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

**APL-2018-00191**

# 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**

# REPLY BRIEF FOR APPELLANT ERIE COUNTY


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## PRELIMINARY STATEMENT

We submit this reply brief with permission of the Court as outlined in the Court's letter dated 7/29/2019. Since the Appellant's original submission in December of 2018 the procedural posture of this appeal has changed as the Respondent Workers' Compensation Board now seeks reversal of their own decision. This change in posture is outlined in detail in the Board's brief (pages 11-14) and, therefore, does not merit repetition here. Appellant agrees with the Respondent Workers' Compensation Board that this matter must be remanded as the Board's decision is inconsistent with its past precedent without an adequate explanation for the departure. Erie County submits this reply brief to address new issues raised by both Respondents in their recent filings with the Court.

## ARGUMENT

Appellant submits this reply brief to contend: (1) the Workers' Compensation Board is not permitted to infer the claimant's post-retirement reduction in earnings is due to her partial disability absent a search for employment; (2) even if such an inference is drawn, it is defeated by the claimant's concession she failed to search for any work following her retirement; (3) Respondent O'Donnell's arguments are not preserved for review; (4) the Workers' Compensation Board did not create a policy refusing to apply the permissive inference outlined in Zamora v New York Neurologic Assoc., 19 NY3d 186 [2012]; and (5) the amendment to Section 15[3][w] does not provide a basis to revisit this Court's holding in Zamora, 19 NY3d 186 [2012].

## POINT I

**THE BOARD MAY NOT INFER THE CLAIMANT'S POST-RETIREMENT REDUCTION IN EARNINGS IS DUE TO HER DISABILITY BASED ON THE CLAIMANT'S FAILURE TO APPLY HER REMAINING EARNING CAPACITY.**

Respondent Workers' Compensation Board contends that the Court's decision in Zamora permits the Board discretion to "infer labor market attachment solely from a claimant's involuntary withdrawal." Respondent Board Brf. at 14. However, this is incorrect for two reasons. First, the question for the Workers' Compensation Board to address following a cessation of employment is whether the claimant's reduction in earnings is caused by her disability or other factors. Zamora, 19 NY3d at 192. Whether or not the claimant is attached to the labor market is a factor the Board will examine when addressing this question. See Burns v Varriale, 9 NY3d 207 [2007]. This is particularly evident in the case at bar as the claimant conceded she is not searching for work within her physical restrictions. App. at 51-52. The Board cannot infer the claimant is attached to the labor market when she conceded she is not. Therefore, the appropriate question is whether the Board may infer the claimant's reduction in earnings is due to her disability absent evidence the claimant is searching for remunerative employment consistent with her restrictions.

Second, this Court's decisions have consistently placed limitations on when the Board may infer the claimant's reduction in earnings is caused by her disability. For instance, in Zamora this Court noted the Board will likely not be able to draw the inference if other remunerative work is available within the claimant's physical limitations and the claimant does not avail herself of such work. Zamora, 19 NY3d at 192. In Burns v Varriale, 9 NY3d 207 [2007], this Court held it is incumbent upon the claimant to demonstrate any post-retirement reduction in earnings is caused by his or her disability as opposed to other factors, such as a voluntary withdrawal from the labor market. Id. at 216.

The doctrine is well settled, and has been followed by the courts of this State for nearly a century. For instance, in Dzink v U.S. R.R. Admin., 204 AD 164 [3d Dept 1923], the Third Department denied an award for partial disability benefits based on the claimant's concession he did not search for light duty work. The claimant in Dzink had a disability which prevented him from returning to his usual occupation in the railroad industry.[1] Id. at 165. However, the court stressed that claimant must search for work consistent with his physical limitations elsewhere in order to be eligible for awards. Id. at 166-67 (noting the "referee was in error in assuming that the whole burden was cast upon the employer to furnish employment of the character for which the claimant was fitted"). Further, in Miller

[1] His cessation of employment with the Pennsylvania Railroad was therefore involuntary.

v Pan Am. World Airways, 46 AD2d 718 [3d Dept 1974], the Third Department found that a flight attendant who retired due to her disability was entitled to awards as "she tried unsuccessfully to find" work consistent with her physical limitations. Id. The court noted the failed search for work supported the conclusion that her post-retirement reduction in earnings was due to her disability. Id.

The most succinct explanation of the limitations on when the inference may be drawn is outlined by Justice Cardozo in Jordan v Decorative Co., 230 NY 522 [1921]. Justice Cardozo explained the permissible inference is appropriately drawn following a failed search for work. Id. at 525 (stating, "[t]he claimant's search for work was fruitless. The inference is permissible that it was his own physical defects which made the quest a vain one"). Accordingly, although the Board is given some discretion as to when it may draw the inference, it is inappropriate to do so if the claimant does not make an attempt to exercise her remaining earning capacity. See Becker v Gen. Electric Co., 210 AD 495 [3d Dept 1924] (holding that although a claimant could not return to work in his usual occupation, "it is his duty to search for the kind of work for which he is fitted"). Therefore, the Board is incorrect inasmuch as it argues it would be permissible to draw the inference in this claim if an adequate explanation was provided for the departure from prior precedent. The Board is not permitted to draw the inference unless the claimant presents attempts to apply her remaining earning capacity.

## POINT II

**EVEN IF THE INFERENCE WAS APPROPRIATELY DRAWN, IT FAILED WHEN THE CLAIMANT CONCEDED SHE DID NOT SEARCH FOR ANY WORK FOLLOWING HER RETIREMENT.**

Any inference that was drawn by the Workers' Compensation Board was defeated when the claimant conceded she failed to exercise her remaining earning capacity. "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]. Further, in Tipping v Natl. Surface Cleaning Mgt., Inc., 29 AD3d 1200 [3d Dept 2006], Justice Carpinello[2] stated, "I view a decision not to seek any employment within one's medical restrictions to be sufficient proof that something other than the disability was the sole cause of a claimant's reduced earning capacity." Id. at 1202 (noting employers must be an afforded an opportunity to rebut the inference if it is drawn). This concurring opinion became the basis of the Court's decision in Zamora. Moreover, this is consistent with the Court's reversal of the Third Department's underlying decision in Zamora, which had erroneously concluded that "[w]hile a claimant's failure to look for work may be relevant in challenging a claimant's continued right to benefits in these situations, such

[2] Concurring opinion

evidence, standing alone, is insufficient to rebut the inference." Zamora v New York Neurologic Assoc., 79 AD3d 1471, 1472 [3d Dept 2010].

As such, even if an inference was appropriately drawn, it failed the moment the claimant conceded she made no effort to apply her remaining earning capacity. It is undisputed she has an earning capacity. It is also undisputed that she did not attempt to apply her remaining earning capacity following her retirement. Therefore, even if the Board were to infer that the claimant's post-retirement reduction in earnings is due to her disability, the inference failed once the claimant conceded she made no effort to search for work following the retirement. See Tipping, 29 AD3d at 1201 [Carpinello, J., concurring]. Moreover, the claimant's failure to search for work following her involuntary retirement constitutes a voluntary withdrawal from the labor market. Id. Therefore, the Board cannot conclude that the claimant's post-retirement reduction in earnings is due to her partial disability.

## POINT III

**THE CLAIMANT'S ARGUMENTS CONCERNING A REVERSAL OF THE COURT'S DECISION IN ZAMORA, UNCONSTITUTIONAL RULE MAKING, THE BOARD'S USURPATION OF A LEGISLATIVE ROLE, AND DUE PROCESS VIOLATIONS ARE ALL UNPRESERVED FOR REVIEW.**

An issue is not preserved for the review of the Court of Appeals unless the issue was sufficiently argued below. See Ellington v EMI Music, Inc., 24 NY3d 239, 246 [2014] (holding an issue is not preserved for the Court's review unless sufficiently argued in the underlying pleadings). Unlike the Appellate Division, the Court of Appeals lacks jurisdiction to review unpreserved issues. Bingham v New York City Tr. Auth., 99 NY2d 355, 359 [2003]. A new issue may be heard for the first time on appeal "only if it could not have been avoided by factual showings or legal countersteps had it been raised below." Id. (finding "the sound policy reasons that underlie this principle are especially acute when the new issue seeks change in a long-established common-law rule"). Accordingly, Respondent O'Donnell's argument that the April 2017 amendment to Section 15[3][w] requires a reversal from the Court's position in Zamora is not preserved for review. The claimant failed to submit a brief or appear for argument before the Third Department. She now presents a new issue attacking a well settled area of law and seeks modification of this Court's decision in Zamora. This unpreserved attack on

settled case law is proscribed and, therefore, the claimant's arguments in favor of a change in precedent must be dismissed. Likewise, the claimant's assertions concerning unconstitutional rule making, the Board's alleged usurpation of a legislative role, and due process violations are also unpreserved for review.

## POINT IV

### THE WORKERS' COMPENSATION BOARD DID NOT CREATE AN UNCONSTITUTIONAL POLICY OF REFUSING TO DRAW THE INFERENCE DISCUSSED IN ZAMORA.

In her reply brief the claimant contends that the Workers' Compensation Board has a policy "that it will never apply the inference inherent in Workers' Compensation Law Section 15[5] and permitted by this Court in Zamora." Claimant-Respondent Reply Brf. at 5-6. This is incorrect for several reasons. First, although Section 15[5][3] states "compensation *shall* be two-thirds of the difference between" the average weekly wage and the claimant's earning capacity; it has never been treated as a blanket entitlement to awards absent a showing the reduction in earnings is due to the partial disability. See e.g, Zamora v New York Neurologic Assoc., 19 NY3d 186 [2012]. Accordingly, the inference is not "statutory" as the claimant argues.

[3] This section refers to the claimant's weekly benefit rate and not the claimant's general entitlement to awards.

Next, the claimant erroneously contends that the Board will "never infer" a claimant's post-retirement reduction in earnings is due to the claimant's disability. Claimant-Respondent Reply Brf. at 9. However, the Board has consistently stated it will infer a claimant's post-retirement reduction in earnings is due to the occupational disability if the claimant unsuccessfully searches for work following the involuntary retirement. See e.g. Walmart 1959, 2012 WL 4040526 [WCB Case No. 5972 2324 Sept. 6, 2012] (finding a claimant sufficiently searched for work following her involuntary retirement); Sixth Ave. Elecs. City, 2012 WL 3057683 [WCB Case No. G023 5979 July 23, 2012] (noting a claimant demonstrated entitlement to awards via attempts at self-employment).

Further, the claimant lacks standing to challenge the Board's general practices in this claim. The Board has yet to issue a ruling addressing the appropriateness of the inference in the case at bar, and instead has only announced an intention to do so. Upon receipt of an adverse decision from the Board the claimant may file an appeal to the Appellate Division challenging the Board's practice concerning attachment to the labor market. However, absent such an underlying decision, the claimant is asking this Court to give an impermissible advisory opinion. See generally, In re Workmen's Compensation Fund, 224 NY 13, 17 [1918 Cardozo, J.] (stating the Court cannot give "an omnibus answer to an omnibus question").

Further, this "policy" is not "unconstitutional rulemaking" as the Board's practice is entirely consistent with this Court's decisions in Jordan v Decorative Co., 230 NY 522 [1921] and Zamora v New York Neurologic Assoc., 19 NY3d 186 [2012]. Both of these decisions, and their progenies, hold it would be inappropriate to conclude a claimant's reduction in earnings is due to his or her disability absent some evidence the claimant is attempting to apply his or her remaining earning capacity. As such, the Board's policy is not rule-making, but instead a series of decisions that reinforce the well settled doctrine that absent an attempt to apply remaining earning capacity, the Board may not conclude a reduction in earnings is due to an occupational disability. Therefore, the Board's "policy" is merely a correct application of the Workers' Compensation Law that has been reiterated in hundreds of decisions.

Moreover, administrative agencies are permitted to interpret law and facts, establish precedent, and to follow or reverse precedent. See Matter of Charles A. Field Delivery Serv., Inc., 66 NY2d 516, 518 [1985]. Like courts, administrative agencies are generally expected to arrive at consistent holdings when presented with similar facts. Id. (noting "justice demands that cases with like antecedents should breed like consequences"). This permits agencies "to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice." Id. Therefore, administrative

agencies may create tests litigants must satisfy in furtherance of the agency's obligation to decide factual matters. See generally, King v Riccelli Enterprises, 156 AD3d 1095, 1097 [3d Dept 2017] (highlighting the Board's test for determining whether a claimant is sufficiently attached to the labor market); Palmer v Champlain Val. Specialty, 149 AD3d 1342, 1343 [3d Dept 2017] (outlining the Board's multi-factorial test regarding the sufficiency of labor market attachment evidence). Further, questions of involuntary retirement, attachment to the labor market, and the cause of reduced earnings are factual matters for the Board to resolve. See King, 156 AD3d 1095; Stagnitta v Consol. Edison Co. of New York, 24 AD3d 1099, 1100 [3d Dept 2005]; Coyle v Intermagnetics Corp., 267 AD2d 621, 622 [3d Dept 1999].

Accordingly, the Board is permitted to create a two-part test to determine whether a claimant has demonstrated his or her post-retirement reduction in earnings is due to their partial disability. The Board logically first ascertains whether the retirement was voluntary, and the Board then determines whether the claimant sufficiently made an attempt to apply her remaining earning capacity. See e.g. Caldor Inc., 2013 WL 418067 [WCB Case No. 5940 7452, Jan. 25, 2013]. This is not rule making, but instead the Board applying its inherent fact finding authority on a consistent basis in published decisions that provide guidance to employees, employers, their attorneys, and trial judges.

Next, the Board's practice concerning the permissive inference does not "usurp the role of the Legislature." The claimant contends the Board is abandoning its adjudicative role by applying the two-part test outlined above. This is incorrect. The Board has simply outlined what evidence needs to be presented by a litigant in order for the Board to arrive at a particular factual conclusion. The Board then evaluates the available evidence and determines whether: (1) the cessation of employment was voluntary; and (2) the claimant attempted to exercise her remaining earning capacity. Not only is this an adjudicative process, it is one that prevents inconsistent decisions and provides litigants with notice of what evidence is sufficient to obtain a particular result. Therefore, this portion of the claimant's argument is without merit.

Similarly, the Board's practice concerning the permissive inference does not violate the claimant's due process rights. First, the Board has yet to issue a decision unfavorable to the claimant and, therefore, it cannot be maintained her constitutional rights have been violated. Further, in her reply brief[4] the claimant contends that the Board has announced an unconstitutional intention to ignore the nature of the claimant's retirement when determining whether her subsequent reduction in earnings is due to her disability. This is factually inaccurate. The Board has instead announced an intention to evaluate both the circumstances of her

[4] Page 19.

retirement *and* her subsequent failure to search for remunerative work. Moreover, the claimant has not been denied a "fair hearing[.]" Claimant-Respondent Reply Brf. at 19. The claimant testified at a hearing concerning both the nature of her retirement and her subsequent failure to search for work. App. at 51. She was afforded an ample opportunity to demonstrate her disability is the cause of her reduction in earnings, and failed to do so. Accordingly, her due process rights have not been violated.

Finally, the claimant inaccurately contends that the Board has "wholly eradicate[d] any inference that a compensable disability results in loss of wages[.]" Claimant-Respondent Reply Brf. at 9. The claimant argues that the Board no longer draws a distinction between injured workers who involuntary retire and those who voluntary retire. Id. at 8-9. However, this is untrue. The Board may infer that the reduction in earnings following an involuntary retirement is due to the partial disability if the claimant demonstrates an unsuccessful search for employment. See Zamora v New York Neurologic Assoc., 19 NY3d 186 [2012]; Caldor Inc., 2013 WL 418067 [WCB Case No. 5940 7452, Jan. 25, 2013]. However, the Board will never infer that the reduction in earnings following a voluntary retirement is due to the claimant's partial disability. Holman v Hyde Park Nursing Home, 268 AD2d 705 [3d Dept 2000]; Benesch v Util. Mut. Ins. Co., 263 AD2d 585, 585 [3d Dept 1999]. The claimant who voluntarily removes

herself from the labor market must demonstrate, without the benefit of an inference, that her inability to find work is due to her partial disability and not other causes. Holman, 268 AD2d at 705 [3d Dept 2000]. The Board will not infer the subsequent reduction in earnings is due to the disability, even if the claimant subsequently finds light duty work. See Reese v Sysco Food Services-Albany, 148 AD3d 1477, 1478 [3d Dept 2017] (declining to infer that a claimant who had voluntarily removed himself from the labor market suffered a causally related reduction in earnings when he obtained a lower paying light duty job).

Accordingly, there is a significant distinction between claimants who involuntarily retire and those who voluntarily remove themselves from the labor market. The Board will infer the former's reduction in earnings is due to the their disability if they present evidence of a failed search for light duty work. The latter will not receive such an inference, and must demonstrate the reason they cannot find equally well paying work is due to their disability. Therefore, the claimant's arguments concerning the Board's intention to decline to drawn an inference that her reduction in earnings are due to her disability are without merit.

## POINT V

### THE APRIL 2017 AMENDMENT TO SECTION 15[3][W] DOES NOT REQUIRE REVISITING THIS COURT'S HOLDING IN ZAMORA.

Regardless of the preservation issue, Respondent O'Donnell's argument that the amendment to Section 15[3][w] requires a reversal of the Court's own decision in Zamora is also without merit. As noted by the Workers' Compensation Board (Respondent-Board's Brf. at 20-22), the amendment only obviates claimants from demonstrating an ongoing attachment to the labor market if they were entitled to wage-replacement benefits when they were classified with a permanent disability. Further, the correspondence from the Board's counsel to the Legislature makes clear the statute requires adjudication of the issue of attachment to the labor market at the time of classification. Letter, David F. Wertheim, Workers' Compensation Board General Counsel, Bill Jacket L 2017, ch. 59 at 29. Therefore, the amendment does not require a reversal of Zamora, but instead codifies the Court's finding in Burns that "in a permanent partial disability case, whether a claimant has maintained a sufficient attachment to the labor market must be resolved by the Board in determining his or her reduced earning capacity and whether benefits should be awarded." Burns v Varriale, 9 NY3d 207, 216 [2007]. Moreover, the principal basis for the dissenting opinion in Zamora v New York Neurologic Assoc., 19 NY3d 186 [2012] is that the phrase "attachment to the labor market"

does not appear in the Workers' Compensation Law. Now that the Legislature has explicitly recognized the doctrine, the majority's decision certainly has the "statutory support" the dissenting Judges felt it lacked. Accordingly, the amendment does not mandate a revisiting of Zamora, but instead reinforces the doctrine that a claimant must demonstrate an attachment to the labor market prior to an award of permanent disability benefits.

## CONCLUSION

We agree with the Respondent Workers' Compensation Board that this matter must be remanded for the Board to issue a decision consistent with its prior holdings addressing the nature of the permissive inference outlined in Zamora, 19 NY3d 186 [2012]. Accordingly, no further analysis of the issues presented by the Appellant or Respondent are necessary for adjudication of this appeal. However, if the Court wishes to address when the Board may infer a claimant's lack of earnings is due to her disability and what evidence is necessary to rebut this inference, we point the Court to the arguments above and in the Appellant's initial filing.

Respectfully submitted,

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**COURT OF APPEALS**
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**WORD COUNT CERTIFICATION**

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Employer and Carrier Appellants by their attorneys, Hamberger & Weiss, state the following pursuant to Rule 500.13[c]:

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