No. APL-2018-00191

To be argued by:
Patrick A. Woods
15 minutes requested

State of New York
Court of Appeals

SANDRA L. O'DONNELL,

Claimant-Respondent,

v.

ERIE COUNTY, EMPLOYER C/O FCS ADMINISTRATORS,

Appellants,

And

WORKERS' COMPENSATION BOARD,

Respondent.

BRIEF FOR RESPONDENT WORKERS' COMPENSATION BOARD

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Dated: July 25, 2019

Third Department No. 524981

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PRELIMINARY STATEMENT

This appeal challenges an inadvertent departure by the Workers' Compensation Board from its administrative precedent. The Board has consistently required workers seeking permanent partial disability awards of the kind at issue here to demonstrate a continued willingness to work (commonly referred to as continued "labor-market attachment") from the time that they incur injury through the time that they are classified as having the requisite partial disability.

Here, in contrast, the Board implicitly inferred a continued willingness to work from claimant's involuntary withdrawal from her specific position of employment, even though there was no reason to believe she took any steps to find other suitable work. 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. And it is well established that an administrative agency acting in an adjudicatory capacity cannot depart from its own precedent without explanation. *See*

Matter of Charles A. Field Delivery Serv., 66 N.Y.2d 516 (1985). Because the agency provided no such explanation here, but rather inadvertently departed from its established precedent, the Court should reverse and remit the case to the agency for further proceedings.

QUESTION PRESENTED

Did the Third Department err by sustaining a determination of the Workers' Compensation Board that departed from the Board's administrative precedent inadvertently and thus without explanation?

STATUTORY BACKGROUND

The Workers' Compensation Law the ("WCL") requires an employer to "secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury." WCL § 10(1). The law makes available medical benefits, WCL § 13, wage-related compensation benefits, WCL § 15, and in the case of death, funeral expenses and death benefits payable to the employee's survivors, WCL § 16.

There are four classifications of disability: (1) permanent total disability, (2) temporary total disability, (3) permanent partial disability, and (4) temporary partial disability. *See Matter of Schmidt v. Falls Dodge, Inc.*, 19 N.Y.3d 178, 181 (2012). A worker who suffers a permanent partial disability typically qualifies for either a "schedule loss of use" award or a "non-schedule" award. *See* WCL § 15(3); *see also Matter of Mancini v. Office of Children & Family Svcs.*, 32 N.Y.3d 521, 525-26 (Dec. 11, 2018) (describing these awards).

This case involves a claim for wage-related benefits for a "non-schedule" award. For such awards, it has long been settled that a claimant must show that any loss of earnings is due to an inability to work brought on by the injury, rather than a post-injury unwillingness to work in a different capacity. *See Matter of Jordan v. Decorate Co.*, 230 N.Y. 522, 525-27 (1921) (Cardozo, J.). Claimants are thus required to show what is known as "labor-market attachment."[1]

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[1] The phrase "attachment to the labor market" appears to have been imported from the law of unemployment insurance. *See*

(*continued on next page*)

Most recently, in *Matter of Zamora v. N.Y. Neurological Assoc.*, 19 N.Y.3d 186, 191 (2012), this Court confirmed the Board's responsibility to determine "whether a claimant has maintained sufficient attachment to the labor market" at a level the claimant's disability allows. A claimant must thus "prove to the Board that the cause of his or her reduced income is a disability, rather than an unwillingness to work again." *Id.* (quoting *Burns v. Varriale,* 9 N.Y.3d 207, 216 (2011)).

Zamora also clarified that while the Board *may* infer labor-market attachment from an injury that requires a claimant to withdraw involuntarily from employment, the Board is not required to do so. *Id.* at 191-92. A "claimant can prove to the Board that the cause of [the claimant's] reduced income is a disability, rather than an unwillingness to work again" by "finding alternative work

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Matter of Bourne, 282 A.D. 1, 2 (3d Dep't 1953). It first appeared in a Workers' Compensation Board administrative proceeding in *Watertown Daily Times*, Case No. 6860 0365, 1990 W.L. 190153 (February 26, 1990), and did not appear in a reported judicial decision involving workers' compensation until *Matter of Nickens v. Randstad*, 18 A.D.3d 1008, 1009 (3d Dep't 2005).

consistent with [the claimant's] physical limitations, or at least showing reasonable efforts at finding such work." *Id*.

Since *Zamora*, the Board has exercised its discretion to infer continuing labor-market attachment from an injury that causes a claimant to withdraw involuntarily from employment only when the employer does not dispute labor-market attachment. When an employer puts a claimant's labor-market attachment at issue, the Board has consistently required the claimant to proffer evidence of continuing labor-market attachment after involuntary withdrawal from employment by showing, for example, efforts to obtain or train for alternate employment. *See, e.g., Longwood Central School District*, 2019 NY Wrk. Comp. LEXIS 1423 at *9-11 (Feb. 6, 2019); *Monticello Cent. Sch. Dist*., 2018 NY Wrk. Comp. LEXIS 11665 *8-9 (Nov. 19, 2018); *Mineola UFSD*, 2017 NY Wrk. Comp. LEXIS 6803 at *9-10 (2017); *Sumitomo Mitsui Banking Corp*., 2016 NY Wrk. Comp. LEXIS 4334 (2016). The Board has departed from this evidentiary requirement only when a claimant has provided a sufficient explanation for the failure to seek employment, such as a need to follow doctor's orders to refrain from all work. *See IBM*,

2012 NY Wrk. Comp. LEXIS 4743 (2012); *see also, e.g.*, *Matter of Tallini v. Martino & Son*, 58 N.Y.2d 392 (1983) (involuntary commitment to a psychiatric hospital prevented claimant from seeking work).

Moreover, 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.[2] This Court referenced that practice in *Burns v. Varriale,* 9 N.Y.3d 207 (2007), when it explained that the full value of a claimant's award could not be "reliability predicted" because of claimant's "ongoing obligation to demonstrate his continued

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[2] A claimant's subsequent labor-market attachment was generally examined only if a case was re-opened at the request of a party to consider new evidence. *See, e.g.*, *Matter of Andrews v. Combined Life Ins.*, 146 A.D.3d 1203 (3d Dep't 2017); *Matter of Danin v. Stop & Shop*, 115 A.D.3d 1077 (3d Dep't 2014); *Matter of White v. Herman*, 56 A.D.3d 872 (3d Dep't 2008).

attachment to the labor market and how much he actually earns." *Id.* at 217.

In April 2017, however, and during the pendency of the administrative proceedings in this case, 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. *See* L. 2017, ch. 59 pt. NNN § 1 subpt. A § 1(w). As amended, the relevant provision now reads:

> 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.

WCL § 15(3)(w) (emphasis added). The amendment was made effective "immediately." L. 2017, ch. 59 pt. NNN § 1 subpt. A § 4.

FACTS AND PROCEDURAL HISTORY

A. Claimant Is Injured, Takes a Disability Retirement, and Is Awarded Workers' Compensation Benefits

In December of 2010, while working for respondent Erie County's juvenile probation office, claimant O'Donnell fell and injured her back, elbows, and knees. (A35.[3]) Her treating physician recommended surgery and she was forced to take time off work. (A33-36.) Afterwards, Erie County transferred her without explanation from the juvenile to the adult probation office. (A46.) Her new position was "harder to do" with her disability and "more physical." (A37-38, A41, A48-49.) Consequently, at the age of 57, she filed for and was granted disability retirement from her position, effective March 9, 2013. (A42, A51.) Since that time, O'Donnell has neither worked at all, attempted to find alternate employment consistent with her medical limitations, nor sought additional education or retraining. (A41, A51.)

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[3] References to "A__" denote pages of appellants' Appendix.

On September 19, 2015, and thus before the enactment of the 2017 amendment discussed above, the WCL judge issued a decision classifying O'Donnell "as having a permanent partial disability" and awarding her continuing payments. (A65-66.) The WCL judge concluded, without reference to any authority or precedent, that "claimant is excused from looking for work and in effect has a compensable retirement." (A65.)

Erie County and the administrator of its workers' compensation coverage (appellants) applied for Board Panel review, arguing, among other things, that the Board improperly failed to require O'Donnell demonstrate labor-market attachment either at the time of her classification or thereafter. (A71-72.)

In an initial decision dated August 18, 2016, the Board Panel upheld the WCL judge's decision in relevant part.[4] Citing *Zamora*, the Board concluded that O'Donnell's injuries and unsuccessful attempts to continue working in her position in the adult probation

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[4] The Board Panel also reduced the value and duration of the benefits awarded because it found O'Donnell's loss of wage earning capacity to be 65% rather than 81%. (A78, A80.)

office established that her retirement constituted an involuntary withdrawal from the labor market. (A79-80.) While the Board Panel did not explicitly infer ongoing labor-market attachment from O'Donnell's involuntary withdrawal, it implicitly did so by upholding the WCL judge's decision, which had excused O'Donnell from providing evidence of continued labor-market attachment. Appellants sought full Board review, arguing among other things that the Board's implicit inference conflicted with the Board's prior precedents declining to draw that inference and instead requiring claimants to provide evidence of continued labor-market attachment. (A90.)

Before the Board Panel acted on that request, the Legislature amended WCL § 15(3)(w) as described above. *See* supra at 7. The Board Panel thereafter denied the request for full Board review, but issued an amended decision with a new section on "Post-Classification Award of Lost Wages" addressing the effect of the amendment. (A98-99, A92.) The Board Panel explained that, because the 2017 amendment was effective immediately, it applied to O'Donnell's case, even though her injury predated the effective

date of 2017 amendment. Accordingly, O'Donnell was not required to demonstrate *ongoing* labor-market attachment upon establishing her entitlement to benefits at the time of classification. (A98-99.) The Board did not, however, modify the original panel decision to the extent it had inferred labor-market attachment at the time of classification instead of requiring evidence from the claimant to establish that attachment. (A97-98.)

B. The Third Department Affirms, this Court Grants Leave, and the Board Recognizes Its Error

On appeal to the Third Department, appellants made two arguments: (1) that the 2017 amendment to § 15(3)(w) did not apply to a claim like O'Donnell's in which the injury predated the amendment's effective date (A115-16), and (2) even assuming the applicability of that amendment, that O'Donnell was not entitled to a permanent partial disability award because she failed to provide evidence of labor-market attachment at the time of classification (A111-114). In support of that second argument, appellants noted that the Board's prior precedents established a practice in which it declined to infer labor-market attachment from a claimant's

involuntary separation from employment, and instead routinely required claimants to provide evidence of such attachment. (A113.) The Board defended its determination in the Third Department, while O'Donnell declined to appear.

The Third Department affirmed. Third Department assumed without deciding that the Board panel erred by initially awarding claimant benefits without determining whether the inference approved in *Zamora* applied so as to relieve claimant of the need to provide evidence of labor-market attachment after withdrawing from employment. (A135-36.) The Third Department agreed with the Board that the amendment to § 15(3)(w) relieved eligible recipients of non-schedule awards of the need to demonstrate ongoing labor-market attachment after the date of classification, regardless of the date of injury. (A133-137.) And on that basis, the Third Department affirmed. The Third Department thus did not address the issue of claimant's labor-market attachment *at the time of classification,* let alone whether any such attachment was established by inference or evidence.

On appellants' motion, this Court granted leave to appeal.

It was only afterwards that the Board recognized that it had inadvertently departed from its administrative precedent by relying, albeit implicitly, on the inference of labor-market attachment permitted, but not required, by *Zamora*. Accordingly, the Board sought, but was unable to obtain, the Court's permission to issue a corrected determination (or to confirm the Board's authority to do so on its own) that would have denied claimant benefits for failure to provide evidence of labor-market attachment at the time of classification.[5] The Board thus now asks the Court to reverse the Third Department, annul the amended determination as inconsistent with Board's administrative precedent, and remit the matter to the Board for further proceedings.

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[5] Worker's Compensation Law § 123 gives the Board continuing jurisdiction to revisit its decisions. The Board has never exercised that authority after an erroneous determination has been affirmed by the Appellate Division and leave to appeal has been granted by this Court, however. Rather than risk running afoul of principles of administrative finality and the authority of this Court to control its docket, the Board asked the Court to either confirm its § 123 authority to revoke and replace the amended determination or for the Court to grant the Board permission to do so.

ARGUMENT

THE COURT SHOULD ANNUL THE AMENDED DETERMINATION AS INCONSISTENT WITH THE BOARD'S ADMINISTRATIVE PRECEDENT

A. The Board's Determination Reflects a Departure from Administrative Precedent without Explanation.

The determination that the Third Department sustained here reflects an unexplained—indeed inadvertent—departure from the Board's otherwise-consistent precedent requiring applicants for non-schedule permanent partial disability awards to demonstrate labor-market attachment at the time of classification. The Court should therefore reverse the Third Department's order, annul the Board's determination, and remit the matter to the Board for further proceedings.

It is true that the Board may in its discretion infer labor-market attachment solely from a claimant's involuntary withdrawal from employment on account of disabling injuries. *Zamora* and the earlier decision on which *Zamora* was based, *Matter of Jordan v. Decorative Co.,* 230 N.Y. 522 (1921), make this clear. *See Zamora*, 19 N.Y.3d at 191; *Jordan*, 230 N.Y. at 525.

But the Board must also adhere to its own administrative precedent. *See Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985). Most recently, this Court has explained that, "an agency that deviates from its established rule must provide an explanation for the modification so that a reviewing court can 'determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision.'" *Terrace Ct., LLC. v. N.Y.S. Div. of Hous. & Comm'y Renewal*, 18 N.Y.3d 446, 453 (2012) (quoting *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 520.). Thus, the "failure to provide a justification for the change requires reversal even if there is substantial evidence to support the agency's determination." *Id.*

As we have explained—and as the parties to this appeal acknowledge (Appellant Br. 10; Claimant Br. at 21)—since *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 or to take steps such as retraining that could enable the applicant to obtain such work, absent a sufficient explanation for the failure

to do so. *See, e.g.*, *Longwood Central School District*, 2019 NY Wrk. Comp. LEXIS 1423 at *9-11 (Feb. 6, 2019) (requiring claimant to produce evidence continued labor market attachment before making award); *Schervier Pavilion*, 2017 NY Wrk. Comp. LEXIS 13505 at 11 (2017) (same); *J.D. Consulting LLC DBA JD TRA*, 2017 NY Wrk. Comp. LEXIS 7657 at 3, 8-12 (2017) (denying benefits because of insufficient evidence of continued attachment); *Sahlen Packing Co.*, 2017 NY Wrk. Comp. LEXIS 7523 (2017) (same); *Compass Group/Morrison*, 2017 NY Wrk. Comp. LEXIS 6668 at 2-4 (2017) (same); *Fairway Group Holding*, 2013 NY Wrk. Comp. LEXIS 1148 at 2-3, 8-10 (2013) (awarding benefits for period where claimant found part-time work and denying benefits where claimant' search for work was inadequate); *John T. Mather Memorial Hospital*, 2013 NY Wrk. Comp. LEXIS 1240 at 6, 11-15 (2013) (finding sufficient evidence of attachment from participation in a job search program); *IBM*, 2012 NY Wrk. Comp. LEXIS 4743 (2012) (finding sufficient evidence of attachment where claimant looked for work only after being cleared by treating physician).

Indeed, the Board specifically advises the public of its practice in this regard on its website, which includes forms for claimants to use to document their job searches. *See* Workers' Compensation Board, *Labor Market Attachment*, http://www.wcb.ny.gov/labor-market-attachment/ (last visited July 16, 2019).

The Board thus departed from its administrative precedent when it concluded that O'Donnell remained attached to the labor market at the time of her classification, notwithstanding the lack of evidence. O'Donnell conceded that she did not search for employment within her limitations or take other actions to make herself more marketable after her involuntary retirement. (A51.) Nevertheless, the Board implicitly inferred labor-market attachment.

The Board's departure from its precedent may have been permissible had it acknowledged that precedent and explained a decision to depart from it. But the Board provided no such explanation; indeed its departure from that precedent was inadvertent. The Board also did not appreciate that the underlying determination reflected a departure until after leave was granted

in this appeal. And the Third Department apparently overlooked the departure as well.

Accordingly, the Board asks this Court not alter the Board's practice, but instead to reverse the Third Department's decision and annul the Board's determination in this case. The Board's precedent works well because it avoids litigation over the reasonableness of a decision to draw the permissive inference in an individual case. After all, the Board's discretion to draw such an inference would not be unlimited. For example, where a partially disabled claimant has been offered but refused work within applicable medical limitations, the Board could not reasonably draw the inference. *See Matter of Jordan*, 230 N.Y. at 526-28. Requiring claimants generally to proffer evidence of a post-separation search for employment or efforts to retrain for employment provides a straightforward way for the Board to determine whether a claimant has the necessary willingness to accept employment if offered. Indeed, it is hard to see why an injured employee who is willing to work and is medically able to do so would not naturally seek new employment.

Consequently, the Court should reverse the Third Department's decision, annul the underlying determination of the Board, and remit the matter for further proceedings.

B. The 2017 Amendment Does Not Save O'Donnell's Claim.

Preliminarily, while O'Donnell now argues (Claimant Br. 21-24) that the 2017 amendment to the Workers' Compensation Law overruled *Zamora,* and thus that labor-market attachment should be presumptively inferred from all involuntary withdrawals from employment, no party made that argument either before the Board or the Third Department. Indeed, O'Donnell did not submit a brief to the Third Department. Accordingly, O'Donnell's argument is unpreserved for this Court's review. *See People v. Brown*, 28 N.Y.3d 392, 409 (2016); *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 246 n.2 (2014); *Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003).

The argument is mistaken in any event because nothing in the 2017 amendment to WCL § 15(3)(w) altered the requirement that a partially disabled worker must show labor-market

attachment at the time of classification in order to obtain a non-schedule award. The amendment eliminated only the ongoing requirement to show labor-market attachment after classification.

Before the subject amendment, applicants for non-schedule permanent partial disability awards were required to show attachment to the labor market both at the time of classification and also during the entire period thereafter in which they continued to receive benefits. *See Burns,* 9 N.Y.3d at 217.

By its plain language, the 2017 amendment to WCL § 15(3)(w) eliminated only the ongoing requirement to show labor-market attachment after classification as a permanently partially disabled individual entitled to a non-schedule award. "'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.'" *Matter of Mancini v. Office of Children and Family Servs.*, 32 N.Y.3d 521, 525 (Dec. 11, 2018) (quoting *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1988)). As amended, the statute provides that benefits are payable "without the necessity for the claimant *who is entitled to benefits at the time*

of classification to demonstrate *ongoing* attachment to the labor market." WCL § 15(3)(w) (emphasis added). This language makes clear that a claimant who has already demonstrated labor-market attachment at the time of classification need not continue to do so thereafter. But a claimant cannot obtain a non-schedule award without demonstrating labor-market attachment "at the time of classification." WCL § 15(3)(w).

Although the language of the 2017 amendment is clear, and thus there is no need to resort to legislative history, *Matter of Avella v. City of New York*, 29 N.Y.3d 425, 437 (2017), the legislative history confirms that the Legislature intended to relieve claimants prospectively from the ongoing obligation to demonstrate labor-market attachment if they had already demonstrated labor-market attachment at the time of classification. Explaining the amendment in a submission to the Governor's counsel, the Board explained:

> It will be important for the Board to make labor market attachment determinations at the time of classification as claimants 'entitled to benefits' at that time, will have no continuing obligation to show labor market attachment under WCL § 15(3)(w). If the Board finds a claimant is not attached to the labor market at the time of classification, the claimant must reattach to the

> labor market before subsequent causally related earnings can be awarded.

Letter, David F. Wertheim, Workers' Compensation Board General Counsel, Bill Jacket L 2017, ch. 59 at 29. Indeed, a claimant who is not attached to the labor market at the time of classification, but who reattaches thereafter, can obtain benefits, but the claimant would have to demonstrate ongoing attachment to the labor market at that subsequent time. *Id*.

If the Legislature had wanted to overrule this Court's decision in *Zamora*, as O'Donnell contends, "it knew how to do so." *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 34 (2015) (citing McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74; *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (1982)). Instead, the Legislature chose to limit the scope of the 2017 amendment to claimants "entitled to benefits at the time of classification."

And there is no reason to overrule *Zamora* now. *Zamora* merely restated the longstanding requirement that a partially disabled claimant must have a continued willingness to work after suffering a disabling injury (i.e., continued labor-market attachment) in order to establish entitlement to benefits, regardless

of the involuntary nature of the claimant's withdrawal from employment. *Zamora*, 19 N.Y.3d at 191; *Matter of Jordan*, 230 N.Y. at 525-27. That requirement makes sense. The fact that an injury forces a worker to withdraw from particular employment does not automatically establish the worker's continued willingness to work more generally. And *Zamora* reasonably permits the Board to place the burden of proof on the worker to establish a continued willingness to work. *Id.* at 192.

C. While the Third Department Correctly Held that the 2017 Amendment Applies to Those Like O'Donnell Who Were Previously Classified, the Court Need Not Address that Issue.

Much of the Third Department's decision focuses on the question whether the 2017 amendment was intended to relieve claimants who had previously been classified from the ongoing requirement to demonstrate labor-market attachment. While the Third Department correctly answered that question in the affirmative, this Court need not review that aspect of its decision for either of two reasons.

First, appellants abandoned any challenge to that aspect of the Third Department's decision by not raising any such challenge in their brief to this Court. *See People v. Correa*, 15 N.Y.3d 213, 233 (2010).

Second, resolution of the issue is not necessary to resolve this appeal. As we have explained, the Court should reverse the Third Department's decision because the Board's determination reflects a departure from administrative precedent without explanation. That fact renders academic any question about the propriety of the Board's determination to apply the 2017 amendment to O'Donnell and thereby relieve her of the requirement to show continued labor-market attachment after classification.

The Third Department's resolution of this issue was nonetheless correct. By its plain text, the 2017 amendment prospectively relieves[6] *all* permanent partial disability claimants

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[6] The Third Department was wrong to characterize the statute's application as retroactive. The 2017 amendment affects the prospective obligation of those with non-schedule permanent partial disability awards to show ongoing labor-market attachment. The fact that a statutory change "'may relate to an injury that occurred prior to the enactment of the statute does not render it

(*continued on next page*)

who were entitled to non-schedule awards at the time of classification from the obligation to demonstrate ongoing labor-market attachment thereafter, including those who had already been so classified.

Unless otherwise specified, WCL § 15(3)(w) applies "[i]n all other cases of permanent partial disability." And following its 2017 amendment, the statute provided the following language regarding labor-market attachment:

> 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.

WCL § 15(3)(w). The statute thus encompasses *all* permanent partial disability claimants otherwise entitled to non-schedule awards at the time of classification.

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retroactive.'" *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 148 (2017) (quoting *Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 57 (2011)).

In contrast, when the Legislature intended to limit the changes in the 2017 amendment to particular groups of claimants, it did so expressly. Two portions of that amendment that modified the statute in ways unrelated to this case are expressly limited to "a claimant with a date of accident or disablement after the effective date" of the amendment. *See* L. 2017, ch. 59 pt. NNN § 1 subpt. A § 1(w). The fact that the amendment contained no language limiting the application of the section on labor-market attachment to only those claimants whose injuries were incurred or whose classifications were made after a certain date only confirms that the Legislature did not intend to adopt any such limitation.

The legislative history of the 2017 amendment also confirms this view. The Board's letter to the Governor's counsel expressly noted, "This amendment took effect immediately, and affects previously decided cases in which there has not been a finding that the claimant had voluntarily removed him or herself from 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.

CONCLUSION

The Court should reverse the Third Department and the Board's determination because the Board has not abided by its own precedent.

Dated: Albany, New York
July 25, 2019

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Patrick A. Woods an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,326 words, which complies with the limitations stated in § 500.13(c)(1).

PATRICK A. WOODS