To be Argued by:
ROBERT E. GREY
Time Requested: 15 minutes

APL-2018-00191

COURT OF APPEALS
of the
STATE OF NEW YORK

In the Matter of the Claim of SANDRA O'DONNELL,

Respondent,

- against -

ERIE COUNTY, et. al.

- and -

NEW YORK STATE WORKERS' COMPENSATION BOARD,

Appellants.

BRIEF FOR RESPONDENT SANDRA O'DONNELL

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PRELIMINARY STATEMENT

The Workers' Compensation Law is social legislation that is intended to be construed liberally for the protection of injured workers. Workers' Compensation Law § 15(3)(w) provides that in "cases of permanent partial disability, the compensation shall be sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages and his or her wage-earning capacity thereafter in the same employment or otherwise." WCL § 15(3)(w). The statute does not require a permanently partially disabled worker to demonstrate attachment to the labor market as a condition of receiving benefits.

In a 4-3 decision in Matter of Zamora v. New York Neurologic Assoc., 19 N.Y.3d 186, 947 N.Y.S.2d 788, 970 N.E.2d 823 (2012), this Court overruled numerous decisions of the Appellate Division, Third Department, and held that the Workers' Compensation Board may require an injured worker who has stopped work as the result of a compensable injury to prove that he or she is attached to the labor market as a condition of receiving benefits.

In 2017, the Legislature amended Workers' Compensation Law § 15(3)(w) to provide that "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." L 2017, ch. 59, part NNN, subpart A, §1.

Appellant erroneously contends that this Court's decision in Zamora prohibits the Workers' Compensation Board from drawing an inference of causally related wage loss following an involuntary retirement, thus requiring it to demand proof of labor market attachment in every case. To the contrary, this Court's decision in Zamora expressly permitted the Board to draw such an inference and to obviate proof of labor market attachment where the compensable injury resulted in an "involuntary withdrawal from the labor market." On this appeal, the Court should reaffirm the principle that an injured worker who stops work due to the compensable injury is entitled to an inference that his or her subsequent wage loss is attributable to the disability and is not required to demonstrate attachment to the labor market as a condition of receiving benefits.

The 2017 amendment to Workers' Compensation Law § 15(3)(w) is not relevant to this appeal because the Board did not rely on the amendment to find that Claimant-Respondent was entitled to benefits at the time of her classification, which is the issue in dispute. The Board merely observed that because it found in 2016 that Claimant-Respondent was entitled to benefits at the time of classification, the amendment of the statute in 2017 thereafter relieved her from the obligation to demonstrate labor market attachment.

If the amendment to Workers' Compensation Law § 15(3)(w) is relevant here, it buttresses Claimant-Respondent's position and the Appellate Division,

Third Department correctly concluded that it is applicable retroactively.

Therefore, the decision of the Workers' Compensation Board should be affirmed on different grounds than those used by the Appellate Division, Third Department, or alternatively upon the same grounds.

QUESTIONS PRESENTED

Question 1: When an injured worker stops work as a result of a compensable permanent partial disability, does an inference arise that the subsequent loss of wages is causally related, regardless of whether the injured worker demonstrates "attachment to the labor market?"

Answer: Yes. The Workers' Compensation Board properly found that because Claimant-Respondent involuntarily retired as a result of her compensable disability, she is not required to prove labor market attachment as a condition precedent to an award of benefits.

Question 2: Were the Workers' Compensation Board and the Appellate Division, Third Department required to consider the amendment to Workers' Compensation Law § 15(3)(w) in affirming the award of permanent partial disability benefits?

Answer: No. The Workers' Compensation Board's decision was properly based on the inference that arises from an involuntary retirement, rather than the statutory amendment.

Question 3: Did the Appellate Division, Third Department properly conclude that the amendment to Workers' Compensation Law § 15(3)(w) relieving permanently partially disabled workers from demonstrating attachment to the labor market is applicable retroactively?

Answer: Yes. The Appellate Division properly applied the principles of statutory construction and the precedents of this Court in concluding that the statutory amendment is applicable retroactively.

STATEMENT OF FACTS

On December 14, 2010, Claimant-Respondent Sandra O'Donnell ("O'Donnell") was employed as a probation officer for Employer-Appellant Erie County ("the County") when she slipped and fell, injuring her back, knees and elbows. R. 1-6.[1] She later returned to work on January 27, 2011, but continued to receive medical treatment for her injuries over the following years. R. 6-7, 8-38.

On September 14, 2015, the Workers' Compensation Board ("the Board") held a hearing to address the question of whether O'Donnell was permanently disabled and entitled to compensation payments. A. 28-32.[2] At the hearing, O'Donnell testified that she had worked for the County for twenty-eight and a half years in various positions before being injured on the job. A. 33. She explained that after her accident, notwithstanding a recommendation that she have back surgery, she continued to work for about two years, but occasionally missed time from work due to her injuries. A. 35-36. She further testified that after her accident the County transferred her to a more physically demanding position that she was unable to perform and that she "fought with them regarding putting me back" into her previous job, without success. A. 36-38.

O'Donnell testified that she eventually "filed for disability retirement" in December of 2011. A. 39. Her application was based on the injuries from her

[1] "R" references are to the Respondent's Appendix.
[2] "A" references are the Appellant's Appendix.

workplace accident as well as several unrelated conditions, and was granted in March of 2013, at which point she left employment. A. 39-42. At the time of her hearing, she stated that she was "on a disability retirement and I'm on a Social Security disability," and that she had not looked for other work or sought vocational retraining. A. 51. She testified that an employment counselor for the Social Security Administration had "indicated that they did not have any work" she would be capable of performing. A. 52.

The County produced no witness to dispute O'Donnell's testimony.

At the conclusion of the testimony, O'Donnell's attorney contended that she was "almost unemployable" and that the extent of her disability and the circumstances of her retirement should "excuse her from the labor market." A. 54-55. The County's attorney contended that "[e]ven if she takes a disability retirement and in some sense involuntarily retires … she is obligated to look for work within her restrictions." A. 56-57. After reviewing the evidence, the WCL Judge concluded that O'Donnell had an eighty-one percent loss of wage earning capacity and that "this does get beyond Zamora due to the fact that the claimant has received the compensable retirement from the employer of record" and was thus "excused from looking for work." A. 59-60.

The County appealed the WCL Judge's decision, conceding that "[i]t is undisputed that the claimant retired at least in part because of her disability," and

also that under those circumstances "an inference *may* be drawn that her disability is the cause of her lost wages," but nonetheless contending that "a partial disability … does not allow the Board to afford this inference." A. 71-72.

In a decision filed on August 18, 2016, the Board found "that the claimant's withdrawal from the labor market was not voluntary as the record evidence supports finding that the claimant's disability caused or contributed to the retirement." A. 79. The Board further found that although "there is no mandatory inference of entitlement to wage-loss benefits … [a]n inference of causation may be drawn from the disability-related withdrawal." A. 79. The Board also noted that "the claimant's efforts to continue working periodically failed as she testified to working only 'off and on.'" A. 80. However, it modified the WCL Judge's decision to find that O'Donnell had a sixty-five percent loss of wage-earning capacity, instead of an eighty-one percent loss. A. 80.

The County applied for Full Board Review, contending that the Board had failed to consider its argument that O'Donnell was obligated to look for work regardless of whether her retirement was voluntary or due to her compensable disability. A. 88-91. In response the Board issued an amended decision on July 19, 2017 which incorporated its first decision verbatim, but added as a third issue: "Whether the claimant is required to show attachment to the labor market." A. 92-93. The Board then resolved that issue by finding that the WCL Judge had found

O'Donnell entitled to benefits at the time she was classified as having a permanent partial disability and that "in view of the amendment to WCL § 15(3)(w) [on April 10, 2017], … the claimant is not obligated to demonstrate an ongoing attachment to the labor market thereafter." A. 99.

The County appealed both of the Board's decisions to the Appellate Division, Third Department, continuing to contend that "the Board erred inasmuch as it drew an inference that the claimant's post-retirement reduction in earnings was caused by her involuntary retirement." A. 111. The County claimed that under this Court's decision in "Zamora … even claimants who involuntarily retire must demonstrate an ongoing attachment to the labor market following retirement." A. 113. The County further asserted that "the amendment [to Workers' Compensation Law § 15(3)(w)] has no bearing on the case at bar" because O'Donnell should not have been found entitled to benefits at the time of her classification as permanently partially disabled. A. 115.

The Third Department declined to address the question of whether, having found an involuntary retirement, the Board erred in excusing O'Donnell from demonstrating attachment to the labor market. A. 135. Instead, finding that the amendment to Workers' Compensation Law § 15(3)(w) was applicable retroactively, the Third Department upheld the Board's determination that because O'Donnell was entitled to benefits at the time of classification (due to the finding

that she had not voluntarily withdrawn from the labor market), she had no obligation to demonstrate attachment to the labor market thereafter. A. 135-136.

This Court granted Appellant's motion for leave to appeal. A. 4.

ARGUMENT

Throughout the course of this litigation, Appellant has consistently – and erroneously – asserted that this Court's decision in Matter of Zamora v. New York Neurologic Assoc., 19 N.Y.3d 186, 947 N.Y.S.2d 788, 970 N.E.2d 823 (2012) prohibits the Workers' Compensation Board from drawing an inference that the lost wages of a permanently partially disabled worker who was driven from her employment as a result of the compensable injury are due to her disability. To the contrary, this Court's decision in Zamora expressly permits the Board to make precisely such an inference. Moreover, in view of the Third Department's application of Zamora and the Legislature's action to overrule the decision, we respectfully submit that the Court should revisit Zamora to clarify that the inference should be drawn where the separation from employment is not voluntary, but is instead due to the compensable disability.

The Appellant also contends that the Legislature's amendment to Workers' Compensation Law § 15(3)(w) is not applicable to this case, arguing that the issue here is whether O'Donnell was entitled to benefits at the time of her classification as permanently partially disabled and that the statute cannot be used to decide that issue, but only to govern the consequences flowing from that decision. We agree with Appellant that the Board's decision did not depend on the statutory amendment. Instead, the Board found that O'Donnell involuntarily retired as a

result of her compensable permanent partial disability and properly chose to infer that her post-retirement wage loss was causally related to that disability, thus excusing her from demonstrating further attachment to the labor market without regard to the amendment.

We recognize, however, that the Appellate Division, Third Department affirmed the Board's decision on the basis of the amendment to Workers' Compensation Law § 15(3)(w) rather than addressing the status of the inference that flows from an involuntary withdrawal from the labor market. To the extent that this honorable Court may find the statute relevant to its decision, we respectfully submit that the Third Department properly concluded that the statute is applicable retroactively.

POINT I: UPON FINDING THAT CLAIMANT-RESPONDENT DID NOT VOLUNTARILY WITHDRAW FROM THE LABOR MARKET, THE WORKERS' COMPENSATION BOARD PROPERLY INFERRED THAT HER LOSS OF WAGES WAS CAUSED BY HER PERMANENT PARTIAL DISABILITY.

Appellant contends that regardless of whether an injured worker's separation from work is voluntary (unrelated to the workplace injury) or involuntary (due to the workplace injury), the Workers' Compensation Board must require proof of attachment to the labor market as a condition precedent to an award of benefits in any case involving a partial disability. This argument is completely contrary to the statute and this Court's decision in Zamora, *supra*.

At the outset, it must be noted that the Workers' Compensation Law is "social legislation in [which] the claimant is entitled to every favorable intendment of the legislation." Matter of Needleman v. Queensboro Medical Group, 31 A.D.2d 383, 388; 297 N.Y.S.2d 807, 812 (3rd Dept. 1969) (Herlihy, J. concurring). It "rests on the economic and humanitarian principles that compensation should be given at the expense of the business to the employee or his representatives for earning capacity destroyed by an accident in the course of or connected with his work, and this not only for his own benefit but for the benefit of the state which otherwise might be charged with his support." Matter of Waters v. William J. Taylor Co., 218 N.Y. 248, 252; 112 N.E. 727, 728 (1916).

Consistent with this fundamental purpose, the statute defines "disability' in terms of wage-earning capacity. WCL § 15(5); Matter of Marhoffer v. Marhoffer, 220 N.Y. 543, 546-547; 116 N.E. 379, 380 (1917) ("The word 'disability' in the law as we read it, therefore, means 'impairment of earning capacity' and not 'loss of a member'"). The statute presumes that the existence of a partial "disability" has caused a partial "loss of wage-earning capacity." It then provides for an award of benefits unless the injured worker has returned to employment at full wages, in which event compensation is prohibited by the formula in Workers' Compensation Law § 15(5-a).[3]

Under the statutory formula, an injured worker with a greater post-accident wage-earning capacity receives a lower weekly compensation benefit rate, and an injured worker with less post-accident wage-earning capacity receives a higher weekly benefit. For example, in the case at bar, O'Donnell's pre-accident average weekly wage was established by the Board as $1,224.28. R. 6. Upon finding her to have a sixty five percent loss of wage-earning capacity, it fixed her weekly benefit rate at $530.52 ((65/150) x $1,224.28 = $530.52). A. 80. If the Board had instead found her to have a twenty-five percent loss of wage-earning capacity, her benefit rate would have only been $204.05 ((25/150) x $1,224.28 = $204.05). The

[3] The statute sets the amount of compensation as two-thirds of the difference between the injured worker's average weekly wage and his or her post-accident earnings. Thus, if the post-accident earnings equal or exceed the average weekly wage, no compensation is payable regardless of the partial disability.

statute is thus inherently designed to provide compensation only for the injured worker's loss of wage-earning capacity, and to encourage the exercise of any remaining wage-earning capacity, for which the law provides no compensation.

In view of the fact that the statute only compensates an injured worker's lost wage-earning capacity, the courts have long concluded that benefits for partial disability should be denied only when the loss of wages is wholly unrelated to the compensable injury. *See*, Matter of Roberts v. General Electric Co., 6 A.D.2d 43, 174 N.Y.S.2d 533 (3rd Dept. 1958).

In Roberts, the claimant was found to have a permanent partial disability, but returned to work for the employer at a lighter job with full wages. Roberts, 6 A.D.2d at 44. He continued to perform this job until he "was compelled by his employer to retire on a pension, being then 65 years of age." Id. He thereafter applied for compensation benefits on the ground that he had "retired from work." Id. The Board made an award, and the employer appealed.

The Appellate Division, Third Department held that

> [w]here the cessation of employment is apparently due solely to compulsory retirement on a pension because of age, and other causes unrelated to disability from an industrial accident, to pay compensation benefits would result in a situation where employees would obtain retirement benefits supplementing, in this case, their pension and social security payments, without the employee being compelled to show causal connection between the disability and inability to work. Such would

> not seem to be the intent of the Workmen's Compensation Law.

Roberts, 6 A.D.2d at 45 (emphasis added).

The Roberts case thus established the principal of "voluntary withdrawal from the labor market" – that if the injured worker's separation from employment was wholly unrelated to the compensable disability, compensation would not be payable unless he or she could prove a connection between the injury and his or her wage loss.

The statute contains no provision that requires an injured worker to demonstrate "labor market attachment" as a condition for receipt of benefits.[4] *See*, Zamora 19 N.Y.3d at 193 (Chief Judge Lippman, dissenting). Instead, the concept of labor market attachment was created by the Roberts court as a means for a partially disabled worker who had voluntarily withdrawn from the labor market to obtain benefits by proving that the compensable disability was having an adverse impact on his or her post-injury wage earning capacity. *See*, e.g., Matter of Holman v. Hyde Park Nursing Home, 268 A.D.2d 705, 701 N.Y.S.2d 516 (3rd Dept. 2000); Matter of Mazziotto v. Brookfield Constr. Co., 40 A.D.2d. 245, 338 N.Y.S.2d 1001 (3rd Dept. 1972); Matter of Peluso v. Fairview Fire Dist., 269 A.D.2d 623, 702 N.Y.S.2d 701 (3rd Dept. 2000); Matter of Topf v. American

[4] With the exception of the recent amendment to Workers' Compensation Law § 15(3)(w), which expressly exempts permanently partially disabled workers from such a requirement.

Character Doll, 62 A.D.2d 1111, 404 N.Y.S.2d 451 (3rd Dept. 1978).

Thus, the purpose of "labor market attachment" was to enable an injured worker who had voluntarily withdrawn from the labor market to obtain compensation if it could be shown that the compensable disability had resulted in an actual loss of wages. Conversely, when there is no voluntary withdrawal and instead the compensable injury and disability contribute to the injured worker's separation from employment, an inference arises that the subsequent wage loss is caused by the injury. *See*, *e.g.*, Matter of Jiminez v. Waldbaums, 9 A.D.3d 99, 780 N.Y.S.2d 799 (3rd Dept. 2004); Matter of Leeber v. LILCO, 29 A.D.3d 1198, 816 N.Y.S.2d 205 (3rd Dept 2006); Matter of Pittman v. ABM Industries, Inc., 24 A.D.3d 1056, 806 N.Y.S.2d 301 (3rd Dept. 2005); Matter of Tipping v. National Surface Cleaning Management, Inc., 29 A.D.3d 1200, 816 N.Y.S.2d 202 (3rd Dept 2006). In this situation, benefits are payable for the loss of wage-earning capacity without a requirement that the injured worker demonstrate "attachment to the labor market." Id.

Prior to Zamora, *supra*, the courts held that in order to rebut the inference that arose when the separation from work was caused by the injury (an "involuntary withdrawal from the labor market"), the employer or carrier was required to demonstrate that the post-injury loss of wages was wholly unrelated to the compensable injury, and that a mere "failure to look for work" was insufficient

to meet this burden. *See*, *e.g.*, Jiminez, *supra*; Leeber, *supra*; Pittman, *supra*; Tipping, *supra*.

In Zamora, a four-justice majority of this Court found that "the Third Department has treated the inference as required, or presumed, rather than merely permitted," and that "the Board may, but need not, infer that the claimant cannot find a suitable job because of her disability." Zamora, 19 N.Y.3d at 192. The majority therefore held that where there was no voluntary withdrawal from the labor market, the Board could exercise its discretion to either infer that the subsequent loss of wages was due to the compensable disability or, if it chose, to require proof from the injured worker. Id. Contrary to Appellant's contention in this case, the majority clearly did not mandate that the Board require proof of labor market attachment from an injured worker who had not voluntarily withdrawn from the labor market.[5]

Three justices dissented in Zamora. In an opinion by Chief Judge Lippman, they observed that

> "Attachment to the labor market" is a concept that is conspicuously absent from the Workers' Compensation Law. The majority's formulation of the issue in this case

[5] Also contrary to Appellant's contention on this appeal, the Zamora majority did not read this Court's decision in Burns v. Varriale, 9 N.Y.3d 207, 879 N.Y.S.2d 1, 879 N.E. 2d 140 (2007) as compelling the Board to required proof of labor market attachment in every case. Instead, the Zamora majority held that the Board could use its discretion to require or to waive such proof. The dissenters in Zamora also rejected reliance on Burns, observing that the decision was concerned with an entirely different issue, that of liens and credits in third-party actions.

> distracts from the proper identification of the question before the Court, which is whether a worker who has involuntarily withdrawn from his or her employment due to a compensable disability must demonstrate "attachment to the labor market" in order to be eligible to receive benefits. Nothing in the statute suggests that this is a prerequisite to entitlement to workers' compensation benefits.

Zamora, 19 N.Y.3d at 193.

The dissent would have upheld the half-century of precedent dating to Roberts, *supra*, finding it "reasonable that a claimant suffering from a PPD who has left his or her job voluntarily - that is to say, for reasons unrelated to the disability - should not benefit from the inference that the loss in wage earning capacity is due to the disability, precisely because the claimant chose to leave his or her employment and was not forced to do so by reason of the compensable disability." Zamora, 19 N.Y.3d at 194-195. However, the dissent found that denying the inference to an injured worker who did not voluntarily withdraw from the labor market

> extends the rule regarding "attachment to the labor market" beyond the limits that can reasonably be imposed on the application of such a rule when considering the remedial and humanitarian roots of the critically important statute that we address today. Workers' compensation benefits are intended to do what the name implies: compensate workers for losses in wage earning capacity incurred due to work-related injuries. To impose barriers to access to those benefits, where there is no basis for such prerequisites, contravenes the law and

> violates basic principles of fairness for debilitated workers injured in the course of their employment.

Zamora, 19 N.Y.3d at 195.

Subsequent to Zamora, the Third Department's decisions on this issue have fallen into two categories. In cases where it finds that the injured worker voluntarily left employment, it has required proof of labor market attachment as a condition precedent for an award of benefits consistent with the rule in Roberts. *See*, Matter of Winters v Advance Auto Parts, 119 A.D.3d 1041, 990 N.Y.S.2d 283 (3rd Dept. 2014); Matter of Scott v. Rochester City Sch. Dist., 125 A.D.3d 1083, 3 N.Y.S.3d 438 (3rd Dept. 2015); Matter of Cole v. Consolidated Edison Co. of N.Y., Inc., 125 A.D.3d 1084, 3 N.Y.S.3d 769 (3rd Dept. 2015); Matter of Woodruff v. Phelps Sungas, Inc., 137 A.D.3d 1345, 26 N.Y.S3d 632 (3rd Dept. 2016); Matter of Pravato v. Town of Huntington, 144 A.D.3d 1354, 41 N.Y.S.3d 594 (3rd Dept. 2016); Matter of Romanko v. New York Univ., 154 A.D.3d 1031, 61 N.Y.S.3d 729 (3rd Dept. 2017).

However, in cases in which the Board made no finding whether the separation from employment was voluntary or involuntary, the Third Department has now also placed the burden of proof on the injured worker to demonstrate attachment to the labor market – in essence presuming that no injured worker is entitled to the benefit of the inference, regardless of whether the Board considered

that question. *See,* Matter of Launer v. Euro Brokers, 115 A.D.3d 1130, 938 N.Y.S.2d 128 (3rd Dept. 2014); Matter of Gioia v. Cattaraugus County Nursing Home, 122 A.D.3d 970, 995 N.Y.S.2d 822 (3rd Dept. 2014); Matter of Aponte v. NBTY, Inc., 126 A.D.3d 1157, 5 N.Y.S.3d 581 (3rd Dept. 2015); Matter of Florentino v. Mount Sinai Med. Ctr., 126 A.D.3d 1279, 6 N.Y.S.3d 704 (3rd Dept. 2015).

Indeed, as observed by Appellant, since Zamora the Board has generally not extended the inference to injured workers, with the notable exception of the case at bar.

On April 10, 2017, in response to these post-Zamora developments, the Legislature amended Workers' Compensation Law § 15(3)(w) to expressly state that "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." L 2017, ch. 59, part NNN, subpart A, §1. This amendment was intended to ensure the delivery of benefits for permanent partial disability by specifically prohibiting the Board from requiring proof of labor market attachment as a condition precedent for such awards.

As Appellant correctly observes, the Board's decision in the case at bar did not depend on the statutory amendment, but instead upon its finding that

O'Donnell did not voluntarily withdraw from the labor market and its decision to infer that her subsequent loss of wages was attributable to her compensable disability. *See*, Point II, *infra*. However, the amendment is consistent with the legal standard prior to Zamora, and is indicative of the Legislature's intent to return to that standard.

Under the law prior to this Court's decision in Zamora, having found that O'Donnell's compensable injury contributed to her separation from employment, the Board would have been required to infer that the permanent partial disability has resulted in a loss of wage-earning capacity, thus entitling her to compensation to the extent of that loss. *See*, Jiminez, *supra*; Leeber, *supra*; Pittman, *supra*; Tipping, *supra*.

The County would have been free to rebut that inference if it could show that her lost wages were wholly unrelated to the established permanent partial disability. Id. It is unlikely that the County would be able to meet its burden of proof in this case, given its approval of O'Donnell's disability retirement based on this accident and its concession throughout the litigation that she was driven from employment as a result of her compensable injury. This serves only to reinforce the rationality of the rule, particularly in the context of the remedial purpose of the law: If it is clear that O'Donnell left work because of her compensable injury, that she has a substantial permanent partial disability, and the employer is unable to

point to any other reason for her wage loss, there is no justification to erect another obstacle to benefits by putting O'Donnell to yet additional proof of causality.

The Appellant seeks to do just that, arguing that although it concedes O'Donnell's compensable injury caused her to leave the employment, she has a significant disability, and it has pointed to no other cause for wage loss, this Court should affirmatively prohibit the Board from awarding benefits unless she offers still more proof in the form of an unsuccessful work search. Appellant contends that although the inference of causal relationship was previously mandatory, and was made permissive by this Court's decision in Zamora, it should now be wholly prohibited. In essence, Appellant seeks to convert the doctrine of labor market attachment from a shield that permits an injured worker who has voluntarily withdrawn from the labor market to seek benefits into a sword that permits the employer or carrier to cut them off.

We respectfully submit that for the reasons set forth above, Appellant's position is contrary to Zamora, the text of the statute, and the remedial manner in which this law has been construed by this Court for over a century. Contrary to Appellant's position, we respectfully suggest that the Court should revisit the holding in Zamora and restore the inference flowing from an involuntary separation from the labor market to its previously well-established status: required in the absence of substantial evidence to the contrary.

At a minimum, the Court should make it clear that where the injured worker has a partial disability and the separation from employment is due to the compensable injury, the Board should, in the absence of substantial evidence to the contrary, draw an inference that the subsequent loss of wages is compensable.

Under any circumstances, the Board's decision should be affirmed because it was entitled to afford O'Donnell the inference that her involuntary retirement and permanent partial disability caused her wage loss.

POINT II: THE DECISION IN THIS CASE DID NOT DEPEND UPON THE 2017 AMENDMENT TO WORKERS' COMPENSATION LAW SECTION 15(3)(w).

The Board's decision in this case did not depend on the Legislature's 2017 amendment to Workers' Compensation Law § 15(3)(w), but instead upon its decision to infer, based on her involuntary (disability) retirement, that O'Donnell's wage loss was due to her compensable permanent partial disability.

The WCL Judge found that O'Donnell "is excused from looking for work and in effect has a compensable retirement." A. 65. Although he did not explicitly state that he was drawing an "inference" of causally related wage loss from the fact that O'Donnell did not voluntarily withdraw from the labor market and instead retired due to her disability, it is clear that this was the WCL Judge's rationale. In its decision, the Board noted that "[a]n inference of causation may be drawn from

the disability-related withdrawal, depending on the nature of the disability and the nature of the claimant's work." A.79. The Board went on to review the facts of the case, finding that O'Donnell's "disability caused or contributed to the retirement," that her job requirements were "contrary to the functional ability found by both the carrier's consulting physician … and the claimant's treating physician," and that her "attempts to continue working periodically failed as she testified to working only 'off and on.'" A. 79-80. It is apparent that the Board concluded that O'Donnell did not voluntarily withdraw from the labor market and that it therefore chose to infer that her post-retirement wage loss was due to her disability.

The Board's amended decision, filed almost a year later, included exactly the same findings and conclusions, simply adding several paragraphs noting that the amendment of Workers' Compensation Law § 15(3)(w) in the interim now operated to relieve O'Donnell of the burden to demonstrate attachment to the labor market because the Board had already found that she was entitled to benefits at the time of classification by extending her the inference associated with an involuntary withdrawal from the labor market. A. 97-99.

The Board did not, therefore, find that O'Donnell was initially entitled to permanent partial disability benefits because of the statutory amendment. Instead, in both of its decisions the Board found that she was entitled to benefits because

she had involuntarily withdrawn from the labor market, from which it inferred that her subsequent loss of wages was attributable to her permanent partial disability. In its second decision in July of 2017, the Board additionally found that because it had already found that O'Donnell was entitled to benefits at the time of her classification, the statutory amendment in April of 2017 relieved her of any further obligation to demonstrate labor market attachment. The Board did not substitute the statutory amendment as the basis for its original determination that O'Donnell was entitled to benefits as a result of the inference flowing from the facts of her case, but simply held that having already found that she was entitled to benefits at the time of classification, the amendment of the statute in the interim now precluded it from requiring her to demonstrate attachment to the labor market.

The Board presumably included consideration of the statutory amendment in its second decision in recognition of the effect of its continuing jurisdiction pursuant to Workers' Compensation Law § 123. Absent the statutory amendment, on the County's application for review the Board could have exercised its continuing jurisdiction in July of 2017 to require O'Donnell to demonstrate labor market attachment regardless of her involuntary withdrawal and her initial entitlement to the benefit of the resulting inference. WCL § 123. However, once the Legislature amended Workers' Compensation Law § 15(3)(w) in April of 2017 the Board could no longer do so unless it chose to revisit and reverse its original

finding that O'Donnell was entitled to benefits at the time of her classification – which it expressly did not do, instead adhering to that determination in its second decision.

We recognize that the Third Department expressly declined to consider Appellant's argument that the Board erred in extending the inference to O'Donnell ("[a]ssuming without deciding that the Board panel so erred"), and instead chose to decide the matter based on the statutory amendment. Matter of O'Donnell v. Erie County, 162 A.D.3d 1278, 1279; 78 N.Y.S.3d 506, 507 (3rd Dept. 2018). We agree with Appellant to the extent that it contends that the Appellate Division should have decided the matter on the basis of whether the Board properly inferred that O'Donnell's wage loss was causally related to her injury given her involuntary retirement and permanent partial disability, rather than on the amendment to the statute. Our position with regard to that issue is set forth in Point I, *supra*.

However, Appellant does not appear to dispute that if the Board properly found that she was entitled to compensation at the time of her classification in 2015, then by July of 2017 the statutory amendment would have operated to relieve her of the obligation to demonstrate attachment to the labor market. This Court should therefore affirm the Board's decision, albeit on different grounds than the Third Department.

POINT III: THE 2017 AMENDMENT TO WORKERS' COMPENSATION LAW SECTION 15(3)(w) IS APPLICABLE RETROACTIVELY.

As set forth in Point II, *supra*, and the briefs submitted by all of the parties, the Board's decision in this case did not depend upon the Legislature's amendment to Workers' Compensation Law § 15(3)(w) and the Third Department's decision should not have reached that issue. Instead, as discussed in Point I, *supra*, the Third Department should have affirmed the Board's decision based on the inference established by precedent.

Should this honorable Court consider the 2017 amendment of Workers' Compensation Law § 15(3)(w), we respectfully submit that it should lead the Court to revisit the Zamora decision and to restore the inference to its previous presumptive status.

The amendment provides that "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." L 2017, ch. 59, part NNN, subpart A, §1. This effectively reinstates the legal standard that existed prior to Zamora and is therefore entirely consistent with the Board's decision in this case.

An injured worker is "entitled to benefits at the time of classification" as long as he or she has not voluntarily withdrawn from the labor market (or returned

to work at full wages). The statute thus establishes that unless the Board finds a voluntary withdrawal from the labor market, an injured worker is not required to demonstrate attachment to the labor market as a condition precedent to an award of benefits. The amendment effectively codifies the inference in its pre-Zamora form.

We therefore respectfully submit that to the extent the Court considers the amendment to Workers' Compensation Law § 15(3)(w), it should be interpreted as evidence of Legislative intent to overrule the Zamora standard that the Board "may" infer causally related wage loss without proof of labor market attachment when there is an involuntary withdrawal from the labor market, and to instead establish that the Board "must" do so.

With regard to the question of retroactivity, as set forth in Point II, *supra*, we do not believe that the Board applied the amendment retroactively. Instead, the Board simply found that since it had determined that O'Donnell was entitled to benefits at the time of her classification in 2015 based on the inference, then as of July, 2017 she was no longer required to demonstrate labor market attachment due to the statutory amendment that had occurred in the interim.

However, should the Court reach the issue of retroactivity, we respectfully submit that the Third Department correctly concluded that the amendment is applicable to any case in which the injured worker was entitled to benefits at the

time of classification, including those in which classification occurred prior to the date of the amendment.[6]

This Court has recently considered the issue of retroactivity in two cases involving the Workers' Compensation Law. In Matter of Raynor v. Landmark Chrysler, 18 N.Y.3d 48, 936 N.Y.S.2d 63, 959 N.E.2d 1011 (2011), the Legislature amended Workers' Compensation Law § 27 to mandate insurers to make deposits into the Aggregate Trust Fund once, as here, the injured worker was classified as having a permanent partial disability. Raynor, 18 N.Y.3d at 54. On appeal, the insurers contended that this requirement should not be construed to apply to accidents that occurred prior to the effective date of the legislation. Raynor, 18 N.Y.3d at 56.

This Court unanimously rejected the insurers' argument and found that the amendment was to be applied without regard to the date of accident. Raynor, 18 N.Y.3d at 55. The Court held that the Legislature "specifically chose the date of the award" as the determinative point for application of the amendment with full knowledge that it could have chosen "the date of accident as the demarcation point" as it did elsewhere in the statute. Raynor, 18 N.Y.3d at 56-57.

In American Economy Ins. Co. v State of New York, 30 N.Y.3d 136, 65 N.Y.S.3d 94, 87 N.E.3d 126 (2017), *cert. den.* 2018 U.S. LEXIS 3440 (U.S., June

[6] We note that Appellant does not appear to dispute this point, and that Respondent Workers' Compensation Board agrees that the amendment is applicable retroactively.

4, 2018), the Legislature chose a date on which it closed the Special Fund for Reopened Cases to new applications. American Economy, 30 N.Y.3d at 140. On appeal, the insurers contended that this closure had an impermissible retroactive impact because it imposed "new legal consequences" on events that had been "completed before its enactment." American Economy, 30 N.Y.3d at 147.

This Court again unanimously rejected the insurers' argument. Relying in part on Raynor, *supra*, as well as Matter of Becker v Huss Co., 43 N.Y.2d 527, 402 N.Y.S.2d 980, 373 N.E.2d 1205 (1978), the Court held that "[w]hether this alleged retroactive application of the amendment 'attaches new legal consequences to events completed before its enactment' is debatable. Nevertheless, even assuming arguendo that the amendment has retroactive impact to the extent it imposes unfunded liability costs upon plaintiffs under policies finalized before the amendment's effective date, we conclude that this retroactive impact is constitutionally permissible." American Economy, 30 N.Y.3d at 149 (*cit. omit*.).

The statutory amendment at issue here is analogous to that in Raynor, *supra*. In Raynor, the deposits that the Legislature made mandatory could previously have been directed by the Board as a matter of discretion, and the amendment thus imposed no new costs on the insurers. Raynor, *supra*. Similarly, absent a voluntary withdrawal, the Board already possessed the authority to make an award of permanent partial disability benefits regardless of proof of labor market

attachment, and the amendment imposed no new costs by mandating what the Board could already have done (and did in this case) as a matter of discretion. Of course, even if the amendment did result in new costs it was within the Legislature's power to impose them. See, Becker, *supra*; American Economy, *supra*.

Thus, the sole question is whether the statute, as written, applies to cases in which classification occurred prior to the effective date of the amendment on April 10, 2017.

In Majewski v Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998), the Court held that

> "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated:
>
> "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning."

Majewski, 91 N.Y.2d at 986 (*cit. omit.*).

In this case, the Legislature did not specify that the amendment applied only to cases in which the accident occurred on or after a certain date, or even where the

permanent disability classification occurs after its effective date. As a result, the Court must determine the legislative intent, taking into consideration not only the plain language of the statute, but also the fact that the Workers' Compensation Law is remedial in nature and its provisions must be liberally construed for the protection of injured workers. Majewski, *supra*; Becker, *supra*.

The Third Department properly concluded that "retroactive application may be inferred from other language in the amendment." As the court observed, other portions of Workers' Compensation Law § 15(3)(w) (and many other provisions of the statute) apply only where the accident occurs "on or after" a certain date – a limitation the Legislature did not include in the amendment at issue.

Similarly, when the Legislature amended Workers' Compensation Law § 27 to convert discretionary Aggregate Trust Fund deposits into mandatory ones, it did so based on permanent partial disability classifications occurring on or after a certain date. Raynor, 18 N.Y.3d at 56-67. Again, the Legislature notably did not include such a limitation in its amendment of Workers' Compensation Law § 15(3)(w).

"When a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." Matter of Alonzo M. v. New York City Dept. of Probation, 72 N.Y.2d 662, 665; 536

N.Y.S.2d 26, 28-29; 532 N.E.2d 1254, 1256-57 (1988). This is especially so when the Legislature "includes particular language in one section of the statute but omits it in another." Keene Corp. v. United States, 508 U.S. 200, 208; 113 S. Ct. 2035, 2040; 124 L. Ed. 2d 118, 128 (1993). In those circumstances, "it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion." Id.

Thus, because the Legislature did not specify that the amendment to Workers' Compensation Law was to apply to "accidents on or after" a certain date, or even to "classification on or after" a certain date, the Third Department correctly interpreted the amendment as applying to all cases in which the worker did not voluntarily withdraw from the labor market prior to classification.

We therefore respectfully submit that to the extent the Legislature's amendment to Workers' Compensation Law § 15(3)(w) is relevant to the decision in this case, it is consistent with the Board's decision to infer that O'Donnell's loss of wages was attributable to her permanent partial disability without further evidence of attachment to the labor market, and that the Appellate Division correctly concluded that the amendment should be given retroactive effect. The decision below should therefore be affirmed.

CONCLUSION

The Workers' Compensation Board properly concluded that because O'Donnell did not voluntarily withdraw from the labor market, she was entitled to the benefit of an inference that her wage loss was due to her permanent partial disability without the need to demonstrate attachment to the labor market as further proof. Appellant's contention that this Court's decision in Zamora prohibited the Board from doing so is wholly erroneous. To the contrary, the Court should revisit its holding in Zamora to clarify that where there is no voluntary withdrawal from the labor market, the Board should draw such an inference in the absence of substantial evidence to the contrary.

The Board's decision in this case did not depend on the Legislature's amendment to Worker's Compensation Law § 15(3)(w), because the Board did not apply the statute to determine that O'Donnell involuntarily retired and was entitled to the benefit of the inference, which is the issue raised by Appellant. The Board issued an amended decision merely to clarify that having found an involuntary retirement and having extended the inference, after April 10, 2017 O'Donnell was also relieved of the obligation to demonstrate attachment to the labor market as a matter of statute, in addition to the Board's exercise of its discretion.

To the extent that the Appellate Division, Third Department's decision was based on the statutory amendment, its interpretation of the statute was consistent

with well-established precedent and its decision that the amendment should be given retroactive effect was correct.

Therefore, the decisions of the Workers' Compensation Board and the Appellate Division, Third Department should be affirmed.

Dated: Farmingdale, New York
March 5, 2019

Respectfully submitted,

_____
Robert E. Grey

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §1250.8(j) that the foregoing brief was prepared by a computer.

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Dated: Farmingdale, New York
March 5, 2019

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Robert E. Grey, Esq.