

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0091
STATE OF WISCONSIN**

Cir. Ct. No. 02CV002311

**IN COURT OF APPEALS
DISTRICT I**

RALPH BRAUNREITER,

PLAINTIFF,

DONNA BRAUNREITER,

APPELLANT,

v.

**CITY OF MILWAUKEE AND MILWAUKEE
EMPLOYEES' RETIREMENT SYSTEM/ANNUITY
AND PENSION BOARD,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Donna Braunreiter, widow of Ralph Braunreiter,¹ appeals from a circuit court order affirming the Milwaukee Employees' Retirement System/Annuity and Pension Board's decision denying Mr. Braunreiter's request for duty disability retirement benefits. Braunreiter claims that duty disability retirement should have been granted because: (1) the Board was bound to follow the initial decision of the independent reviewer; (2) there is insufficient evidence to support the decision of the Board; (3) the Board erred in failing to apply the "substantial factor" causation test; and (4) the Board erred in failing to apply the "breakage" theory of causation. Because we resolve each issue in favor of upholding the order, we affirm.

I. BACKGROUND

¶2 Braunreiter was a City of Milwaukee police officer. On February 23, 2000, he was involved in a scuffle with an unruly prisoner, resulting in severe pain to his back. Following his shift on February 23, 2000, Braunreiter went to the emergency room and was treated for what was believed to be musculoskeletal pain. On February 24, 2000, the severe back pain persisted and he sought treatment from Dr. Marshall J. Mirviss. Some x-rays were taken, which revealed mild to moderately severe hypertrophic arthritis in the thoracic spine and mild to moderately severe osteoarthritis in the lumbar spine, with no evidence of acute abnormality.

¶3 Braunreiter remained off work for the next ten days and then returned to follow-up with Dr. Mirviss. Dr. Mirviss referred Braunreiter to a

¹ Ralph Braunreiter passed away during appeal proceedings in this matter. Accordingly, an amended complaint was filed substituting Donna Braunreiter as the plaintiff.

neurologist for evaluation. The neurologist ordered an MRI, which revealed a large enhancing mediastinal mass involving the T2 and T3 vertebrae with a 50% compression fracture of the body of the T3 vertebra. A spinal x-ray confirmed the 50% compression fracture of the body of the T3 vertebra.

¶4 On March 9, 2000, Braunreiter sought treatment with a radiation oncologist, Dr. Kenneth T. Bastin. Dr. Bastin concluded that Braunreiter had metastatic cancer, probably originating in the lung, and scheduled a series of radiation treatments.

¶5 On April 4, 2000, Braunreiter applied for duty disability retirement. He noted that he had suffered a fracture to his vertebrae on February 23, 2000, while attempting to control a violent prisoner. Following the application, Braunreiter was evaluated by two doctors in compliance with the applicable rules. One doctor was selected by the union, usually the applicant's treating physician, here Dr. Bastin. The second doctor was selected by the City, here Dr. Andrew Seter.

¶6 Dr. Bastin filed his duty disability retirement certification, opining that Braunreiter was "totally and permanently disabled from performing his full job description as a natural and proximate result of an incident that occurred ... on February 23, 2000." Dr. Seter filed his duty disability retirement certification, agreeing that Braunreiter was totally and permanently disabled from performing his full job description, but disagreeing with Dr. Bastin as to the natural and proximate cause of the disability. Dr. Seter stated that the cause was not the February 23, 2000 work-related incident, but rather an underlying pre-existent, non-work-related carcinoma involving the third thoracic vertebra. Dr. Seter noted that the fracture of the back occurred as a result of the underlying malignancy and

the fall at work, but clarified that the scuffle on February 23, 2000, would not have led to the fracture if the malignancy was not present.

¶7 Because of the difference in opinion, a third doctor was selected, Dr. Mark Aschliman. Dr. Aschliman concluded that Braunreiter was totally and permanently disabled from performing his duties as a police officer. Dr. Aschliman opined, however, that the February 23, 2000 work-related incident was not the “primary factor” causing the disability. Rather, the reason for the disability was the metastatic carcinoma. Accordingly, Dr. Aschliman filed his certification stating that Braunreiter was ineligible for duty disability retirement.

¶8 Subsequently, the Board accepted the majority decision of the medical panel and Braunreiter received notice that he did not qualify for duty disability retirement. He then appealed the Board’s decision and the matter was assigned to Circuit Court Reserve Judge Frederick P. Kessler for an independent review. Judge Kessler initially recommended that Braunreiter receive duty disability retirement and the matter was sent back to the medical panel for reconsideration. The medical panel affirmed their original opinions and the matter was sent back to Judge Kessler. Judge Kessler then issued a final decision concluding that Braunreiter was not entitled to duty disability retirement.

¶9 Braunreiter appealed Judge Kessler’s decision and a hearing was conducted. The hearing examiner issued a decision affirming the denial of duty disability benefits. The Board adopted this decision and denied Braunreiter’s application for duty disability retirement. Braunreiter filed a writ of certiorari for review by the circuit court. The circuit court affirmed the decision of the Board. Braunreiter now appeals.

II. DISCUSSION

¶10 Braunreiter contends that the Board erred in denying his application for duty disability because: (1) the Board was bound by Judge Kessler’s initial determination regardless of what the majority of the medical panel concluded; (2) there is insufficient evidence to support the conclusion that Braunreiter’s disability was caused by cancer rather than the work-related fight with a prisoner on February 23, 2000; (3) the Board should have adopted the “substantial factor” theory of causation used in negligence law in rendering a decision on his duty disability application; and (4) the Board should have adopted the “breakage” theory of causation used in worker’s compensation proceedings in rendering a decision on his duty disability application. We are not persuaded.

¶11 This appeal arises from a writ of certiorari. In reviewing such matters, we are limited to determining whether: (1) the agency stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary; and (4) the evidence provides reasonable support for the decision. *George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. Applying this same standard of review, the circuit court concluded that the Board’s decision denying duty disability retirement was not erroneous. In a written memorandum and order, the circuit court aptly addressed and rejected the second, third and fourth issues raised by Braunreiter. Because the circuit court’s order provides the correct and well-reasoned analysis, we affirm the circuit court’s decision and adopt the memorandum and order as our own on these three issues. *See* WIS. CT. APP. IOP VI (5)(a) (Mar. 1, 2002). A copy of the circuit court’s memorandum decision is attached and incorporated in this decision.

¶12 We, however, address separately the first issue raised relative to whether the Board was bound to accept the independent reviewer's initial decision as a final determination. Braunreiter contends that Judge Kessler's initial decision recommending that he receive benefits was a final determination and thus, binding on the Board. The language of Judge Kessler's initial decision does not comport with that argument. In the October 16, 2000 decision, Judge Kessler "recommends" that the Board grant Braunreiter's application for duty disability retirement and questions the medical findings of the two physicians who concluded that the injury here was not caused by the work-related incident. WISCONSIN STAT. § 68.09(5) (2001-02) states that the "municipal authority may affirm, reverse or modify the initial determination." Judge Kessler's first decision did none of the above.

¶13 In Judge Kessler's amended decision of January 14, 2001, he concludes that Braunreiter is not qualified for duty disability retirement benefits based on the medical panel's causation conclusions. Thus, at this point, he affirmed the initial determination. The January 14, 2001 decision then became the final determination from which the appeal followed. Accordingly, we hold that the Board was not bound by the earlier recommendation.

¶14 We conclude, as did the circuit court, that the Board's decision was not erroneous. Accordingly, Braunreiter was not entitled to duty disability retirement benefits.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

BRANCH 26

RALPH BRAUNREITER,

Plaintiff,

v.

Case No: 02-CV-002311

**CITY OF MILWAUKEE AND
MILWAUKEE EMPLOYEES'
RETIREMENT SYSTEM/ANNUITY
AND PENSION BOARD**

Defendants.

MEMORANDUM AND ORDER

Plaintiff is a Milwaukee police officer. On February 23, 2000, Plaintiff became injured during a fight with a prisoner who attempted to escape from a patrol wagon. On April 4, 2000, Plaintiff applied for a duty disability retirement. Pursuant to section 36-02-20 of the Milwaukee City Charter ("MCC"), a medical panel was convened to examine Plaintiff and determine whether Plaintiff was permanently and totally incapacitated from duty as the natural and proximate result of the work injury.

According to the MCC, the medical panel is comprised of one doctor appointed by the police union and one doctor appointed by the City of Milwaukee. §36-02-20, MCC. In

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the event the two doctors disagree on whether the applicant is entitled to duty disability retirement, the two doctors select a third, tie-breaking doctor.

In this case, the police union appointed Dr. Kenneth Bastin to the medical panel. On June 5, 2000, Dr. Bastin concluded that Plaintiff was totally and permanently disabled from performing his full job description as a natural and proximate result of the February 23 work incident. According to Dr. Bastin:

With regards to Mr. Braunreiter's disability, it is fairly clear that the acute onset of pain occurred as a result of the assault and battery while on duty as a police officer. Based on my extensive experience with patients like Mr. Braunreiter, I strongly believe that had he not been assaulted, and had presented in the usual fashion, that he would be at work today. It is not uncommon for patients with disease to the spine to have an excellent if not complete pain response to external radiation, and many return to work.

The City of Milwaukee appointed Dr. Andrew Seter to the medical panel. On June 1, Dr. Seter certified that Plaintiff was not permanently and totally incapacitated for duty as the natural and proximate result of the work incident. In his report, Dr. Seter stated:

Mr. Braunreiter presents with metastatic carcinoma involving the thoracic spine and left humerus of uncertain primary. Such a condition is clearly not work related. Mr. Braunreiter developed a pathologic fracture of T3 as a result of the underlying malignancy and the fall at work on 2/23/00. Impression would be that the events of 2/23/00 would not have led to a compression fracture in and of themselves without the presence of the underlying malignancy. Impression would be that the malignancy at T3 would likely have led to pathologic fracture over time, even without the injury of 2/23/00.

Duty Disability is indicated when an individual "is totally and permanently disabled from performing the member's full job description as the natural and proximate result of an injury" which occurred while at work. In this case, Mr. Braunreiter had an underlying pre-existent, non-work related carcinoma involving T3. The events of 2/23/00 in combination with the pre-existent, non-work related carcinoma led to the development of a compression fracture at T3. Expectation would be that any compression fracture which may have occurred would have healed without sequela or permanent disability, except for the fact that a pre-existent, non-work related carcinoma was present. The events of 2/23/00 have not

led to, or caused, and permanent disability. Based upon the requirement needed, Duty Disability is not indicated.

In light of the divergent medical opinions, Drs. Bastin and Seter appointed Dr. Mark Aschliman as the third, tie-breaking doctor. In concluding that Plaintiff was not totally and permanently disabled from performing his duties as a result of the work incident, Dr. Aschliman made the following statement:

IMPRESSION: It is my impression that Ralph Braunreiter has a condition of metastatic carcinoma of metastatic carcinoma of the thoracic spine and proximal humerus with an unknown primary source. Mr. Braunreiter also has a compression fracture of a pathologic nature of the T3 level. Presently Mr. Braunreiter continues to be observed for his condition. The primary carcinoma has not been determined. Systemic treatment for carcinoma has not been undertaken due to the desires of Mr. Braunreiter.

As a result of the industrial activities of the examinee, Mr. Braunreiter sustained a thoracic spine injury. Initially there was no evidence of fracture. Later work up was consistent with a destructive mass in the T3 area with a compression fracture.

On 2/23/00, Mr. Braunreiter may be considered to have sustained a severe strain of the thoracic spine. He may actually have injured the T3 level aggravating a destructive carcinoma leading to the manifestation of a T3 compression fracture. Further work up demonstrated multiple sites of metastasis with an unknown primary source of carcinoma. Mr. Braunreiter has also deferred systemic treatment for the carcinoma choosing only local radiation treatment.

At the present time, Mr. Braunreiter remains somewhat symptomatic with regard to his thoracic carcinoma. The mass has been diminished in size with the radiation therapy. Some symptoms remain relative to the underlying thoracic compression fracture. There may also be some discomfort from the mass of diminished size.

At the present time, Mr. Braunreiter may be considered temporarily totally disabled from performing the duties of a police officer. The 2/23/00 event is a contributing factor to his inability to perform the duties of a police officer. Mr. Braunreiter is not however totally and permanently disabled from performing the duties of a police officer as a result of the 2/23/00 occurrence. The primary factor preventing Mr. Braunreiter from working is his metastatic carcinoma of unknown etiology. The underlying condition of primary carcinoma with multiple metastatic may totally disabled Mr. Braunreiter from the performance of duties of police officer. This condition, however, is not industrial in its origin and not directly related to the 2/23/00 occurrence.

As such, while Mr. Braunreiter is temporarily totally disabled from performing the duties of a police officer as a result of the 2/23/00 event this event has not and will not lead to permanent total disability. Should Mr. Braunreiter be unable to return to work as a police officer then that inability to do so would related to his underlying metastatic carcinoma.

Based on the certifications of the majority of doctors on the medical panel, the Board denied duty disability to Plaintiff on September 21, 2000. On October 2, 2000, Plaintiff appealed the Board's decision. The Board assigned the matter to Reserve Circuit Court Judge Frederick Kessler to conduct an independent review. On October 16, 2000, Independent Reviewer Kessler issued his decision, in which he concluded that the work incident aggravated and accelerated Plaintiff's pre-existing carcinoma, which had not been detected prior to the incident, and which was not found during Plaintiff's initial medical examination. Accordingly, Independent Reviewer Kessler recommended that the Board grant Plaintiff's application for duty disability retirement because of the work incident.

The Board referred the matter back to the medical panel, and requested that the medical panel review Plaintiff's application in light of Independent Reviewer Kessler's decision and complete new certifications.

Dr. Bastin again certified that Plaintiff should be retired on duty disability, and Drs. Seter and Ashliman again certified that Plaintiff should not. Only Dr. Aschliman issued a report with the second certification. As his report provides:

A review of a Duty Disability retirement application regarding Ralph Braunreiter has been provided. This review was undertaken by Frederick P. Kessler. Mr. Kessler opines that had Mr. Braunreiter not been injured while working as a police officer his underlying cancer would not have had the destructive effect that it has had. Mr. Kessler opines that the industrial activities of the examinee aggravated and accelerated the carcinoma.

Respectful disagreement with this opinion is provided. It is not known whether Mr. Kessler is a physician or not. The opinions provided have no clear medical basis, however. Mr. Braunreiter clearly had a pre-existing tumor in his thoracic spine. This tumor was in the process of destroying his thoracic spine as well as the surrounding tissue at the time of the industrial occurrence of 2/23/00, Mr. Braunreiter was involved in an altercation and sustained a strain to his spine leading to pain. Subsequently the pre-existing carcinoma continued to destroy the thoracic spine of Mr. Braunreiter. This destructive process continues to the present time. Treatment is being provided for this pre-existing carcinoma.

There is no medical basis to state that the underlying carcinoma has been aggravated, precipitated and accelerated on a permanent basis as a result of the industrial activities of the examinee. If Mr. Braunreiter had not sustained his industrial injury of 2/23/00 the carcinoma would have continued to progress. Destruction of the thoracic spine would have continued and Mr. Braunreiter would have gone on to develop significant pain and spinal collapse as a result of the progression of his carcinoma. That the carcinoma was not detected prior to the incident does not mean that the carcinoma was not present and not progressive. This is simply the nature of metastatic cancer. A tumor may not be apparent when in fact it exists. That was the case with Mr. Braunreiter. On January 14, 2001, Independent Reviewer Kessler issued an Amended

Decision, which states as follows:

D. Conclusions

The reaffirmation of the opinions by Dr. Seter and Dr. Aschliman was that Braunreiter had an underlying pre-existent, non-work related carcinoma, which led to the development of a compression fracture at T3.

The Medical Panel reviewed this Reviewer's Decision prior to reaffirming their opinions. They have, in effect, rejected the Decision. Pursuant to the opinion of the City Attorney, after the Medical Panel re-certifies its determination, the Board must approve the Medical Panel's decision as a ministerial act.

E. Amended Decision

The Annuity and Pension Board having sent the original decision of the Reviewer to the Medical Panel for reconsideration, and the majority of the Medical Panel having re-certified that Braunreiter is not qualified for duty disability retirement benefits, and the Board being required to accept this re-certification, the re-certification of the Medical Panel stands that Braunreiter is not qualified for duty disability retirement benefits, and the matter is left open for appeal.

On January 19, 2001, Plaintiff appealed the Amended Decision, and a hearing was conducted on June 27, 2001.² On December 4, 2001, Examiner Moerke issued a decision affirming the denial of duty disability benefits. On February 26, 2002, the Board adopted the Board's decision in its entirety. Plaintiff now seeks review of the Board's final decision by way of certiorari.

Discussion:

The scope of review is limited to the record of administrative proceedings and includes: (1) Whether the Board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *See State ex rel. Ruthenberg v. Annuity & Pension Board*, 89 Wis. 2d 463, 472 (1979).

Plaintiff argues that the Medical Panel erred in (1) failing to find that the work injury was a substantial factor in causing Plaintiff's disability and (2) in determining that Plaintiff did not qualify for duty disability retirement benefits. Plaintiff alleges that the (a) the determination is in error in that the evidence does not support the findings and decisions; (b) the determination applies an incorrect theory of law as to what constitutes total and permanent incapacity for duty; and (c) the determination is based on irrelevant and inadmissible evidence.

Section 36-05-3-a, MCC, provides, in pertinent part:

Any member in active service who shall become permanently and totally incapacitated for duty as the natural and proximate result of an injury occurring at

² Although Plaintiff passed away prior to the hearing, his duty disability application continued to be processed as authorized by section 36-05-3-e, MCC.

some definite time and place while in the actual performance of a duty shall . . . be entitled to a duty disability retirement allowance . . . , provided the medical counsel or medical panel after a medical examination of such member shall certify that such member is mentally or physically incapacitated for further duty as a result of such service injury and such incapacity is likely to be permanent and such member should be retired.

Section 36-05-3-c, MCC, further provides, in pertinent part:

c. Firemen and Policemen Duty Disability. c-1. Medical Panel, etc. Firemen and policemen show are eligible for duty disability retirement allowance shall file a request therefore with the Board . . . ; such disability shall be determined as follows:

c-1-a. Recommendations. Such member shall be examined by a medical panel and such medical panel shall make the examination, determination and certification required under this act If the panel recommends that such person is entitled to duty disability retirement allowance . . . , the Board shall thereupon grant such allowance. Except as otherwise provided in sub. 3-c-f, any firemen or policemen who shall become disabled as a direct result of injury incurred in the performance of one or more specific acts of duty shall have a right to receive a duty disability benefit during the period of such disability of an amount equal to 75% of the current annual salary for such position which he held at the time of such injury Periodic medical examinations of such person shall be made at least once each year but the heads of the respective departments may direct more frequent examinations.

Plaintiff argues that his work injury is compensable under the “substantial factor” concept of causation, used in negligence cases. According to Plaintiff, in light of the substantial factor test, Dr. Seter’s opinion that Plaintiff’s cancer was the “dominant factor” that caused his disability is legally erroneous. Plaintiff also argues that his work injury is compensable under the “breakage theory” used in worker’s compensation law. Under this theory:

If there is a definite “breakage” (a letting go, a structural change . . .), while the employee is engaged in usual or normal activity on the job, and there is a relationship between the breakage and the effort exerted or motion involved, the injury is compensable regardless of whether or not the employee's condition was preexisting and regardless of whether or not there is evidence of prior trouble.”

If the employee is engaged in normal exertive activity but there is no definite "breakage" or demonstrable physical change occurring at that time but only a

manifestation of a definitely preexisting condition of a progressively deteriorating nature, recovery should be denied even if the manifestation or symptomization of the condition became apparent during normal employment activity.

If the work activity precipitates, aggravates and accelerates beyond normal progression, a progressively deteriorating or degenerative condition, it is an accident causing injury or disease and the employee should recover even if there is no definite "breakage."

If the work activity precipitates, aggravates and accelerates beyond normal progression, a progressively deteriorating or degenerative condition, it is an accident causing injury or disease and the employee should recover even if there is no definite 'breakage.'

E.F. Brewer Co. v. DILHR, 82 Wis. 2d 634, 638 (1978).

Plaintiff's arguments are without merit. Plaintiff has not submitted any caselaw which establishes that the "substantial factor test" and "breakage theory" apply to this provision in the City Charter. Looking to the language of the City Charter, duty disability benefits are provided if the applicant "shall become permanently and totally incapacitated for duty as the natural and proximate result of an injury occurring at some definite time and place while in the actual performance of a duty." The test for duty disability is fairly restrictive.

In this case, Plaintiff's inability to work immediately followed his altercation with the prisoner, and his incapacity could therefore have been the *proximate* result of the T3 fracture which may have been sustained on February 23. However, the Charter requires that Plaintiff's inability to work be *the natural* and proximate result of the injury sustained on February 23. In this case, all doctors agree that the work injury did not cause Plaintiff's cancer. The records indicate that Plaintiff suffered from a severe form of cancer which had metastasized to his spine, and the cancer and the bony mass on the spine which caused Plaintiff's pain, and which ultimately caused Plaintiff's death. The

records indicate that Plaintiff's inability to work had little, if any, significance, with the T3 fracture which may have occurred on February 23. Both Dr. Seter and Aschliman were of the opinion that but for the cancer, the fracture would have healed, allowing Plaintiff to return to full duty. Both Dr. Aschliman and Dr. Seter were of the opinion that Plaintiff's permanent disability stemmed from his cancer, rather than the February 23 incident. The Board acted according to law when it concluded that Plaintiff's permanent incapacity was the natural and proximate result of his cancer, rather than the work incident. In light of the Board's correct interpretation of the law, the Board's decision is supported by relevant, credible and substantial evidence.

Plaintiff also argues that the Board is bound by the decision on review as initially issued by Judge Kessler on October 16, 2000. In support of his position, Plaintiff submits that section 68.09, Wis. Stats., grants a municipal authority the discretionary power to affirm, reverse, or modify an initial determination. However, this court is not satisfied that section 68.09, Wis. Stats., eliminates the requirement in section 36-05-3-a, MCC, that the initial determination to grant duty disability benefits must be made by the medical council or panel. In situations where the medical panel certifies that the applicant is not entitled to a disability, it is only after a de novo hearing under section 68.11, Wis. Stats, where findings of fact are made, that the Board could grant duty disability benefits.

CONCLUSION

Based upon and in light of the foregoing, and a full review of the record and the arguments of the parties as set forth in their briefs, IT IS ORDERED that the decision of

the Milwaukee Employees' Retirement System/Annuity and Pension Board is hereby
AFFIRMED.

Dated at Milwaukee, Wisconsin this _____ day of November, 2002.

BY THE COURT:

Honorable Michael P. Sullivan
Circuit Court Judge
Branch 26