*To be argued by: Matthew M. Hoffman, Esq.*
*Time requested: 30 minutes*

# New York State
## Court of Appeals

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

SANDRA L. 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**
**Court of Appeals No.: 2018-756**

# BRIEF ON BEHALF OF ADMINISTRATOR APPELLANTS AND EMPLOYER


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STATE OF NEW YORK
COURT OF APPEALS

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

Sandra L. O'Donnell,

Claimant-Respondent,

**DISCLOSURE STATEMENT PURSUANT TO COURT OF APPEALS RULES OF PRACTICE 500.1(f)**

-vs-

**Case # 2018-756**

Erie County

Appellant,

and

Workers' Compensation Board,

Respondent.

WCB Case No.: G0360932
App. Div. Docket No. 524981

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The appellant, Erie County, is not a business entity or corporation pursuant to Rule 500.1[f]. Appellant's workers' compensation claims administrator, FCS Administrators Inc., is a corporation; however, it has no parents, subsidiaries, or affiliates.

DATED: 12/12/2018

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STATE OF NEW YORK
COURT OF APPEALS

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

Sandra L. O'Donnell,

Claimant-Respondent,

**STATUS OF PROCEEDINGS BEFORE WORKERS' COMPENSATION BOARD**

-vs-

**Case # 2018-756**

Erie County

Appellant,

and

Workers' Compensation Board,

Respondent.

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The undersigned, an attorney duly admitted to practice in the courts of this state, hereby affirms under penalty of perjury that no hearings are currently scheduled before the Workers' Compensation Board. However, the Board has advised the parties a hearing will be scheduled in the near future to address a disputed medical bill. The bill and the anticipated hearing are not germane to the appeal pending before this Court. Accordingly, there is no reason to delay adjudication of this appeal.

DATED: 12/12/2018

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## QUESTION PRESENTED

1. Did the Workers' Compensation Board err by finding the claimant entitled to benefits at the time of classification?
2. Did the Appellate Division err by finding the April 2017 amendment to Section 15[3][w] of the Workers' Compensation Law applicable to this claim despite declining to address whether the claimant was entitled to benefits at the time classification?

## BRIEF ANSWERS

1. Yes. The claimant conceded she failed to search for any employment following her retirement and, therefore, is not entitled to post-retirement wage replacement benefits based on the Court's decision in Zamora v New York Neurologic Assoc., 19 NY 3d 186 [2012].
2. Yes. The amendment is only implicated if a claimant is entitled to wage replacement benefits at the time of classification with a permanent partial disability. As this claimant was not entitled to benefits at the time of classification, the amendment is irrelevant.

## PROCEDURAL HISTORY

This case presents an appeal by the County of Erie and FCS Administrators Inc. (the "Appellant") from the 6/14/2018 order of the Appellate Division, Third Department, affirming two decisions (8/18/2016 and 7/19/2017) of the Workers' Compensation Board (the "Respondent") that found Sandra O'Donnell entitled to post-retirement wage replacement benefits. App. at 74-81, 92-101. This Court granted the Appellant's motion for leave via order dated 10/18/2018. App. at 4.

The case was established by the Workers' Compensation Board for accidental injuries to the back, knees, and elbows occurring on 12/14/2010. App. at 74. The claimant stopped working on 3/13/2013; however, she did not pursue a claim for benefits until a hearing on 9/14/2015. App. at 28-63. At that hearing the claimant conceded she failed to search for any employment following her retirement. App. at 51. She also conceded she possessed no evidence that she was incapable of working. App. at 57. The Law Judge found the claimant to have "involuntarily retired" and "excused her" from the labor market, and directed the employer to pay wage replacement benefits. App. at 58-62. The Judge also classified the claimant with a permanent partial disability pursuant to Section 15[3][w] of the Workers' Compensation Law. Id.

The Appellant then filed an Application for Board Review to the Workers' Compensation Board contending the Law Judge erred by awarding indemnity benefits. App. at 67-73. The Board Panel affirmed the Law Judge's decision to award benefits, but never addressed Appellant's argument concerning the claimant's failure to search for work following her retirement. App. at 74-81. The employer then filed a Notice of Appeal to the Appellate Division and a discretionary application for Full Board Review with the Workers' Compensation Board.

App. at 82-91. While the discretionary appeal was outstanding, Section 15[3][w] of the Workers' Compensation Law was amended to obviate permanently partially disabled claimants from demonstrating an ongoing attachment to the labor market if they were entitled to benefits at the time of their classification with a permanent partial disability.

The Board then denied the employer's request for discretionary Full Board Review. App. at 92-101. However, the Board amended the 8/18/2016 decision to find the that the recent changes to Section 15[3][w] provided a further basis to rule against the employer. App. at 98-99.

The Appellate Division then affirmed both decisions of the Workers' Compensation Board; however, the court declined to address whether the Board erred by awarding benefits in the first instance. App. at 132-137. The Third Department found the retroactive application of the amendment to Section 15[3][w] negated any obligation to maintain an attachment to the labor market. This Court then granted leave to hear the current appeal. Id.

## JURISDICTIONAL STATEMENT

The Court has jurisdiction to entertain this claim as: (1) the 6/14/2018 order of the Appellate Division is a final order; and (2) there is no counter-claim, cross claim, or other relief for request pending that would disturb the finality of that order. The jurisdictional basis for hearing this claim is fully outlined in the Appellant's underlying motion for leave, which was granted by the Court on 10/18/2018. App. at 4, 138-149.

## STATEMENT OF FACTS

The claimant began working for the Appellant in 1983 as a public assistance examiner, and in 1993 transferred to the Child Protection Department. App. at 32-33. In 2003 the claimant began working in the Erie County Department of Probation. App. at 33. The claimant sustained injuries to her back, knees, and elbows when she slipped and fell on 12/14/2010 while working in the juvenile probation unit. App. at 35. She returned to work after a brief period off due to the injury. App. at 35-36. After returning to work the claimant was eventually transferred from juvenile probation to adult probation. App. at 36.

Thereafter the claimant applied for a disability retirement through the employer, Erie County. App. at 38-40. The claimant was granted the disability retirement with an effective date of 3/9/2013. App. at 41-42. Since that time she has not looked for any work, returned to school, or attempted to retrain for a less physically demanding career. App. at 51-52. Notably all medical evidence during the period at issue supports a partial disability. App. at 5-27. 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.

At a Workers' Compensation Board hearing on 9/14/2015 the parties made oral summations before the Law Judge concerning the claimant's entitlement to awards. App. at 53-62. When queried by the Law Judge concerning the implications of the Court of Appeals decision in Zamora v New York Neurologic Assoc., 19 NY 3d 186 [2012], the claimant alleged she was totally disabled, but conceded she possessed no evidence of this. App. at 57. The Law Judge then found a "compensable retirement" and that the facts of this case are "beyond

Zamora." App. at 59. He went on to "excuse" the claimant from "looking for work." App. at 58-59.

The Appellant then filed an Application for Board Review with the Worker's Compensation Board. App. at 67-73. Appellant conceded the claimant's retirement was involuntary, but contended her failure to search for work following her retirement precluded an award of wage replacement benefits. App. at 67-73. The Board Panel affirmed the Law Judge and noted that the claimant's retirement was involuntary. App. at 74-81. However, the Board Panel never addressed the Appellant's argument concerning the claimant's failure to search for employment following her involuntary retirement.

Accordingly, the Appellant filed a discretionary Application for Full Board Review requesting the Board address the implications of the claimant's failure to search for employment following her retirement. App. at 86-91. The Board denied the Appellant's request, but amended the previous decision to find that recent amendments to Section 15[3][w] of the Workers' Compensation Law provided a further basis to affirm the Law Judge's decision. Id.

The employer then perfected an appeal to the Appellate Division, Third Department, pursuant to Section 23 of the Workers' Compensation Law. The employer contended the Board erred by awarding benefits to the claimant despite her involuntary cessation of employment. App. at 102-117. The Third Department declined to address whether the Board erred by awarding benefits in the first instance as the court found the April 2017 amendment to Section 15[3][w] obviates any obligation to demonstrate an attachment to the labor market. App. at 132-137. Further, the court found the amendment applies retroactively to claims predating its enactment. This appeal follows.

## ARGUMENT

The Board and Third Department both failed to address the implications of the claimant's concession that she failed to search for employment following her involuntary retirement. The Board did not address the claimant's failure to search for work following her retirement at all. The Board simply found the involuntary nature of the retirement to be a sufficient basis to award benefits. The Appellate Division found the April 2017 amendment obviates any failure to search for employment following the retirement. Therefore the Board erred by declining to address the claimant's failure to search for alternative employment, and the court erred by finding the April 2017 amendment obviates this failure.

First, the Board erred as the Court's decision in Zamora v New York Neurologic Assoc., 19 NY 3d 186 [2012], permits the awarding of post-retirement wage replacements benefits only if the claimant demonstrates an adequate attachment to the labor market following her retirement. As the claimant conceded she failed to search for any employment following her retirement, the Board was not permitted to infer her post-retirement reductions in earnings was caused by her partial disability. Therefore, she was not entitled to benefits following her retirement, including the date she was classified with a permanent partial disability, 9/14/2015.

Second, the Appellate Division erred by considering the April 2017 amendment altogether. As the claimant was not entitled to benefits at the time of classification, the amendment is not implicated. As the amendment is irrelevant, it does not provide a basis to affirm the decision of the Board. Therefore, the decision of the Appellate Division must be reversed.

## POINT I

**THE WORKERS' COMPENSATION BOARD ERRED BY FINDING THE CLAIMANT ENTITLED TO WAGE REPLACEMENT BENEFITS FOLLOWING HER RETIREMENT AND, THEREFORE, SHE WAT NOT ENTITLED TO BENEFITS AT THE TIME OF HER CLASSIFICATION WITH A PERMANENT PARTIAL DISABILITY.**

An award for partial disability benefits is inappropriate absent evidence the claimant maintained "a sufficient attachment to the labor market." Burns v Varriale, 9 NY3d 207, 216 [2007]. A claimant may demonstrate an attachment to the labor market by "finding alternative work consistent with his or her physical limitations, or at least showing reasonable efforts at finding such work." Zamora v New York Neurologic Assoc., 19 NY3d 186, 191-193 [2012] (noting whether a claimant maintains a sufficient attachment to the labor market is a factual matter for the Board to resolve). Further, the claimant bears the burden of demonstrating that her reduction in earnings is related to her partially disability. See Burns, 9 NY3d at 216 [2007]. If a claimant retires due to her partial disability, the Board may draw an inference that her reduction in earnings is due to the disability. Zamora, 19 NY3d at 192 [2012] (reversing a Third Department decision which concluded the inference is mandatory and not permissive). However, the Board will not draw the inference if the claimant's disability does not prevent her from engaging in alternative remunerative occupations. Id. (noting the Board will not draw the inference if light duty work exists in other equally well paying occupations).

Accordingly, the Board erred inasmuch as it drew an inference that the claimant's post-retirement reduction in earnings was caused by her involuntary retirement. However, first it must be noted that the Board did not address whether it was drawing an inference at all. The

Board simply concluded the claimant's retirement was involuntary, a fact conceded by the employer, and then affirmed the Judge's decision to award post-retirement benefits. An actual analysis concerning the claimant's entitlement to post-retirement benefits was not performed. Therefore, at a minimum the matter should remanded to the Board to determine the impact of the Court of Appeals decision in Zamora v New York Neurologic Assoc., 19 NY3d 186 [2012] on the case at bar. However, absent evidence that the claimant is incapable of performing other types of remunerative work, or is at least searching for such work, the Board erred by drawing the inference. Zamora, 79 AD3d at 1471 [3d Dept 2010] [Cardona, P.J., dissenting] (declining to draw the inference absent a search for alternative employment). Accordingly, the decision of the Board must be reversed and the matter remanded to render a decision consistent with the Court of Appeals decision in Zamora.

Moreover, even if the inference is drawn, it is does not create an unrebuttable presumption that the post-retirement reduction in earnings is due to the partial disability. Zamora, 19 NY3d at 192 (refusing to follow multiple Third Department cases which presumed all post-retirement reduction in earnings are due to the claimant's partial disability once a finding of involuntary retirement is made). Further evidence of the Court's rejection of prior Third Department decisions is the Court's reliance on the minority opinions of Justices Carpinello and Cardona. See Zamora, 19 NY3d at 192; Tipping v Natl. Surface Cleaning Mgt., Inc., 29 AD3d 1200, 1201 [3d Dept 2006] [Carpinello, J., concurring]; Zamora v New York Neurologic Assoc., 79 AD3d 1471, 1473 [3d Dept 2010], rev'd, 19 NY3d 186 [2012] [Cardona, P.J., dissenting].

Justice Carpinello noted "a conscious refusal to seek employment consistent with one's medical limitations constitutes a voluntary withdrawal from the labor market" regardless of a preexisting involuntary retirement. Tipping, 29 AD3d at 1201 [3d Dept 2006] [Carpinello, J.,

concurring]. He went on to state, that permitting claimants to refuse to search for work, even consistent with their own physician's restrictions, "effectively deprive[s] every workers' compensation carrier of an opportunity to rebut the inference." Id. (highlighting the absurdity of decisions which "illogically create a new class of claimants—permanently partially disabled retirees—who are not required to show that their diminution in income is attributable to their disability, even though permanently partially disabled claimants who do not retire must make such a showing"). Justice Cardona proposed that the inference only arises after the injured worker has demonstrated an attachment to the labor market. Zamora, 79 AD3d at 1471 [3d Dept 2010] [Cardona, P.J., dissenting] (opining to hold otherwise would create an "unfettered right to compensation" based solely upon a finding of involuntary retirement). Further, following the Court of Appeals decision in Zamora, the Third Department stressed that, "the inference does not rise to the level of a presumption in the claimant's favor." Ballou v Southworth-Milton, Inc., 107 AD3d 1084, 1086 [3d Dept 2013].

Moreover, in response to the Court of Appeals decision in Zamora, the Workers' Compensation Board has adopted a two-part test to determine if post-retirement benefits may be awarded. First, a claimant must show his or her cessation of employment was involuntary, *and* second the claimant must show a sufficient attachment to the labor market before receiving wage-replacement benefits. See e.g., Employer: Mineola Ufsd, 2017 WL 1537228, at *3 [WCB No. G059 0489, Apr. 24, 2017]; Employer: Brickens Constr. Inc, 2017 WL 1717027 [WCB No. 0032 4548, Mar. 28, 2017]; Employer: Sumitomo Mitsui Banking Corp, 2016 WL 2607694, at *3 [WCB Case G122 1752, May 2, 2016]. As such, the Board has interpreted Zamora to hold that even claimants who involuntarily retire must demonstrate an ongoing attachment to the labor market following retirement.

Furthermore, this reasoning is not new, and had been followed by the courts for nearly a century. See Jordan v Decorative Co., 230 NY 522, 526 [1921] (noting the Workers' Compensation Law was not created so "sloth might be a source of profit"); Becker v Gen. Electric Co., 210 AD 495, 496 [3d Dept 1924] (holding an award is inappropriate absent a search for employment); Rigatti v Gerard Lollo & Sons, Inc., 31 AD2d 871, 872 [3d Dept 1969] (awarding post-retirement benefits only after a failed search for employment); Yamonaco v Union Carbide Corp., 42 AD2d 1014, 1015 [3d Dept 1973] (highlighting a claimant's failure to search for post-retirement employment as a basis for denying an award); Miller v Pan Am. World Airways, 46 AD2d 718, 718 [3d Dept 1974] (relying on the claimant's post-retirement search for employment to justify an award of wage replacement benefits).

Accordingly, the Board erred by awarding benefits due to the claimant's failure to search for employment following her retirement. The claimant conceded that since her retirement she has not looked for any work whatsoever. She also admitted she possesses no evidence she is incapable of working. Accordingly, the Board's award hinges exclusively on the finding that the claimant's decision to retire was involuntary. However, absent a post-retirement search for employment an award cannot stand. Any inference drawn by the Board was rebutted by the claimant's concession she failed to search for employment following her retirement. The Board's decisions in this case are not only inconsistent with decisions from the courts, but also its own decisions following the Court's decision in Zamora. Therefore, the claimant was not entitled to wage replacement benefits following her retirement, and was not entitled to benefits at the time she was classified with a permanent disability.

## POINT II

**THE APPELLATE DIVISION ERRED BY FINDING THE APRIL 2017 AMENDMENT TO SECTION 15[3][W] APPLICABLE AS THE CLAIMANT CONCEDED SHE FAILED TO SEARCH FOR EMPLOYMENT AT TIME SHE WAS CLASSIFIED WITH A PERMANENT PARTIAL DISABILITY.**

In April of 2017, Section 15[3][w] of the Workers' Compensation Law was modified to obviate claimants who are "entitled to benefits at the time of classification" from demonstrating an "ongoing attachment to the labor market." Accordingly, the amendment only obviates a claimant from demonstrating an attachment to the labor market if he or she are entitled to wage replacement benefits at the time of 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 defined 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

[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.

classification" refers to the date in which the Board makes a permanent disability award pursuant to Section 15[3][w] or Section 15[1].

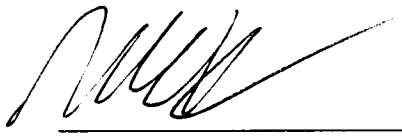
Accordingly, the amendment to Section 15[3][w] only obviates claimants from demonstrating an ongoing attachment to the labor market if they are entitled to awards at the time their level of permanent disability is addressed. In the case at bar the "time of classification" was the hearing held on 9/14/2015 when the claimant's level of permanent disability pursuant to Section 15[3][w] was adjudicated. It was at this moment that awards were marked permanent in accordance with Section 15[3][w]. App. at 64-66. Therefore, for the amendment to be implicated, the claimant would have to be entitled to benefits as of 9/14/2015. As noted above, the claimant's failure to search for employment following her involuntary retirement renders her ineligible for wage replacement benefits.

Therefore, the Third Department was first obligated to address the threshold question of whether the Board erred in awarding benefits following the claimant's retirement of 3/13/2013. However, the Court simply found the retroactive application of the amendment obviated any failure to "demonstrate a continued attachment to the labor market." See App. at 132-137. The Court never adjudicated whether the Board erred in finding the claimant entitled to benefits in the first instance following her 2013 retirement. As the amendment is not implicated in this claim, it cannot provide a basis to remedy the lack of a post-retirement job search. Accordingly, the decision of the Third Department must be reversed.

## CONCLUSION

The claimant failed to maintain an attachment to the labor market following her involuntary cessation of employment in March of 2013. Therefore, she was not entitled to wage-replacement benefits following her retirement including the date she was classified with a permanent partial disability, 9/14/2015. Accordingly, there is no basis to affirm an award of benefits from the date of retirement forward. Further, as the claimant was not entitled to benefits on the date she was classified with a permanent disability, the amendment cannot provide a basis to affirm the decisions of the Workers' Compensation Board. As such, the Board the Third Department erred by finding the claimant entitled to benefits following her retirement in March of 2013. Wherefore, the decision of the Third Department must be reversed, and the matter remanded to the Workers' Compensation Board to address the implications of the claimant's failure to search for remunerative work following her cessation of employment.

Respectfully submitted,



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Pursuant to Rule 500.13[c] the Appellant certifies the total word count for the body of the brief is 3,273 words.