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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF O'DONNELL,

Respondent,

-against-

NO. 14

ERIE COUNTY,

Appellant.

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20 Eagle Street  
Albany, New York  
February 11, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 14, Matter of  
3 O'Donnell v. Erie County.

4 Good afternoon, Counsel.

5 MR. HOFFMAN: Good afternoon, Your Honor. I  
6 would like to request two minutes for rebuttal, please.

7 CHIEF JUDGE DIFIORE: You may.

8 MR. HOFFMAN: May it please the court, my name is  
9 Matthew Hoffman. I represent the appellant, Erie County,  
10 in this matter.

11 First, as an initial matter, it must be noted  
12 that I think all parties are now in agreement that the  
13 particular Board decision, subject to an appeal, is  
14 inconsistent with both the Board's prior decisions and its  
15 subsequent decisions addressing the nature of permissive  
16 inference outlined by this court in Zamora. Therefore, the  
17 simplest and I think the most logical explanation for this  
18 court to remand the matter for the Board to either, A,  
19 issue a decision consistent with - - -

20 JUDGE WILSON: Was that argument preserved below?

21 MR. HOFFMAN: Well, at all stages, the - - - the  
22 employer has pointed out that this decision is inconsistent  
23 with the Board's decisions addressing the nature of the  
24 inference, so I would say yes, by - - - by outlining to the  
25 - - - the Board panel and to the Appellate Division the - -



1 - that the - - - that the Board both before and after this  
2 particular decision had rendered inconsistent decisions. I  
3 would say yes.

4 JUDGE WILSON: Why - - - why do you say it's  
5 inconsistent with Zamora? As I understand Zamora, Zamora  
6 simply corrected a - - - a misguided strain of Third  
7 Department law and went back to the prior consistent strain  
8 that said the Board may, but does not have to, make an  
9 inference. Is that the correct understanding of Zamora?

10 MR. HOFFMAN: That is correct, Your Honor.  
11 However, the majority decision also in a few different  
12 places gave us some indications as to what facts would be  
13 sufficient to draw that particular inference.

14 JUDGE WILSON: So did the - - -

15 JUDGE RIVERA: Is that exhaustive?

16 JUDGE WILSON: I'm sorry, Judge. Go ahead.

17 JUDGE RIVERA: Excuse me.

18 MR. HOFFMAN: Is the - - - is the list - - -

19 JUDGE RIVERA: Is that exhaustive? Are you - - -  
20 are you suggesting that the only thing mentioned by the  
21 majority in Zamora, the only basis by which to draw an  
22 inference?

23 MR. HOFFMAN: No, I - - - I don't think the list  
24 is exhaustive, but - - - and I think what the majority  
25 indicated to us is that absent some attempt to apply your



1 remaining earning capacity, we're not going to infer that  
2 your continued reduction in earnings is due to your work-  
3 related injury. For instance, in the tenth paragraph, the  
4 second sentence, the court highlighted the - - -

5 JUDGE RIVERA: Could it be enough that it's an  
6 involuntary retirement?

7 MR. HOFFMAN: No, the - - - the court rejected  
8 that. That was - - - that was the nature of those  
9 erroneous Third Department decisions which existed - - -

10 JUDGE RIVERA: The dissent, right.

11 JUDGE WILSON: Well, I - - - I understood that  
12 differently. I understand the erroneous Third Department  
13 cases to be ones that said you must make an inference from  
14 that, not that you could make an inference from that.

15 MR. HOFFMAN: Correct, that was the - - - the  
16 Third Department's say - - - decisions - - - excuse me - -  
17 - treated the inference as a presumption, so - - -

18 JUDGE WILSON: So do you read Zamora, our  
19 decision, as leaving open the question that Judge Rivera  
20 just asked; that is, could you make an inference just from  
21 the injury?

22 MR. HOFFMAN: I - - - I don't think so, because  
23 of some other indications in that decision, and  
24 particularly - - -

25 JUDGE WILSON: In dicta.



1 MR. HOFFMAN: I - - - I wouldn't even say dicta.  
2 If - - - if you looked at the tenth paragraph, the court  
3 noted that the claimant must demonstrate that her - - - her  
4 production in earnings is due to her disability, as opposed  
5 to other factors, such as her general unwillingness to work  
6 again.

7 And the court also cited itself, obviously, in  
8 Burns, a 2007 decision, noting that a central question for  
9 the Board to address before awarding PPD benefits,  
10 permanent partial disability benefits, is whether an  
11 attachment to the labor market had been maintained. And in  
12 particular, the court highlights now with a ninety-nine-  
13 year-old decision, of course, Jordan v. Decorative Co.,  
14 which Justice Cardozo outlined two - - -

15 JUDGE RIVERA: Well, I'm - - - I'm a little  
16 confused, because I - - - I see the majority. I'm just  
17 going to take the moment to quote you. The court says,  
18 "If" - - - and it's quoting something else - - - "If the  
19 Board determines that a workers' compensation claimant has  
20 a permanent partial disability", which we all agree is the  
21 point here. There's no dispute about this particular  
22 claimant in the appeal before us. "And that the claimant  
23 retired from the claimant's job due to that disability" - -  
24 - again, this is an involuntary retirement; there's no  
25 dispute about that, correct? Okay. "An inference that the



1 claimant's reduced future earnings resulted from the  
2 disability may be drawn." I don't see anything else added  
3 to that.

4 MR. HOFFMAN: Well, the - - -

5 JUDGE RIVERA: There may be further embellishment  
6 to - - - to explain some examples, but there's nothing  
7 there that says, oh, and by the way, these are necessary  
8 prerequisites and here they are.

9 MR. HOFFMAN: I - - - I think yes, on that narrow  
10 passage, but if you look at the decision as a whole, and -  
11 - - and also particularly reliance, which put on Justice  
12 Carpinello's concurring opinion in Tipping, where he noted  
13 that a conscience refusal to seek employment after the  
14 involuntary retire - - - excuse me - - - the involuntary  
15 retirement would constitute a voluntary retirement of its  
16 own.

17 So I think you have to look at the decision of  
18 its own, the citation to Burns, the citation to Jordan, the  
19 citations to the concurring and dissenting opinions of  
20 Carpinello and Cardona to - - - to arrive at that  
21 conclusion.

22 JUDGE WILSON: So it now sounds like you're  
23 making a different interpretation of Zamora than you made  
24 in the Appellate Division, just as a matter of law. In the  
25 Appellate Division, what your brief said is, "The Board,



1           however, is entitled to evaluate the testimony and  
2           evidence, and determine that this inference may be drawn  
3           from a withdrawal, depending on the nature of the  
4           disability and the nature of the claimant's work." Is that  
5           right or wrong?

6                       MR. HOFFMAN: I - - - I trust Your Honor is  
7           citing it accurately. That - - - that sounds right, yes.

8                       JUDGE WILSON: No, and you agree with that  
9           position now?

10                      MR. HOFFMAN: Well, just that when there is  
11           evidence - - - and particularly in - - - in this case, it's  
12           not as if there is no evidence of a search for work. There  
13           is - - - there's something more than that. There's just a  
14           concession from the claimant that she's making no effort  
15           whatsoever to apply her residual earning capacity. So it -  
16           - - it's not as if we have a record that's silent on that  
17           particular issue. We have - - -

18                      JUDGE FAHEY: But there - - - there was a reason  
19           for that; wasn't there? There - - - going all the way back  
20           to when this whole mess started, and going back to the  
21           original hearing, and in the original hearing, the ALJ  
22           there seemed to be very clear in char - - - asking, so are  
23           within Zamora or are we not in Zamora? And it seemed that  
24           everyone was saying, no, you've not in Zamora now.

25                      And - - - and your - - - and I suppose that if



1           you have someone who's either be - - - either eighty-one  
2           percent disabled or sixty-five percent disabled, that's a  
3           person that's pretty disabled. So it seemed to me, when I  
4           read it, like they were saying, well, this is almost a  
5           self-evident conclusion. They asked the questions on  
6           cross-examination that you talk about in the original  
7           hearing about whether or not she was attached to labor  
8           market, but really, for factual purposes, it - - - I think  
9           we have to reach all the way back, don't we, to that  
10          original finding?

11                       MR. HOFFMAN: I - - - I certainly agree you need  
12           to look at the - - - the record from the trial hearing. I  
13           - - - I disagree; I don't think the parties, certainly not  
14           the employer indicated that this case was beyond Zamora.  
15           That was a statement of - - - of - - -

16                       JUDGE FAHEY: No, that was a statement of the  
17           court. I agree with you.

18                       MR. HOFFMAN: Right.

19                       JUDGE FAHEY: No, you're totally right. No, he  
20           didn't - - - he didn't - - - no, the employer didn't say  
21           that. The court said that, and the court's an experienced  
22           ALJ who - - - who looked at this case, and - - - and there  
23           wasn't much argument on that, outside of the attachment  
24           questions, which the court allowed them to ask. And I - -  
25           - I just thought that that's where we get into the "may" of





1 Zamora, in - - - in other words, the "may" question. Ca -  
2 - - is this case, within it or not, and by that, I mean  
3 there are certain disabilities that are so clear, that it's  
4 really not a question as to whether or not there's a  
5 possible attachment to the labor market in anything  
6 approaching the labor that they were doing beforehand.

7 MR. HOFFMAN: Well, Your Honor, I - - - I would  
8 disagree, but as I see my time is about to expire. I would  
9 say, in the alternative, this is only an inference. We - -  
10 - we know it's not a presumption. Inferences fail in the  
11 presence of contrary evidence, and that's what we have  
12 here: confer - - - contrary evidence. We have evidence  
13 that something other than the claimant's disability is the  
14 cause of her reduction in earnings, and that's her  
15 unwillingness to work again. She - - - she is - - -

16 JUDGE STEIN: There were several witnesses who  
17 gave testimony, I believe, that she was capable of doing  
18 certain kinds of work.

19 JUDGE WILSON: Well, there was - - -

20 JUDGE STEIN: Is that what you're talking about?

21 MR. HOFFMAN: Well, for - - - from the Board's  
22 finding itself, I - - - I don't think that factual finding  
23 is in dispute. The Board found she had a sixty-five  
24 percent loss of her earning capacity, or a thirty-five  
25 percent reduction - - -



1 JUDGE STEIN: Right, but de - - - but depending  
2 upon the nature of her background and her work, she might  
3 or might not be able to do work that was within her  
4 capabilities.

5 MR. HOFFMAN: Well, that would give rise to  
6 another - - - another type of claim that wasn't made here.

7 I see my time has expired. May I briefly answer  
8 your colleague's question?

9 CHIEF JUDGE DIFIORE: Yes, of course.

10 MR. HOFFMAN: Thank you, Your Honor.

11 That would give a rise to something that wasn't  
12 raised here. It's a total industrial disability, which the  
13 courts have recognized is a combination of the high-level  
14 partial disability with a nonimpressive vocational  
15 background that would lead someone who maybe, though they  
16 had the capability to perform light work, they don't speak  
17 English or they're poorly educated. And that's not the  
18 facts we have here. We have someone who has an earning  
19 capacity, and the Board's determined she's had an earning  
20 capacity.

21 Thank you.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 Counsel?

24 MR. WOODS: May it please the court, Patrick  
25 Woods, on behalf of the Workers' Compensation Board.



1 This is a case where the Board messed up.

2 JUDGE GARCIA: So, Counsel, what would you have  
3 us do here? At this stage of the proceedings, what are you  
4 asking this court to do?

5 MR. WOODS: We're asking you to - - - to vacate  
6 and remand for - - - to the Board, for the Board to either  
7 apply its administrative precedent or explain - - -  
8 acknowledge its administrative precedent in its decisions  
9 and explain why it's not going to follow its administrative  
10 precedent.

11 JUDGE GARCIA: Would we need to send this to the  
12 Appellate Division or would we send it back - - - if we  
13 agreed with you, what - - - would we send it to the  
14 Appellate Division?

15 MR. WOODS: I - - - I think - - - I think as a  
16 strictly procedural matter, you may have to send it to the  
17 Appellate Division with instructions to send it back to us.  
18 I'm not one hundred percent sure on that as a process  
19 question. I don't think that there'd be anything for the  
20 Appellate Division to do as a legal matter beyond that at -  
21 - - at this stage of the case. I mean, as you know, we had  
22 - - - we had even made a motion to this court to - - - to  
23 vacate it at this level, using Workers' Compensation Law  
24 123.

25 JUDGE RIVERA: Can - - - can you explain what - -



1 - what you mean by that legal fla - - - phrase you "messed  
2 up"? Explain to me what - - - what is your understanding  
3 of how the Board should have applied the law and its  
4 precedent and its rules.

5 MR. WOODS: Here, the - - - the Board should  
6 have, in making its initial decision, and its two panel  
7 decisions, should have acknowledged that it has an  
8 administrative precedent about when attachment to the labor  
9 market is found. And that's where the claimant has done  
10 something to show that they're continuing to be engaged in  
11 the labor market, either by, you know, honestly seeking  
12 additional employment, or participating in a retraining or  
13 job-placement program.

14 The Board's decision here at no level grappled  
15 with that.

16 JUDGE RIVERA: Okay, I'm sorry; you're going to  
17 have to step back. So it - - - it - - - are you saying  
18 that the Board's understanding of Zamora and the law is  
19 that in every hearing the claimant, in some way or another,  
20 has to show either that they - - - they have made an effort  
21 to continue, using this phrase, attachment to the labor  
22 market, or that they are unable to do so, that they must do  
23 that initially themselves? Is that the Board's position?  
24 That's its understanding of Zamora?

25 MR. WOODS: I'm - - - the - - - the Board's



1 understanding of Zamora is a little bit different than the  
2 generally applied administrative precedent that it could  
3 depart from. So as a general matter, yes, the claimant  
4 would be re - - - it's the claimant's burden, and it's  
5 their requirement to show that they've made efforts to  
6 remain attachment to the labor - - - to the labor market.

7 JUDGE WILSON: Is that only if it's raised by the  
8 employer?

9 MR. WOODS: Yes, that's one of the exceptions  
10 that I was going to point out, is that an employer can  
11 waive that, by not raising it.

12 JUDGE RIVERA: So now I've really misunderstood  
13 the process.

14 MR. WOODS: Okay.

15 JUDGE RIVERA: So the claimant has the burden to  
16 show the disability, correct?

17 MR. WOODS: Co - - - correct.

18 JUDGE RIVERA: Correct? Burden of production,  
19 burden of persuasion. And you're saying that, unless the  
20 employer disputes the attachment to the labor market, they  
21 don't necessarily have to also carry a burden of production  
22 and burden of persuasion on that?

23 MR. WOODS: It's - - - it's the same as in any  
24 aspect of litigation where somebody has waived an issue.  
25 We're not going to worry about the burden of persuasion and



1           burden of production on that issue, because it hasn't been  
2           raised; it's been waived. It's been banned.

3                   JUDGE RIVERA: And - - - and - - - and how does  
4           the employer do that? Simply saying - - - raising their  
5           hand and saying, you have to show that you're not attached  
6           to the labor market?

7                   MR. WOODS: Typically, they'll raise it - - -  
8           they'll - - - as a practical matter, there's generally a  
9           series of hearings that happen, and the cla - - - the  
10          employer will raise it as one of the hearings, and it will  
11          get resolved at a later hearing in the process.

12                   JUDGE RIVERA: In the sense that the claimant  
13          will then come forward or not - - -

14                   MR. WOODS: Or not.

15                   JUDGE RIVERA: - - - will fail to do so, will  
16          come forward with whatever evidence the claimant has.

17                   MR. WOODS: That's correct, Judge.

18                   JUDGE RIVERA: So in other words, you presume  
19          that they're attached to the labor market, unless the  
20          employer argues or - - - or raises the issue, because  
21          you're not saying they have a burden.

22                   MR. WOODS: We - - - we treat the issue as waived  
23          unless the employer raises the issue, but I'm not sure that  
24          it would be right to say that there's a presumption in  
25          either direction.



1 JUDGE RIVERA: Well, I don't know why it's a  
2 waiver? Sounds like a presumption to me.

3 MR. WOODS: It - - - it's essentially treated as  
4 a defense, Judge.

5 JUDGE STEIN: So it - - - it - - - is there a  
6 bright-line rule that the Board can't infer labor market  
7 attachment if the employer puts the attachment in issue, or  
8 is it at that point, then, there is still some discretion?

9 MR. WOODS: I - - - I want to make sure that I'm  
10 understanding the question correctly. Are you - - - there  
11 is a bri - - - there's not even a bright line one-hundred  
12 percent applicable rule that the claimant has to make these  
13 efforts. There are circumstances where the Board does not  
14 require that kind of production and we've cited one of  
15 those in our brief; that's the IBM decision.

16 So for example, if there's medical evidence  
17 saying that they can't go try to be attached to the labor  
18 market during that period, the Board can draw the inference  
19 and won't require them to do so.

20 If you're asking whether the Board can sort of  
21 ignore this requirement after the carrier has raised it and  
22 put it in dispute, it can in that sort of circumstance.

23 Does it - - - have I - - -

24 JUDGE STEIN: Well, I - - - I guess my question  
25 is, is in terms of what your past precedent is, was it a



1 clear line that once the employer raised it, that you  
2 couldn't apply the inference?

3 MR. WOODS: No. No, it is - - - it is not the  
4 case that - - -

5 JUDGE STEIN: Okay.

6 MR. WOODS: - - - that I think either under the  
7 Bo - - - Board's precedent, definitely not the case under  
8 the - - - under Zamora itself, that we could never apply  
9 the inference just because the employer has put the issue  
10 into dispute.

11 JUDGE WILSON: Well, then I'm not sure why this -  
12 - - you're saying this is inconsistent with your prior  
13 precedent here.

14 MR. WOODS: Because we didn't - - - we didn't  
15 acknowledge the prior precedent, and on the facts here,  
16 there really isn't - - - there's no showing that she's - -  
17 -

18 JUDGE WILSON: Because I - - - I think you just  
19 explained the prior precedent would allow you to make an  
20 inference based on the disability, or here, it could be  
21 based on the disability plus the retirement, right?

22 MR. WOODS: But - - - but the - - - the instances  
23 where we're not - - - where we're drawing that inference  
24 based on medical evidence or something, those are  
25 exceptions to the general rule. And we could, in those





1 circumstances, draw that inference, but we would have to  
2 acknowledge the rule, and we would have to explain that  
3 we're deviating from the rule.

4 JUDGE WILSON: But what - - - what is the rule  
5 then? How would you state it?

6 MR. WOODS: That, generally speaking, the  
7 claimant needs to put forward evidence of attachment to the  
8 labor market, and they can do that in one of two ways.  
9 They do it by either putting forward evidence of a search  
10 for employment within their lim - - - limitations, or by  
11 participating in one of several potential job tra - - -  
12 training or job placement programs.

13 JUDGE FEINMAN: So when - - - when you say  
14 attachment to the labor market, it's at the time that  
15 they're seeking the benefit initially?

16 MR. WOODS: That - - - as of - - - right now,  
17 post the 2017 - - -

18 JUDGE FEINMAN: Given the amendment, yeah.

19 MR. WOODS: - - - amendment, yes. The only - - -  
20 the only point at which they need to show attachment to the  
21 labor market post the 2017 amendment is at the times they  
22 are classified. They don't no - - - no longer need to show  
23 it on an ongoing basis, so long as they were entitled to it  
24 - - - to an award at the time at which they were  
25 classified.



1 JUDGE RIVERA: So if I'm understanding your rule,  
2 this part of Zamora that I had quoted previously, that the  
3 - - - that you could draw the inference. The claimant re -  
4 - - based on the fact, "The claimant retired from the  
5 claimant's job due to that disability." That is actually  
6 not what your rule means.

7 MR. WOODS: That - - - no, Judge, and if I could  
8 point you to a - - - to a slightly further up place in  
9 Zamora.

10 JUDGE RIVERA: Okay, that's fine.

11 MR. WOODS: "By finding alternative work  
12 consistent with his or her physical limitations, or at  
13 least showing reasonable efforts at finding such work, the  
14 claimant can prove to the Board that the cause of his or  
15 her reduced income is a disability, rather than an  
16 unwillingness to work again."

17 What the rule - - -

18 JUDGE RIVERA: Sure, but I'm not asking about  
19 that. The - - - that's not in dispute. I'm asking about  
20 this, where it says you can infer this - - -

21 MR. WOODS: Yes.

22 JUDGE RIVERA: - - - inability as opposed to  
23 unwillingness to work from, again, the fact that it's an  
24 involuntary retirement and the nature of the disability,  
25 right?

1 MR. WOODS: Certain - - -

2 JUDGE RIVERA: You're saying you no longer do  
3 that?

4 MR. WOODS: No, I'm saying that the gener - - -  
5 the precedent is that we don't do it, generally speaking,  
6 and if we're going to depart from - - -

7 JUDGE RIVERA: You "don't do it" is don't - - -  
8 you don't make the inference.

9 MR. WOODS: Right, if we're going to part from  
10 that, we have to explain it. The Board absolutely has  
11 authority - - - and this is a point where we disagree with  
12 the appellant - - - the Board has the authority under  
13 Zamora to draw that inference, but if it's going to do so,  
14 it needs to explain that it's departing from its usual  
15 practice when it does so.

16 JUDGE WILSON: Do you have - - - do you have a  
17 prior precedent in which somebody was granted disability  
18 retirement, and then subsequently determined not to be  
19 essentially disabled?

20 MR. WOODS: Not to be disabled or not to be  
21 attached to the labor market?

22 JUDGE WILSON: Well, not to be attached.

23 MR. WOODS: Okay. I'll give you two.

24 JUDGE WILSON: Okay.

25 MR. WOODS: One from be - - - before this



1 decision here is Metropolitan Hospital Center (ph.); that's  
 2 2014 NY WCLR (LRP) Lexis 112. That's a 2014 decision deter  
 3 - - - decision. The second one is Deer Park Union Free  
 4 School District. I have that as NY Wrk. Comp. LEXIS 567.  
 5 That's a 2018 decision.

6 JUDGE RIVERA: I - - - I can't - - -

7 MR. HOFFMAN: We - - - we have in - - - in  
 8 several cases found that there's an involuntary retirement,  
 9 but then also found that they're not attached to the labor  
 10 market.

11 JUDGE STEIN: Do you know any set of facts where  
 12 it would be error as a matter of law for the Board to give  
 13 the claimant an inference of labor market attachment?

14 MR. WOODS: I think there's probably an outside  
 15 case where there - - - it might be an abuse of discretion,  
 16 because it's in the Board's fact-finding discretion to - -  
 17 - whether or not to draw that inference under Zamora or  
 18 not.

19 JUDGE RIVERA: So if I'm understanding your rule  
 20 - - - please correct me, because I - - - I - - - I'm  
 21 generally confused now. If - - - if I'm understanding your  
 22 rule, despite the fact - - - and I'm not going to quote  
 23 again - - - the language from Zamora, the Board's position  
 24 is that it will not draw this inference in - - - when it  
 25 comes to certain kinds of disabilities - - - the



1 combination of certain kinds of disabilities and - - - and  
2 the work, the former employment. They're just - - - some  
3 of those where one would never draw the inference, and  
4 you've already drawn that line.

5 MR. WOODS: I think the Board's precedent is that  
6 for - - - for the vast majority of cases - - -

7 JUDGE RIVERA: Yes.

8 MR. WOODS: - - - there needs to be a  
9 demonstration of willingness to work.

10 JUDGE RIVERA: Okay, so flipping that now, if I'm  
11 understanding you, is that you - - - you all have  
12 interpreted Zamora as meaning there are - - - that a very,  
13 very small class that ever fits the language that I've  
14 quoted.

15 MR. WOODS: I believe that's correct, Judge.

16 JUDGE RIVERA: Okay.

17 MR. WOODS: Certainly, it might have been - - -

18 JUDGE RIVERA: So where - - - where - - - is that  
19 based on the Board's experience - - - where do you come to  
20 that conclusion, because you've obviously didn't go to a  
21 rule-making process. So where - - - where do you get to  
22 that?

23 MR. WOODS: Well, it - - - the - - - at - - - if  
24 I could - - -

25 JUDGE RIVERA: Yes, please.



1 MR. WOODS: One of the things I want to - - -  
 2 right off the bat, one of the problems with the procedural  
 3 posture that we're in right now is that a concern about the  
 4 rule making, for example, wasn't in part of this record at  
 5 any point because we got to the - - - the responding brief  
 6 - - - to our responding brief in this court. And it - - -  
 7 so there - - - there isn't a record that I can point to you  
 8 at for that decision-making process.

9 That's part of the reason that we made the motion  
 10 seeking to vacate it and have it go back, so that that kind  
 11 of argument, if claimant wanted to make it, she could make  
 12 in the first instance, before the Board, and before the  
 13 Third Department, and there could be appropriate stuff in  
 14 the record to show that.

15 JUDGE RIVERA: Yeah, but your argument to send it  
 16 back on the presumption that indeed it is a valid - - -  
 17 that - - - that it is inconsistent, it's - - - it's already  
 18 a valid determination you've made, so I'm not - - - not so  
 19 sure I'm persuaded by that argument.

20 But again, could you please try and answer this  
 21 question, if you can - - - if you can't, I understand - - -  
 22 the prior question about whether or not - - - what - - -  
 23 what's the basis for the Board's apparent determination  
 24 that under Zamora there's - - - there's a small class of  
 25 claimants for which you could infer - - - make the



1 inference that Zamora is referring to?

2 MR. WOODS: I mean, I - - -

3 JUDGE RIVERA: As opposed to doing it on a case-  
4 by-case. You sort of already know there's a very small  
5 class.

6 MR. WOODS: I think it's just the Board's  
7 administrative precedents have grown up as requiring in the  
8 first instance, absent in it - - - some additional  
9 exception, attachment to the labor market. And the Board's  
10 precedent for that, in - - - in fact, they predate Zamora  
11 and they were applied to the involuntary retirement context  
12 after Zamora.

13 JUDGE WILSON: I just wanted to ask you one more  
14 thing about the Board's precedents. And I may have misread  
15 some of these, but some of the precedents you cited - - -  
16 I'm thinking of Schervier Pavilion, Sahlen Packing, Compass  
17 Group, J.D. Consulting - - - as I read them, dealt with  
18 temporary disabilities, not partial permanent disabilities.  
19 Is - - - is the rule the same?

20 MR. WOODS: The - - - the - - - the general labor  
21 market attachment rule is - - - is the same, and it's - - -

22 JUDGE WILSON: You don't apply it differently for  
23 a temporary as to a permanent?

24 MR. WOODS: You - - - you still need to show  
25 willingness to work to - - - in order to be able to - - -



1 unless it's excused for some reason.

2 JUDGE WILSON: Okay.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 Counsel?

5 MR. GREY: May it please the court, Robert Grey  
6 on behalf of the claimant-respondent.

7 JUDGE RIVERA: So why shouldn't we just send it  
8 back? Because he says they messed up.

9 MR. GREY: The outcome that the Board and the  
10 Appellate Division reached here is correct. Each of them  
11 may have gotten the reasoning for that outcome wrong in  
12 different ways, but the outcome is correct.

13 If I can - - - can pick up on the - - - the end  
14 of the last argument, about the Board's precedence of this  
15 issue going back before Zamora and to Zamora and then to  
16 date. The - - - the fact of the matter is that beginning  
17 in the mid-1990s, the Board determined that it wanted to  
18 add to the workers' compensation law the unemployment  
19 insurance law concept that in order to be eligible for  
20 benefits, you must demonstrate attachment to the labor  
21 market.

22 The court's aware that that provision is not in  
23 the workers' compensation law. It's in the uninsurance  
24 (sic) law. The Board now admits in its brief in its case  
25 that it took the concept from unemployment.





1 JUDGE STEIN: Okay, but it - - - is that being  
2 challenged? I mean, my - - - my understanding - - - my  
3 reading of what happened here is, is that the - - - the  
4 Board sort of didn't say anything about the attachment  
5 issue, just said that she had involuntary - - -  
6 involuntarily retired and went - - - and went passed that.  
7 And then - - - and then we get this confusion about the  
8 2017 amendment, which, if I'm correct, everybody agrees - -  
9 - and correct me if I'm wrong - - - applies to after a  
10 person is found qualified for benefits, not before. So I  
11 think we - - - we put that out of the way.

12 So it - - - it seems to me, that that's what - -  
13 - that - - - that the Board is basically saying, you know,  
14 we didn't do what we usually do here; we just sort of went  
15 past that question, and we don't usually base it just on -  
16 - - on the fact of involuntary retirement when the issue  
17 has been raised about attachment, and - - - and - - - and  
18 that's how we goofed, right?

19 MR. GREY: No.

20 JUDGE STEIN: Is - - - isn't that how we got  
21 here, really? And - - - and now you want to say now let us  
22 go back and decide whether we should apply the inference or  
23 not; we never made that determination.

24 MR. GREY: That's not what they're saying, Your  
25 Honor.



1 JUDGE STEIN: No? Okay.

2 MR. GREY: That's - - - that's not at all what  
3 they're saying. The - - - the employer's position here is  
4 that Zamora says the Board can't extend the inference to an  
5 injured worker, which is plainly not what the case says,  
6 and - - - and I don't think, unless the court has questions  
7 about that position, that I need to address that one  
8 further. The Board's position is - - -

9 JUDGE STEIN: You can't do it just based on  
10 involuntary retirement. I think that's what they're  
11 saying. It's a separate issue.

12 MR. GREY: Well, the - - - they express it  
13 different ways in their brief and in oral argument. In  
14 some places, they say that Zamora says that the Board can't  
15 extend the inference without proving labor market  
16 attachment, in which event there is no inference. It's - -  
17 - it's circular logic.

18 So fundamentally, what their argument boils down  
19 to is anytime the worker is partially disabled, regardless  
20 of the reasons why they left work, if we say are you  
21 looking for work, the obligation immediately springs into  
22 existence for the worker to demonstrate that they're  
23 attached to the labor market, or - - - and it's important  
24 for the court to understand this - - - they get no  
25 benefits.



1           So fundamentally, what this argument does is it  
2           transforms this law from one in which we have total  
3           disability and partial disability and no disability to one  
4           where we have total disability or nothing. The result of  
5           an injured worker being unattached to the labor market is  
6           that regardless of the extent of their partial disability,  
7           they do not receive benefits.

8           JUDGE STEIN: Well, that's not - - -

9           JUDGE RIVERA: Well, I thought the argument - - -

10          JUDGE FAHEY: And that's why - - - excuse me - -  
11          -

12          JUDGE RIVERA: - - - is they have to show that  
13          it's - - - the reason they're unattached has to be the  
14          disability.

15          JUDGE STEIN: So they may have a sixty-five  
16          percent disability, and with that sixty-five percent  
17          disability, they may be able to work consistent with their  
18          limitations, or they may not be able to work within their  
19          con - - - consistent with their limitations, depending upon  
20          a lot of other factors. That's - - - that's how I see it.  
21          I - - - that - - - that the rule has always been or at  
22          least for - - - for quite a while now, has been you have to  
23          show involuntary retirement and attachment, unless you  
24          can't attach.

25          MR. GREY: If I can address Judge Rivera's



1 question and then lead into your question, whether the  
2 separation from employment is related to the disability or  
3 unrelated to the disability, up until Zamora, was always  
4 treated as a trigger for the question of what the injured  
5 worker's obligation was.

6 If the worker left employment because they were  
7 hurt and they weren't able to go back to that job, then we  
8 inferred that they were entitled to benefits, and the  
9 worker had no further burden of proof or obligation. On  
10 the other hand, if the worker, as in the Jordan case, went  
11 back to work at full earnings, notwithstanding their  
12 disability, and then quit or got terminated, and then  
13 wanted to claim benefits after there was a clear break in  
14 the chain of causation between the injury and the loss of  
15 wages, then they had a burden of proof.

16 JUDGE STEIN: That's the ongoing versus the - - -  
17 the - - - the initial. Qualification for benefits  
18 initially versus ongoing attachment. And - - - so I'm not  
19 sure whether you agree that attachment is even an issue  
20 when you're first applying for benefits.

21 MR. GREY: The - - - the - - - I can tell you  
22 that the employer's position and the Board's position is  
23 that as soon as at any point in the case, there's evidence  
24 that the worker has a partial disability, as of that date,  
25 that worker has an obligation to demonstrate attachment to



1 the labor market. That's what they're telling you, is once  
2 there's evidence in the case of partial disability, if the  
3 employer raises the issue - - -

4 JUDGE STEIN: Wait - - -

5 MR. GREY: - - - the Board will require the  
6 injured worker to produce that proof.

7 JUDGE STEIN: Except for the amendment now says  
8 that once you get past that initial hurdle, then you don't  
9 have to continue to show that.

10 MR. GREY: Right, well, this is the - - - the  
11 point - - -

12 JUDGE FAHEY: Of course - - - of course - - -  
13 excuse me. The logic do - - - Judge Stein's point is a  
14 good one because it goes to the logic of the attachment to  
15 the labor market caveat that's been placed in the law,  
16 that's not in the statute as far as I can find it one way  
17 or the other.

18 And it seems to say that when the worker is, of  
19 course, most injured and most sick right after something  
20 happens or something - - - they fall, they - - -  
21 herniations, whatever - - - that's when they're supposed to  
22 be attached to the labor market now. And then finally up  
23 to when you're classified. And then now, after the 2017  
24 amendment, post-classification, you don't have to show  
25 attachment to the labor market.



1 Do I have that sequence correct?

2 MR. GREY: Your - - - Your Honor, if I can attack  
3 that this way.

4 JUDGE FAHEY: Okay.

5 MR. GREY: If you go back and look at the Zamora  
6 case, which, obviously, the court has, the Zamora case was  
7 a permanent partial disability case. Zamora was a case  
8 where the lady was declared permanently partially disabled,  
9 then subsequently stopped work. There was a question of  
10 fact as to whether her - - - her separation from employment  
11 at that point was voluntary or involuntary. The Board  
12 found that it was involuntary, but nonetheless required her  
13 to look for work.

14 JUDGE FAHEY: Right.

15 MR. GREY: And the court said, contrary to sixty  
16 years of cases prior to that, going back to Roberts v.  
17 General Electric, that okay, under these circumstances, you  
18 may require a permanently partially disabled worker to look  
19 for work after classification. The legislature overruled  
20 that.

21 JUDGE FAHEY: But - - - but my question is - - -  
22 so - - - so but my question is now - - - now, today - - -

23 MR. GREY: Right.

24 JUDGE FAHEY: - - - is the rule when you're most  
25 injured is when you're supposed to be showing attachment to



1 the labor market?

2 MR. GREY: Right, so - - - so the legislature has  
3 expressly eliminated the one requirement that Zamora  
4 created - - -

5 JUDGE FAHEY: Right.

6 MR. GREY: - - - which is that if you're  
7 permanently partially disabled, you can look for work.

8 JUDGE FAHEY: So you got this divide.  
9 Classification. One side, the legislature's eliminated  
10 attachment to the labor market; pre-classification, you  
11 still have to show it.

12 MR. GREY: Well, so now what's happening in this  
13 case, and why we're here, is the employer wants to take now  
14 that requirement, which was overruled for permanent partial  
15 disabilities, add it to the class of temporary  
16 disabilities, and expand it so that it's a rule that the  
17 injured worker must look for work - - -

18 JUDGE FAHEY: You're referring to the court - - -

19 MR. GREY: - - - and the Board cannot infer.

20 JUDGE FAHEY: Let me stop you. You're referring  
21 to the - - - for the court, for all of us, you're referring  
22 to them as temporary disabilities. That's the time period  
23 from when the injury took place to when the classification  
24 takes place. Is that what you're saying?

25 MR. GREY: Yes.



1 JUDGE FAHEY: All right. All right.

2 MR. GREY: From the date of the accident to the  
3 date of classification.

4 JUDGE FAHEY: So - - -

5 MR. GREY: Which by the way, Your Honor - - -

6 JUDGE FAHEY: Let me just ask this question then.  
7 So are there are cases where someone is so disabled - - -  
8 they're permanently partially disabled, but they're so  
9 disabled, that it's a - - - that a court would look at that  
10 and say, it's self-evident that this person cannot go  
11 forward and be attached to the labor market in any  
12 meaningful way? You know, because of their age, or their  
13 physical condition, other factors; in this case, diabetes,  
14 things like that.

15 Is there a case - - - are there cases like that?

16 MR. GREY: If - - - if I can answer that, Your  
17 Honor, in two parts.

18 JUDGE FAHEY: Okay.

19 MR. GREY: On the temporary disability piece, it  
20 makes less sense to require labor market attachment during  
21 a period of temporary disability, because during that point  
22 in time, the worker has some expectation that perhaps  
23 they'll get better and they'll return to full work. So it  
24 doesn't make logical sense to make them look for other  
25 work.





1 JUDGE FAHEY: All right, and did that happen  
2 here?

3 MR. GREY: With regard - - -

4 MR. GREY: Pardon?

5 JUDGE FAHEY: Did that happen here? This worker  
6 did attempt to go back to work, the way I understood it.

7 MR. GREY: This lady, after she got work, tried  
8 to go back to the employer, tried to do her job, asked the  
9 employer for an accommodation, and only left employment  
10 when the employer refused to give her an accommodation and  
11 approved her disability retirement.

12 I - - - I know my time's expired.

13 JUDGE RIVERA: Well, she claimed she was placed  
14 in a job that created more physical strain than the job  
15 where she was injured.

16 MR. GREY: Yes. The employer seems to have - - -  
17 have transferred her.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 MR. GREY: Thank you, Your Honor.

20 CHIEF JUDGE DIFIORE: Counsel?

21 MR. HOFFMAN: Thank you.

22 Your Honors, if I may, I think the simplest way  
23 to look at this is to look at the difference between  
24 someone who is involuntary ceased working and sometimes who  
25 voluntarily ceased working. An individual who has in - - -



1 it's our position - - - who's involuntarily ceased working,  
2 stopped working because of their disability, may be  
3 entitled to that inference, if they demonstrate some  
4 continuous willingness to work, such as by looking for work  
5 and presenting that to the Board.

6 A claimant who voluntarily ceases working, even  
7 if they search for work, the Board will not infer that the  
8 reason they cannot obtain equally well-paying work is  
9 through their disability claim.

10 JUDGE FAHEY: I didn't think there was a case  
11 here though - - - I mean, maybe I'm wrong. I thought this  
12 was an involuntary - - -

13 MR. HOFFMAN: It is, but when - - - when a - - -

14 JUDGE FAHEY: All right. So - - - so - - - so  
15 the - - - kind of the onerous implication of someone who's  
16 voluntarily ceased working doesn't really apply here.

17 MR. HOFFMAN: Well, I - - - I think it's helpful  
18 to - - - to look at that situation, and I - - - in our  
19 brief is the Appellate Division's decision in Reese. Even  
20 that person who ceases working for reasons unrelated to  
21 their disability and then looks for work, and even finds  
22 light duty work, the Board will not conclude that that  
23 individual's reduction has anything to do with their  
24 disability. That person must show the reason they cannot  
25 obtain equal well-paying work is because of their



1           disability.

2                         JUDGE RIVERA: Well, let - - - yeah, let me - - -  
3           just for clarification. I'm very confused now. So let's  
4           take the example, now with the amendment, once someone has  
5           been classified as PPD, you agree that moving forward, they  
6           do not have to - - - they no longer have an obligation to  
7           show an attachment to the labor market, correct?

8                         MR. HOFFMAN: Assuming they - - -

9                         JUDGE RIVERA: Okay, no, no. Once they're  
10          classified - - -

11                        MR. HOFFMAN: Yes, if I could add a caveat, but  
12          yes.

13                        JUDGE RIVERA: Classified PPD. No, I know where  
14          you're going.

15                        MR. HOFFMAN: Okay.

16                        JUDGE RIVERA: That's what - - - that's the  
17          second part of the question.

18                        MR. HOFFMAN: Sure.

19                        JUDGE RIVERA: Okay. What is your position with  
20          respect to whether or not they have to show that they  
21          either cannot work or that they could work and that they  
22          have tried to find work, but were unsuccessful, before the  
23          classification? Do they have to do that to be classified -  
24          - -

25                        MR. HOFFMAN: In order - - - no.



1 JUDGE RIVERA: - - - as PPD?

2 MR. HOFFMAN: In order - - - and Ms. Zamora was  
3 classified at a time she was working at full duty. So  
4 there's no - - - the Board will classify someone with  
5 permanent partial disability regardless of whether they're  
6 working, not trying to work, et cetera. It's just the  
7 finding that the disability's matured. It's a stage where  
8 we know that it's not going to substantially change.

9 JUDGE RIVERA: Okay. So - - - so, all right. So  
10 then if - - - in this case, how would your understanding of  
11 the rule - - - how should it have worked?

12 MR. HOFFMAN: It - - - it should have worked as  
13 it - - - everyone agrees the claimant left her work because  
14 of her disability. But she needs to - - -

15 JUDGE RIVERA: Involuntary retirement.

16 MR. HOFFMAN: Correct. Well - - -

17 JUDGE RIVERA: You also don't challenge that  
18 there is a disability.

19 MR. HOFFMAN: No, no, there's certainly a  
20 disability. At all - - - at all stages, there's evidence  
21 of a partial disability that are relevant to this case.

22 JUDGE RIVERA: Yes.

23 MR. HOFFMAN: How - - - how it should have worked  
24 is that she should have made some showing that she had a  
25 continued willingness to work. And - - - and based on - -



1 -

2 JUDGE RIVERA: When is "at some point"? At what  
3 point is that?

4 MR. HOFFMAN: Well, before classification. And -  
5 - - and in this case, there were several years of awards  
6 that were addressed all that September 2017 - - -

7 JUDGE RIVERA: In order to be classified - - -

8 MR. HOFFMAN: There's no - - -

9 JUDGE RIVERA: - - - are you saying that's a - -  
10 - there's - - - are you saying that's criteria to be - - -

11 MR. HOFFMAN: No.

12 JUDGE RIVERA: - - - classified?

13 MR. HOFFMAN: An individual could be classified  
14 with a permanent partial disability regardless of whether  
15 they're working, looking for work, or just sitting at home  
16 making no attempts to work. That's purely a medical  
17 question. Has her disability matured to a level where we  
18 don't think it's going to change substantially?

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. HOFFMAN: All right, thank you, Your Honor.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of O'Donnell v. Erie County, No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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