To be Argued by:
ROBERT E. GREY

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.

SUPPLEMENTAL BRIEF FOR RESPONDENT SANDRA O'DONNELL

HURWITZ, WHITCHER & MOLLOY
Attorneys for Respondent
SANDRA O'DONNELL
1725 Liberty Building
Buffalo, New York 14202
Tel. (716) 856-1600
Fax (716) 856-5013

Of Counsel: Robert E. Grey
Dated: August 5, 2019

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PRELIMINARY STATEMENT

Appellant has submitted a brief in which it contends that pursuant to this Court's decision in Zamora v New York Neurologic Assoc., 19 N.Y.3d 186, 947 N.Y.S.2d 788, 970 N.E.2d 823 (2012) "the Board was not permitted to infer her post-retirement reductions in earnings was caused by her partial disability." Brief for Appellant at p. 7.

In response, Claimant-Respondent submitted a brief observing that (1) the inference of a causal connection between a compensable disability and a loss of wages flows directly from the language of the statute; (2) far from prohibiting the Workers' Compensation Board from applying the statutory inference, this Court's decision in Zamora expressly permitted the Board to do so in any given case; and (3) the Board's decision to do so in this case was entirely appropriate based on the facts of the case. Claimant-Appellant further asked the Court to revisit its opinion in Zamora in order to clarify the circumstances in which the Board should apply the inference.

Instead of defending its decision – as it had before the Appellate Division, Third Department and in opposing Appellant's Motion for Leave to Appeal to this Court, Respondent Workers' Compensation Board instead filed a motion seeking the Court's permission to modify its decision to provide the Appellant with "relief more favorable than that sought in their brief to this Court." The Court denied

Respondent Board's motion on June 25, 2019.

Respondent Board has now submitted a brief in which it contends that its own decision was erroneous and should be annulled. It asserts that it "could not" infer that Claimant-Respondent's loss of wages was attributable to her compensable permanent partial disability and disability retirement because it has created an administrative policy against drawing such an inference, and its decision in this case departed from that policy. Brief for Respondent Workers' Compensation Board at pp. 15-18.

In that Respondent Board has not only joined in Appellant's arguments, but asserted that they reflect what it now describes as an administrative policy, the Court granted Claimant-Respondent's request for leave to submit a brief replying to Respondent Board's arguments.

Claimant-Respondent respectfully submits that Respondent Board's creation of an administrative policy pursuant to which it now admits that it will never apply the inference that is inherent in the statute and permitted by this Court on a case-specific basis in Zamora is unconstitutional and unlawful. Such a policy violates Article IV, § 8 of the New York State Constitution, denies injured workers their due process right to a fair hearing based on the facts of their case, and improperly elevates the Board's administrative precedents above the decisions of this honorable Court and the Appellate Division, Third Department.

Respondent Board's contention that the Legislature's 2017 amendment to Workers' Compensation Law § 15(3)(w) was not intended to overrule the majority opinion in Zamora is also plainly erroneous.

Claimant-Respondent therefore respectfully submits that the decision below should be affirmed, and that the Court should revisit and revise its decision in Zamora in view of the manner in which it has been applied by the Workers' Compensation Board and the Legislature's effort to remedy that application by amending Workers' Compensation Law § 15(3)(w).

QUESTIONS PRESENTED

Question 1: Is the Workers' Compensation Board permitted to create an agency policy that determines how the law will invariably be applied, regardless of the facts of any individual case?

Answer: No. Article IV, § 8 of the New York State Constitution prohibits the agency from creating an inflexible rule in the absence of the regulatory process. In addition, a refusal to evaluate the facts of an individual case based on a pre-determined outcome is a denial of the constitutional right to due process.

Question 2: Did the Legislature's amendment of Workers' Compensation Law § 15(3)(w) overrule the majority opinion in Zamora v. New York Neurologic?

Answer: Yes. The majority opinion in Zamora permitted the Workers' Compensation Board to require ongoing proof of labor market attachment in all cases, including workers who were found to be permanently partially disabled. The Legislature's amendment to the statute prohibited the Board from doing so where it had previously found that the worker was entitled to benefits at the time of classification, thus overruling Zamora.

ARGUMENT

POINT I: THE WORKERS' COMPENSATION BOARD'S CREATION OF A POLICY THAT IT WILL NEVER APPLY THE INFERENCE INHERENT IN WORKERS' COMPENSATION LAW § 15(5) AND PERMITTED BY THIS COURT IN ZAMORA IS UNCONSTITUTIONAL AND UNLAWFUL.

In its brief, Appellant Erie County contends that:

> 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 replacement 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 reduction in earnings was caused by her partial disability.

Brief for Appellant Erie County at p. 7 (*emphasis added*).

As discussed in the Brief for Claimant-Respondent, Appellant's argument is directly contrary to the majority opinion in Zamora v New York Neurologic Assoc., 19 N.Y.3d 186, 947 N.Y.S.2d 788, 970 N.E.2d 823 (2012). Far from prohibiting the Workers' Compensation Board from inferring that wage loss flows naturally from a compensable disability – as the text of the statute provides – the opinion in Zamora expressly permitted the Board to draw such an inference.

Workers' Compensation Law § 15(5) provides that "[i]n case of temporary partial disability resulting in decrease of earning capacity, the compensation shall

be two-thirds of the difference between the injured employee's average weekly wages before the accident and his wage earning capacity after the accident in the same or other employment." WCL § 15(5) (*emphasis added*).

Interpreting the statute in Zamora, *supra*, the majority held that:

> In reaching its decision on [whether the decrease of earning capacity was a result of the disability], the Board will, of course, consider the circumstances under which claimant originally stopped full-duty work. "If the Board determines that a workers' compensation claimant has a permanent partial disability and that the claimant retired from his or her job due to that disability, an inference that his or her reduced future earnings resulted from the disability may be drawn." The same is true regardless of whether claimant has completely retired from the work force or merely withdrawn from the particular employment in which she was engaged at the time of her accident. An 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.

Zamora, 19 N.Y.3d at 191-192 (*cit. omit; emphasis on "partial" and "may" in original; emphasis in last sentence added*).

Thus, Respondent's assertion that the Board is "not permitted to infer" that a loss of earnings is due to a compensable disability finds no support in either the statute or this Court's decision in Zamora, *supra*.

However, in support of its claim, Appellant argues that:

> 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.

Brief for Appellant Erie County at p. 10 (*emphasis in original*).

In other words, Appellant contends that the Board has now created an administrative policy that the permitted inference will never be drawn and that the injured worker will always be required to "show a sufficient attachment to the labor market" as a condition precedent to an award of benefits, even where the "cessation of employment was involuntary."

There has never been a question that an injured worker who has voluntarily withdrawn from the labor market bears the burden of proof of demonstrating that the compensable disability is adversely affecting his or her 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 Roberts v. General Elec. Co., 6 A.D.2d 43, 174 N.Y.S.2d 533 (3rd Dept. 1958); Matter of Topf v. American Character Doll, 62 A.D.2d 1111, 404 N.Y.S.2d 451 (3rd Dept. 1978).

Indeed, Jordan v. Decorative Co, 230 N.Y. 522, 130 N.E.634 (1921), upon

which Appellant and Respondent Board rely heavily, was precisely such a case. In Jordan, the claimant returned to his pre-accident employer despite his injury until he was eventually terminated. Jordan, 230 N.Y. at 524. He thereafter sought and eventually obtained work earning more than he had before the injury. *Id.* However, when the new employer offered him a different position at the same wages, he declined that job and as a result was unemployed for a second period of time. *Id.*

The Court of Appeals upheld an award of benefits for the first period of time when he left employment for reasons unrelated to his disability (termination) and sought other work consistent with his disability, but denied him benefits for the second period of time, when he voluntarily left employment (resignation) and sought no other work. *Id.*

Thus, the decision in Jordan – from which Appellant and Respondent Board selectively cull language – rested upon the fact that the claimant left work for reasons unrelated to his disability and did not (for one of the two periods at issue in the case) demonstrate that his loss of earnings was due to that disability as opposed to a choice not to work.

Appellant contends that the Board has now extended that same rule to workers who have involuntarily withdrawn from the labor market as a result of their workplace injury. Under Appellant's theory, there is no longer any

distinction to be drawn between a worker who stops working because of an injury and one who leaves employment for reasons wholly unrelated to the injury. In either event, the worker is obligated to demonstrate attachment to the labor market as a condition precedent to an award of benefits. In short, Appellant contends that the Board has established a rule that wholly eradicates any inference that a compensable disability results in loss of wages, regardless of the circumstances in any particular case.

Far from disagreeing with Appellant, Respondent Workers' Compensation Board acknowledges that it has in fact established a policy that it will never infer that an injured worker's loss of wages is due to their compensable disability, but that it will instead require every partially disabled worker to demonstrate attachment to the labor market in order to obtain benefits.[1]

According to Respondent Board: "[S]ince *Zamora,* the Board has consistently declined to infer labor-market attachment when an applicant for a permanent partial disability award fails to provide evidence of efforts to obtain alternate work." Brief for Respondent Workers' Compensation Board at p. 15 (*emphasis added*).

The Board goes on to inform the Court that: "Indeed, the Board specifically

[1] Notably, Respondent Board acknowledges that "[t]he phrase 'attachment to the labor market'" is nowhere to be found in the Workers' Compensation Law and instead "appears to have been imported from the law of unemployment insurance." Brief for Respondent Workers' Compensation Board at p. 3, fn. 1.

advises the public of its practice in this regard on its website, which includes forms for claimants to use to document their job searches." Brief for Respondent Workers' Compensation Board at p. 17 (*emphasis added*).

The Board thus contends that its own decision in the case at bar was erroneous because it "inferred a continued willingness to work from claimant's involuntary withdrawal from her specific position of employment. … While the Board was permitted to draw that inference under this Court's holding in Matter of Zamora v. N.Y. Neurological Assoc., 19 N.Y.3d 186, 191 (2012), it could not do so without departing from its established administrative precedent." Brief for Respondent Workers' Compensation Board at p. 1.

In short, neither Appellant nor Respondent Board contend that Claimant-Respondent voluntarily withdrew from the labor market, or that it would be unjustified to infer that her subsequent wage loss was attributable to her compensable disability given the facts and circumstances of her particular case.[2] Instead, Appellant contends – and Respondent Board confirms in its brief – that Claimant-Respondent could not be afforded the inference simply because of an administrative policy: Since Zamora, the Board has determined that it will never infer that wage loss is related to a compensable disability.

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[2] Indeed, such arguments would clearly be unavailing considering Appellant and Respondent Board's concession that Claimant-Respondent's retirement was due to her disability and her approval for a disability pension from her employer.

Thus, this is not a case of the agency weighing the facts of Claimant-Respondent's case and arriving at a reasoned decision about whether she was entitled to the benefit of the statutory inference that her wage loss was attributable to her compensable disability. Instead, this is a case of the agency announcing that it will not extend the inference to any injured worker in any case, regardless of the facts presented to it.

The administrative creation of a bright-line rule is the antithesis of an exercise of discretion. Instead, it is an unconstitutional rulemaking, usurps the role of the Legislature, and violated Claimant-Respondent's due process right to a fair hearing.

A. The Workers' Compensation Board's Policy Is An Unconstitutional Rulemaking.

Article IV, § 8 of the New York State Constitution provides that "[n]o rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state." N.Y.S. Constitution, Art. IV, § 8.

In considering this constitutional provision, this Court has held that "[t]he term, 'rule or regulation,' has not, it is true, been the subject of precise definition,

but there can be little doubt that, as employed in the constitutional provision, it embraces any kind of legislative or quasi-legislative norm or prescription which establishes a pattern or course of conduct for the future. The label or name employed is not important and, unquestionably, many so-called 'orders' come within the term." People v. Cull, 10 N.Y.2d 123, 126; 218 N.Y.S.2d 38, 40; 176 N.E.2d 495, 497 (1961).

This Court has further held that there is an important "distinction between ad hoc decision making based on individual facts and circumstances, and rulemaking." Alca Indus. V. Delaney, 92 N.Y.2d 775, 778; 686 N.Y.S.2d 356, 357; 709 N.E.2d 97, 98 (1999). "Choosing to take an action or write a contract based on individual circumstances is significantly different from implementing a standard or procedure that directs what action should be taken regardless of individual circumstances. Rulemaking, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications." *Id.* The key distinction is whether the agency has created a "blanket requirement" or has "allow[ed] for flexibility" depending on individual circumstances. *Id*; *see also*, Matter of Council of the City of N.Y. v. Dept. of Homeless Svcs of the City of N.Y., 22 N.Y.3d 150, 980 N.Y.S.2d 62, 3 N.E.3d 128 (2013).

Thus, in 439 E. 88 Owners Corp. v. Tax Comm'n, 307 A.D.2d 203, 763

N.Y.S.2d 12 (1st Dept. 2003), the Tax Commission's "policy" – not reduced to a regulation – requiring the submission of certain information by every property owner was an unconstitutional rulemaking because it "dictates a specific result in particular circumstances without regard to other circumstances relevant to the regulatory scheme." 439 E. 88 Owners Corp., 307 A.D.2d at 203.

Similarly, in Matter of Callahan v. Carey, 2012 N.Y. Misc. LEXIS 758, 2012 NY Slip Op 30400(U) (Sup. Ct., NY County 2012), a rule established by the New York City Department of Homeless Services was invalid where it denied its decision makers "discretion to independently exercise their professional judgment" and instead "established precepts that remove its discretion by dictating specific results in particular circumstances." Matter of Callahan, at p. 7.

In the case at bar, Respondent Board states that (1) it has established a "practice" requiring all injured workers to demonstrate attachment to the labor market as a condition of their receipt of workers' compensation benefits; (2) "since Zamora" it has applied that practice to "consistently" decline to afford any injured worker the benefit of the statutory inference of a causal relationship between lost wages and a compensable disability; and (3) it believes it "erred" in the case at bar because it departed from its policy of never drawing the inference, regardless of whether it was justified by the facts of this particular case.

Respondent Board's creation of an administrative policy that it concedes it

applies inflexibly to all cases, regardless of their individual facts, is therefore an unconstitutional rulemaking in violation of Article IV, § 8 of the New York State Constitution. Indeed, we respectfully submit that Respondent Board chose to implement its policy in this fashion because it could not have promulgated a similar regulation without contradicting this Court's decision in Zamora, *supra*, and the plain language of the statute.

Respondent Board offers two justifications for its policy: that it is obligated to follow its own "administrative precedent;" and that its rule "works well because it avoids litigation over the reasonableness of a decision to draw the permissive inference in an individual case."[3] Brief for Respondent Workers' Compensation Board at pp. 17-18. Both of these justifications are entirely lacking in merit.

Respondent Board's characterization of its decision as required by "administrative precedent" is simply erroneous as a matter of law. "Precedent" is defined as "[a]n adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law." Black's Law Dictionary, 2nd Ed. (*emphasis added*); *see also*, In re Tug Helen B. Moran, Inc., 607 F.2d 1029 (2d Cir. 1979) ("We find no merit in the State's attempt to invoke the doctrine of stare decisis, since the doctrine is not applicable to determinations of fact: In view of the fact

[3] The latter justification is further evidence that the Board has approached the issue as a matter of administrative policy, rather than reasoned fact-finding and application of the law.

that stare decisis is concerned with rules of law, a decision depending on the facts is not controlling precedent as to a subsequent determination of the same question on different facts and a different record. ...1B Moore's Federal Practice P 0.402(2), at 117" (*emphasis added*)); LaManna v. Carrigan, 196 Misc.2d 98, 762 N.Y.S.2d 333 (Civil Court of City of NY, Richmond County 2003) ("Even where the legal issue is identical, the doctrine of stare decisis is of little aid where the facts in the two actions are materially different." (*emphasis added*)).

By contrast, what Respondent Board characterizes as "precedent" is instead a substitution of its view of what the law should be for this Court's statement of the law in Zamora – without regard to the facts of the case. This Court's decision in Zamora created a precedent that required the Board to evaluate the facts of each case and to decide whether the injured worker should be afforded the statutory inference. Respondent Board has simply rejected that precedent in favor of the blanket rule it has created to replace it. Respondent Board's decisions do not constitute "administrative precedents," but instead amount to administrative legislation.

Respondent Board plainly misapprehends its role in the judicial process. *See*, Workers' Compensation Law § 23. While the Board has broad discretion as a finder of fact, it is bound by the judiciary's interpretation of the statute, and may not reject the Court's view of the law in favor of its own. *See, e.g.*, Graham v

Armstrong Contracting & Supply Co., 126 A.D.2d 36, 512 N.Y.S.2d 533 (3rd Dept. 1987); *app. denied*, 70 N.Y.2d 605, 519 N.Y.S.2d 1028, 513 N.E.2d 1308 (1987).

Respondent Board's second justification for its rule – that it "works well" – is addressed in sub-point I.B., which follows.

B. The Workers' Compensation Board's Policy Usurps The Role of the Legislature.

Respondent Board next attempts to justify its rule on the grounds that it "works well because it avoids litigation over the reasonableness of a decision to draw the permissive inference in an individual case." Brief for Respondent Workers' Compensation Board at pp. 17. Needless to say, taken to its logical conclusion Respondent Board could employ this justification to do away with its adjudicative role entirely. This would, however, be wholly contrary to the very purposes for which the Workers' Compensation Board was created.

The Legislature created the Workers' Compensation Board and delegated to it "power to hear and determine all claims for compensation or benefits … to require medical service for injured employees … [and] to modify or rescind awards." WCL §§ 140, 142(1). The Legislature further specifically provided for the Board to conduct a "review, hearing, rehearing, inquiry or investigation." WCL § 142(2).

These powers were intended to be exercised over an extended period of time, because an injured worker's medical treatment and indemnity benefits may be ongoing for life, and even a case which has been resolved may be reopened for the injured worker to pursue an additional claim for medical treatment at any time or for indemnity benefits for eighteen years from the date of the accident. WCL §§ 13, 15(1) and (2), 15(6-a), 20, 22, 25-a, 123.

In order to permit the Board to carry out its statutory mandate, the Legislature expressly granted it "continuing" jurisdiction over claims, subject to a few well-defined limitations. *See*, WCL §§ 25-a; 123. It also provided a single vehicle for the full and final resolution of a case in its 1996 amendment to Workers' Compensation Law § 32. L. 1996, ch. 635, § 73.

If Respondent Board wishes to administer the statute in a manner that will relieve it of its fundamental adjudicatory role, its remedy lies with the Legislature, not the creation of non-regulatory policies that achieve its desired goal by truncating the statutory rights of the parties. "[A]n administrative policy that 'graft(s)' onto the statute an addendum that excludes only certain tenants and vacate orders violates the plain meaning doctrine." Matter of Smith v. Donovan, 61 A.D.3d 505, 878 N.Y.S.2d 675 (1st Dept. 2009); *see also*, Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 667 N.Y.S.2d 327, 689 N.E.2d 1373 (1997).

C. The Workers' Compensation Board Denied Claimant-Appellant Due Process.

Finally, Respondent Board's argument that it should have applied its blanket policy and refused to consider whether Claimant-Respondent was entitled to the benefit of the inference that her loss of wages was caused by her compensable disability – regardless of the facts of her case - would deprive her of due process.

Due process guarantees the right of an injured worker to a meaningful hearing and an adjudicated remedy. Kendrick v. Sullivan, 784 F. Supp. 94 (S.D.N.Y. 1994).

> The right to an impartial adjudication is a basic element of due process. This aspect of due process applies equally in an administrative setting as it does in a judicial forum. Indeed, the relative lack of procedural protections in an administrative proceeding has been recognized as a basis for stricter application of the requirement that administrative decision-makers be impartial. ... Thus, an administrative law judge may not act in a systematically biased manner in deciding cases. Rather, an administrative law judge is required to reach decisions by impartially applying the legal rules to the facts established by the record in each case.

Kendrick, 784 F. Supp. at 102.

On the other hand, when an administrative agency holds a generalized bias, or routinely interprets the facts or the law to the detriment of an injured worker, "this strikes at the very core of due process." Pronti v. Barnhart, 339 F. Supp. 2d 480, 492 (W.D.N.Y. 2004).

In this case, Respondent Board argues that – as a matter of agency policy –it should not have considered whether the circumstances of Claimant-Respondent's separation from employment and permanent disability would justify the inference that her loss of wages was attributable to her disability. Such a pre-determination of her claim, without regard to the facts but instead based on the creation of a uniform administrative policy in disregard of the statute and judicial opinions, would violate her due process right to a fair hearing.

We therefore respectfully submit that the position advanced by Respondent Workers' Compensation Board in its brief is unconstitutional and unlawful. It violates the New York State Constitution's prohibition against *ad hoc* rulemaking by state agencies, improperly usurps the role of the Legislature, and would deprive Claimant-Respondent and other injured workers of due process. Respondent Board's position should therefore be rejected.

POINT II: THE 2017 AMENDMENT TO WORKERS' COMPENSATION LAW SECTION 15(3)(w) WAS INTENDED TO OVERRULE THE MAJORITY OPINION IN ZAMORA.

Respondent Workers' Compensation Board next contends that the question of whether the Legislature's amendment to Workers' Compensation Law § 15(3)(w) was intended to overrule the majority opinion in Zamora, *supra*, is

unpreserved for review, and that in any event it was not so intended. Respondent Board is again mistaken.

Respondent Board correctly notes that Claimant-Respondent did not appear in this matter before the Appellate Division, Third Department. The issue before the Appellate Division was not the relationship between the statutory amendment and Claimant-Respondent's entitlement to benefits, but instead whether the Board properly afforded her the benefit of the inference – a decision that the Board defended at the Third Department.

The Appellate Division, however, decided the matter on the basis that the statutory amendment relieved Claimant-Respondent of the obligation to demonstrate attachment to the labor market – in effect ruling that the statutory amendment superseded the discretionary authority this Court granted to the Board in Zamora, *supra*. Thus, the issue of the relationship between the amendment and the decision in Zamora became relevant for the first time after the Appellate Division's decision. Claimant-Respondent – who is now no longer united in interest with Respondent Board given the latter's wholesale reversal of its posture in this case after Appellant's motion for leave to appeal was granted – therefore has standing to address the issue. This is especially true given that no other party to the case would brief the issue for the Court.

Respondent Board's position that the statutory amendment does not overrule Zamora is inherently contradictory. At page 6 of its brief, Respondent Board concedes that from the time Zamora was decided "until 2017, the Board required all non-schedule permanent partial disability claimants to demonstrate such continuing attachment both during the period between the involuntary withdrawal from employment and claimant's classification as permanently partially disabled, and also throughout the subsequent period in which the claimant receives benefits."[4] Brief for Respondent Workers' Compensation Board at p. 6 (*emphasis added*).

This was, of course, based on the new authority the Court's decision in Zamora granted the Board to deny the inference of disability-related wage loss to an injured worker, which the Board immediately implemented as its uniform policy.

Respondent Board then admits that "[i]n April 2017, however, … the Legislature amended WCL § 15(3)(w) to eliminate the requirement that claimants entitled to benefits at the time of classification must thereafter continue to establish ongoing labor-market attachment." Brief for Respondent Workers' Compensation Board at p. 7 (*emphasis added*).

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[4] In the case of an "uncapped" permanent partial disability (resulting from an accident prior to March 13, 2007), this means that the Board interpreted Zamora to require an injured worker to demonstrate ongoing attachment to the labor market for the rest of his or her life.

There is no possible interpretation of the statutory amendment other than that it was intended to remove the Board's authority to require "permanent partial disability claimants to demonstrate … attachment … throughout the [post-classification] period in which the claimant receives benefits" – which authority did not exist prior to this Court's decision in Zamora, *supra*.

Thus, Respondent Board's argument that the Legislature's amendment of Workers' Compensation Law § 15(3)(w) was not intended to overrule Zamora is inherently contradictory and clearly erroneous.

Of course, Claimant-Respondent's argument in this case does not rest on the question of whether the Legislature's amendment of the statute overrules the Zamora decision. Instead, as set forth in the Brief for Claimant-Respondent, we respectfully submit that the Court should independently revisit and revise its opinion in Zamora on the merits of the issue. Respondent Board's subsequent misapplication of the Court's opinion and the Legislature's action to remedy that misapplication simply provide further support for Claimant-Respondent's request.

We therefore respectfully submit that this honorable Court should revisit its decision in Zamora. Upon such reconsideration we ask the Court to affirmatively rule that the Workers' Compensation Board should, in the absence of substantial evidence to the contrary, infer that a partially disabled worker who has involuntarily withdrawn from the labor market is entitled to benefits for such

partial disability. The Court should further hold that a lack of "attachment to the labor market," standing alone, does not terminate such a worker's entitlement to benefits for partial disability. Such a conclusion would be amply justified given the Legislature's amendment of the statute and Respondent Board's concession that the concept of labor market attachment is wholly absent from the Workers' Compensation Law.

As set forth in the Brief for Claimant-Respondent, the relevance of "labor market attachment" in workers' compensation jurisprudence arose as a vehicle to assist injured workers in obtaining benefits after a voluntary withdrawal from the labor market, not to permit employers and carriers to deny them after an involuntary (disability-related) separation from employment. Respondent Workers' Compensation Board now concedes that it has imported its present application of the doctrine from the Unemployment Insurance law (which covers able-bodied workers, not disabled workers) and applied it for the latter purpose, rather than the former. This is wholly contrary to the fundamental purpose of the law:

> So narrow a construction thwarts the purpose of the statute. The Workmen's Compensation Law was framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability. He was to be saved from becoming one of the derelicts of society, a fragment of human wreckage (Matter of Post v. Burger & Gohlke, 215 N. Y. 544; N.

> Y. C. R. R. Co. v. White, 243 U.S. 188, 197). He was to have enough to sustain him in a fashion measurably consistent with his former habits of life during the trying days of readjustment. The cost of such support becomes a charge upon the industry without regard to fault.

Matter of Surace v. Danna, 248 N.Y.18, 161 N.E. 315 (1928).

We therefore respectfully submit that the decision of the Appellate Division, Third Department should be modified as set forth herein, and as so modified, affirmed.

CONCLUSION

The Workers' Compensation Board's creation of an administrative policy under which it will never apply the inference that is inherent in the statute and was permitted by this Court on a case-specific basis in Zamora is unconstitutional and unlawful. Its policy violates Article IV, § 8 of the New York State Constitution, denies injured workers their due process right to a fair hearing based on the facts of their case, and improperly elevates the Board's administrative precedents above the decisions of this honorable Court and the Appellate Division, Third Department.

The Board's contention that the Legislature's 2017 amendment to Workers' Compensation Law § 15(3)(w) was not intended to overrule the majority opinion in Zamora is also plainly erroneous.

The decision below should be affirmed, and the Court should revisit and revise its decision in Zamora in view of the manner in which it has been applied by the Workers' Compensation Board and the Legislature's effort to remedy that application by amending Workers' Compensation Law § 15(3)(w).

Dated: Farmingdale, New York
August 7, 2019

Respectfully submitted,

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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
August 7, 2019

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Robert E. Grey, Esq.