**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 21, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-2833** **Cir. Ct. No. 00 CV 8589**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

---

**ANTHONY KOWALSKI,**

**PETITIONER-APPELLANT,**

**V.**

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

**RESPONDENT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Kowalski appeals from a circuit court order which affirmed the County of Milwaukee Employees' Retirement System Annuity and Pension Board's decision that he did not qualify for an accidental disability retirement pension. Kowalski contends that the pension board's

decision was arbitrary and unreasonable and that if the pension board's interpretation of the ordinance was correct, then the ordinance violates equal protection. Because there is substantial evidence to support the pension board's determination and because the ordinance does not violate the equal protection clause, we affirm.

## I. BACKGROUND

¶2 Kowalski began employment with Milwaukee County in 1974. On January 7, 1991, while icing a toboggan slide at one of the Milwaukee County parks, he slipped and injured his lumbar spine. He did not miss any work as a result of this injury, and the injury resolved completely within seven to ten days. In May 1991, Kowalski injured his back while attempting to pull a cup out of a green at Oakwood Golf Course. He was treated with three epidural injections by an orthopedist, Dr. Alvin K. Krug. After completing treatment, Kowalski returned to work without restrictions.

¶3 Kowalski sustained another back injury on February 4, 1994, while picking up traffic cones. He was treated by Dr. Krug with an epidural steroid injection. Dr. Krug opined that there was no permanent disability as a result of this accident. Kowalski suffered another work-related back injury in August 1996, while operating a tractor to cut grass. He returned to work without any work restrictions following this injury. On January 6, 1997, Kowalski injured his back while attempting to lift a truck hood in order to check the oil. He returned to work after this injury and continued to work until September 1997.

¶4 In December 1997 and December 1998, Kowalski underwent back surgery which was performed by Dr. Stephen Delahunt. After the surgery, Dr. Delahunt concluded that Kowalski suffered an 18% permanent disability to his

back and could no longer perform the duties associated with the county highway department.

¶5 Kowalski applied for an accidental disability retirement pension on November 5, 1999, and listed the January 7, 1991 accident as the cause of the disability. Kowalski was seen by the medical board of the employees' retirement system of Milwaukee County, which consisted of three doctors: Theodore R. Bonner, Jean Duester and William Boehm. The medical board issued a report on December 27, 1999, concluding that Kowalski did not qualify for accidental disability. The pension board accepted the recommendation of the medical board and denied Kowalski's application for an accidental disability retirement pension.

¶6 Kowalski appealed the pension board's decision and the matter was referred to a hearing examiner, Justice Louis J. Ceci. Justice Ceci issued a decision and order affirming the decision of the pension board, and the pension board re-affirmed the order on September 13, 2000. Kowalski then petitioned the Milwaukee County circuit court for a writ of certiorari. The circuit court issued the writ on October 16, 2001. The circuit court issued its decision affirming the decision of the pension board. Kowalski now appeals from that order.

## II. DISCUSSION

### *A. Interpretation of the Ordinance.*

¶7 Kowalski argues that the pension board's interpretation of the ordinance involved here was arbitrary, unreasonable and erroneous. He contends that the pension board's decision that he does not qualify for the accidental retirement pension because his disability was the result of a series of accidental injuries and not a single accidental injury cannot be upheld. We disagree.

¶8 On an appeal from a decision on a writ or certiorari, we review the record and findings of the administrative agency, not the circuit court. ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis. 2d 646, 275 N.W.2d 668 (1979). Our review is limited to determining:

> "(1) Whether the board kept within its jurisdiction, (2) whether it proceeded on a correct theory of 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."

***Id.*** at 651-52 (citation omitted). Kowalski's contentions implicate the second and third possibilities. In order to determine whether the pension board acted according to law, we review the pension board's application of the ordinance to Kowalski. The construction and interpretation of an ordinance adopted by an administrative agency charged with the duty of applying that statute is entitled to "great weight." ***Pigeon v. DILHR***, 109 Wis. 2d 519, 524, 326 N.W.2d 752 (1982).

¶9 The ordinance at issue here provides:

> A member shall be eligible for an accidental disability pension if his employment is terminated prior to his normal retirement age by reason of total and permanent incapacity for any duty as a natural and proximate result of an accident occurring at some definite time and place while in the actual performance of duty.

MILWAUKEE COUNTY ORD. § 201.24(4.3). In applying the ordinance to the facts in Kowalski's matter, the pension board relied on the reasoning of the medical board:

> The Medical Board does agree that given the duration and heavy nature of the work which Mr. Kowalski has performed that the cumulative effect of the work activities would have aggravated and accelerated his underlying condition. Since this cumulative effect would meet the

> definition of work-relatedness under the worker's compensation statutes, the Medical Board agrees that from the standpoint of worker's compensation that this is a work-related condition. However, the definition of work-relatedness for an Accidental disability differs from worker's compensation in that it requires that a specific incident "at some definite time and place" cause the disability. For this reason, the Medical Board feels that Mr. Kowalski does not qualify for an Accidental disability.

Kowalski challenges this reasoning, arguing that it would be absurd to interpret the ordinance to allow benefits to employees who are disabled after a single injury, but deny benefits to employees who are disabled from a combination of multiple injuries. As pointed out by the Milwaukee County corporation counsel in its response brief, Kowalski has misconstrued the pension board's interpretation of the ordinance. The decision reflects the pension board's findings that none of Kowalski's individual injuries constituted a medically significant injury. After each injury, Kowalski returned to work. Thus, no single accident directly caused his present disability. In order to qualify for the benefit, the plain language of the ordinance requires: "*an accident occurring at some definite time and place*" that causes total and permanent incapacity for duty. (Emphasis added.) Kowalski's circumstances did not satisfy the language of the ordinance.

¶10 Thus, contrary to Kowalski's suggestion, the pension board did not deny his claim because he suffered multiple accidents. Rather, the pension board denied his claim because not one of his multiple accidents directly caused his present disability. Accordingly, we conclude that the pension board correctly applied the law pertinent to this case.

¶11 Next, we address whether the third possibility occurred here—that is, whether the decision was arbitrary and unreasonable. In essence, the question is whether there is substantial evidence to support the pension board's

determination that Kowalski did not qualify for the accidental retirement pension. In order to do so, we apply the substantial evidence test:

> Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. As the substantial evidence test is highly deferential to the board's findings, we may not substitute our view of the evidence for that of the board when reviewing the sufficiency of the evidence on certiorari. If any reasonable view of the evidence would sustain the board's findings, they are conclusive. Even if we would not have made the same decision, in the absence of statutory authorization[,] we cannot substitute our judgment for that of the [board].

***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis. 2d 300, 304-05, 519 N.W.2d 782 (Ct. App. 1994) (citations omitted). In reviewing the record, we conclude there is substantial evidence to support the pension board's decision. The medical board and the pension board found that none of Kowalski's accidents, standing alone, were substantial factors in his disability. Each accident was viewed as medically insignificant. The medical board found that Kowalski's entire workplace exposure was the cause of his disability. The medical board found that he had pre-existing degenerative changes prior to his first accident. It found that after each of his injuries, he returned to work without significant restrictions or permanent disability. The medical records reviewed by the medical board provide substantial credible evidence to support these findings.

¶12 Kowalski points to the opinion of Dr. Richard Karr which indicated that all of Kowalski's back injuries were causative factors in his progressive low back disability. Dr. Karr's opinion, notwithstanding the other medical records, supports the pension board's decision that none of the accidents caused the disability. The pension board elected to rely on the medical board's report, which was based on the medical records generated after each individual accident. This is

sufficient to uphold its decision. Inconsistencies between testimony of different witnesses are for the fact finder to resolve. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

*B. Equal Protection Claim.*

¶13 Kowalski also contends that the ordinance violates the equal protection clause. We disagree.

¶14 In reviewing an equal protection challenge (not involving a suspect class or a fundamental right), we evaluate the ordinance under the "rational basis" test to determine whether the pension board's interpretation and application was arbitrary and without any rational relationship to a legitimate governmental interest. ***Listle v. Milwaukee County***, 138 F.3d 1155, 1158 (7th Cir. 1998).

¶15 Kowalski contends there is no rational basis to grant benefits to employees who become disabled because of a single accident, but deny benefits to employees who become disabled after a series of accidents. We disagree. The trial court provided an ample explanation of the rational basis involved here. It stated that drawing a line between those workers disabled by a significant accident and other workers disabled by the cumulative effect of individually insignificant accidents

> makes causation more readily discernible. When injury occurs over the course of many years, it becomes much more difficult to ascertain whether non-work related injury or activity contributed to the disability. A simpler, cleaner and less litigious decision-making process is a legitimate state interest.
>
> When examining a single accident, the decision-maker's task is rendered simpler. Causation is more easily determined. The limitation narrows the number of applicants. Lastly, it is legitimate to preserve pension

> funds for those persons who can prove complete and permanent disability as a result of a single accident.

As noted by the trial court, "less litigious decision-making … is a legitimate state interest." *See* ***Listle***, 138 F.3d at 1160. Accordingly, because there is a legitimate state interest in affording the benefits to those who become disabled by a medically significant accident, the ordinance passes the rational basis test and does not violate the equal protection clause.

*By the Court.*—Order affirmed.

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