropriate if the statute is, like the Workers' Compensation Law, remedial in nature (see Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d at 584; Matter of Becker v Huss Co., 43 NY2d 527, 540 [1978]; Matter of Mealing v Hills, 132 AD2d 759, 760 [1987], lv denied 70 NY2d 612 [1987]; see also McKinney's Cons Laws of NY, Book 1, Statutes, § 54 at 108-109). Notably, even though a statute is to take effect immediately, this is not dispositive of the issue of retroactivity (see Matter of Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d at 583; Matter of Becker v Huss Co., 43 NY2d at 541).

Although the amendment does not specifically state that it applies to claimants classified as permanently partially disabled prior to its effective date, the legislative history supports this interpretation. The Governor's Bill Jacket for the legislation contains a letter from the Board's counsel summarizing the various amendments to the Workers' Compensation Law that were included. With regard to the amendment at issue here, the letter states that it "amends [Workers' Compensation Law] § 15 (3) (w) 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" (Letter, David F. Wertheim, Workers' Compensation Board General Counsel, Bill Jacket L 2017, ch 59 at 29). Concerning the issue of retroactivity, this letter notes that "[t]his amendment . . . affects previously decided cases in which there has not been a finding that the claimant had voluntarily removed him[self] or herself from the labor market at the time of the classification." In view of this, 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.

In addition to the legislative history, a retroactive application may be inferred from other language in the amendment. After addressing labor market attachment, subsequent portions of Workers' Compensation Law § 15 (3) (w), dealing with certain credits to be provided to employers and carriers, state that they are applicable to claimants "with a date of accident or disablement after the effective date of" the amendment (Workers' Compensation Law § 15 [3] [w]). Inasmuch 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. In view of the foregoing, we conclude that the Board panel properly found that the recent amendment to Workers' Compensation Law § 15 (3) (w) obviates the need for claimant to demonstrate a continued attachment to the labor market in order to receive wage replacement benefits subsequent to her retirement.

Lynch, J.P., Devine, Mulvey and Aarons, JJ., concur.

ORDERED that the decision and amended decision are affirmed, without costs.

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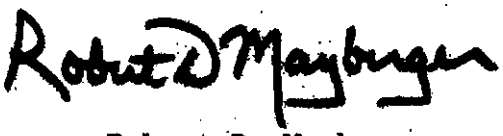

Robert D. Mayberger
Clerk of the Court

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: September 14, 2017 524981

In the Matter of the Claim of SANDRA L. O'DONNELL,
Respondent,

v

ERIE COUNTY et al.,
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

DECISION AND ORDER ON MOTION

Motion to consolidate and for extension of time to perfect appeals.

Upon the papers filed in support of the motion, and no papers having been filed in opposition thereto, it is

ORDERED the motion for an extension of time to perfect the appeals is granted, without costs, and the time to perfect the appeals is extended to November 13, 2017, and it is further

ORDERED that the motion to consolidate is granted, without costs, to the extent that the appeals shall be heard together and may be perfected upon a joint record on appeal and brief.

Peters, P.J., Garry, Egan Jr. and Aarons, JJ., concur.

ENTER:

Robert D Mayberger

Robert D. Mayberger
Clerk of the Court

EXHIBIT B