

**STEWART, GREENBLATT, MANNING & BAEZ**

**ATTORNEYS AT LAW**  
**6800 JERICHO TURNPIKE**

**SUITE 100W**  
**SYOSSET, NY 11791**

**516-433-6677**  
**FAX 516-433-4342**

**KAFI WILFORD (2003-2010)**  
**MICHAEL H. RUINA (1992-2016)**

**RAYMOND J. SULLIVAN**  
**MONICA M. O'BRIEN**  
**MARY ELLEN O'CONNOR**  
**JAMES MURPHY**  
**OF COUNSEL**

**DONALD R. STEWART (RET.)**  
**MADGE E. GREENBLATT (RET.)**  
**ROBERT W. MANNING**  
**RICARDO A. BAEZ**  
**DAVID J. GOLDSMITH**  
**PETER MICHAEL DeCURTIS**  
**LAURETTA L. CONNORS**  
**JOHN K. HAMBERGER**  
**LISA LEVINE**  
**ANDREA L. De SALVIO**  
**KRISTY L. BEHR**  
**LUKE R. TARANTINO**  
**THOMAS A. LUMPKIN**  
**JONATHAN SO**

Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of

SANDRA L. O'DONNELL, Respondent,

v.

ERIE COUNTY, Appellants

WORKERS' COMPENSATION BOARD, Respondent.

March 26, 2020

**Facts:** The claimant, a probation officer for 28 years, was injured in a slip and fall. After the accident the claimant was unable to work in her prior capacity. She was then transferred from juvenile to adult probation which required more standing and walking. The claimant applied for disability retirement and was approved. At the classification hearing the WCLJ held that the claimant had involuntarily retired, thereby exempting her from the requirements of establishing efforts to remain attached to the labor market and granted awards based upon her disability related loss of wage-earning capacity. The carrier appealed arguing that the claimant had not proven that her lack of employment was due to her disability. The Board modified the decision only to the extent that it lowered the claimant's loss of wage-earning capacity. The carrier then filed an Application for Full Board Review. While that application was pending the law was changed so that once a claimant is classified, she does not have to prove an ongoing attachment to the labor market in order to receive continuing classification benefits, which is not an issue in dispute. The Board's decision was affirmed by the Appellate Division. The Court of Appeals granted leave to appeal.

**Holding:** Reversed and remitted.

**Discussion:** The Board cited the case of *Zamora v New York Neurologic Assoc.* (19 NY3d 186 [2012]) as the basis for applying a discretionary inference in favor of the claimant. The

application of Zamora in this case is inconsistent with prior decisions by the Board on this issue in that there was no initial finding that the claimant's reduction in earnings was related to her disability and not just an unwillingness to work. The Board cannot change course without providing a rationale for its decision. However, in this particular case, the Court chose to reverse the Appellate Division's decision and remitted it to that Court with a direction to remand to the Board to allow it to develop a "record of its purported precedent as applied to claimant and clarify its determination whether to draw an inference in accordance with Zamora's core holding. It also permits claimant an opportunity to challenge any adverse decision if she believes, as she now argues, that the Board has misapplied Zamora or other applicable law." Accordingly, the Court of Appeals did not reach the merits of the case.

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