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Enter: *Marconi and Turcol* Exit: *Rizzo and Daily*

Stanley H. Jakala and Daniel P. Jakala

On October 19, 2006, in a 42-page opinion, the Illinois Supreme Court, in *Anthony Marconi, Appellee, v. The Chicago Heights Police Pension Board, et al.*, Appellants, Docket no. 101418, ruled that a policeman's disability pension must be based upon reviewing the entire record of a hearing in order to determine if a policeman is entitled to a duty related pension, or alternatively a non-duty related pension, and cannot be denied only on the basis that one of the three pension board doctors has determined that a police applicant for a duty related pension, or alternatively a non-duty police pension, was not disabled.

Accordingly, by requiring that the entire record of a hearing be reviewed, the concept of manifest weight of the evidence determines if a policeman is or is not entitled to a disability pension; manifest weight being that if the decision of the board to deny a police applicant a disability

pension cannot be supported by the evidence, then it is against the manifest weight. On the other hand, if the evidence of the hearing supports the denial of a disability pension, then the decision is not against the manifest weight of the evidence.

That manifest weight of the evidence controls is reflected in the language of the Illinois Supreme Court in its opinion of October 19, 2006, on page 30 of its decision, with the Illinois Supreme Court upholding the Chicago Heights Police Pension Board denial of Marconi's disability pension, as follows:

As the applicant for disability pension benefits, plaintiff had the burden of proof to establish his entitlement to either a duty-related to non-duty disability pension. After carefully considering the entire record, we hold that the Board's conclusion that plaintiff failed to satisfy his burden of proof in establishing his eligibility for a disability

pension is not against the manifest weight of the evidence. We therefore disagree with the appellate court's reversal of the Board's decision.

In addition, on pages 38-39, the Illinois Supreme Court asserts:

Indeed, we recently addressed a factually analogous situation in *Turcol v. Pension Board of Trustees of the Matteson Police Pension Fund*, 214 Ill.2d 521 (2005). In *Turcol*, the appellate court confirmed the pension board's decision in that case to deny the plaintiff a line-of-duty disability

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The Dilemma of the Denied Disability

Cary J. Collins

The Illinois Firefighters Pension Code sets forth a simple procedure for firefighters to obtain benefits for a disability in 40 ILCS 5/4-101 et seq. The benefits can be either of the following: Non duty disability (4-111), or Duty related disability (4-110). Occupational disease disability (4-110.1)

The procedures require the applicant for a disability to be examined by three physicians selected by the Firefighters Pension Board, 40 ILCS 5/4-112, and such evidence as the Board deems necessary shall be entered into evidence. The disability should be a permanent disability as defined under 40 ILCS 5/4-105(b). A permanent disability is one that is expected to last at least 12 months. An injury on or off the job to a firefighter usually results in a disability benefit.

Where Things go Terribly Wrong

In the event a firefighter who is injured is denied a disability benefit there is usually the opportunity to use sick time, receive Worker's Compensation Benefits or a light duty assignment. The Firefighter then returns to work and continues his/her career as a firefighter.

This however was not the case with John A. Dowrick a Downer's Grove firefighter who applied for a duty related disability. Dowrick was denied the disability benefit and subsequently lost his employment as a firefighter. *Dowrick vs. Downers Grove*, 362 Ill.App.3d 512, 218 Ill.2d 553 (appeal denied) (2006). Dowrick was injured in August 1998 with neck and back injuries. He was out of work in 1998 and

returned to full time work in 1999. In April 1999 Dowrick was assigned to light duty and then in December 1999, he applied for a disability pension.

Dowrick was examined by three (3) physicians selected by the Board; two found him disabled, the third found no medical reason why he could not perform his full duty work without restriction. The Pension Board denied the disability request of Dowrick as his condition did not render him permanently disabled from service in the Downers Grove Fire Department.

In June, Dowrick was sent to training exercises wherein he experienced an aggravation of his condition. He temporarily returned to full duty in the summer of 2000 but then experienced pain and loss of feeling in his hands and dropped a stretcher. Dowrick was sent home as sick, placed on Administrative Leave and once again assigned to light duty.

Unable to Perform Firefighter Duties

The Downers Grove Fire Department, after a meeting with Dowrick and his attorney, believed that Dowrick was unwilling and unfit to perform his firefighter duties. Charges were filed against Dowrick; the record of the testimony and medical records were entered into the record at a hearing before the Board of Fire

and Police Commissioners.

The Downers Grove Board of Fire and Police Commissioners terminated Dowrick. Circuit Court Judge Bonnie Wheaton overturned the decision. The Appellate Court of the Second Circuit reversed Judge Wheaton's decision and affirmed the Downers Grove Board of Fire and Police Commissioners firing of Dowrick.

The Appellate Court stated, "at first blush it seems incongruous that

"...keep in mind "the purpose of laws for firemen's pensions is beneficial and statutes of that character should be liberally construed in favor of those to be benefited."

separate administrative findings could lead to a firefighter being discharged because of a disability while also being denied a disability pension."

The Circuit Court reasoned that the Pension Code and the Illinois Municipal Code, which governs employment of firefighters, have different standards. The Pension Code standard, being more stringent, requires the applicant to be examined by three physicians to determine that the firefighter is disabled. The employment statute of the Illinois Municipal Code believing that in order to protect the citizens a firefighter who has a condition which may or does make him/her unfit should be discharged in order to protect the public.

An argument on the issue of *Res Judicata* on the Pension Boards decision was unsuccessful.

The Dilemma of the Denied Disability

Continued

Pratfalls of Pension Board Decisions

The Decision of the Downers Grove Firefighters Pension Board was rendered prior to the new five person firefighters pension boards.

The firefighters pension boards should keep in mind "the purpose of laws for firemen's pensions is beneficial and statutes of that character should be liberally construed in favor of those to be benefited." *Colton vs. Board of Trustees of Firemen's Pension Fund of Bloomington*, 287 Ill. 56, 122 N.E. 73 (1919) a long established principal.

End Game

The circumstances surrounding Dowrick are most disturbing and give rise to the following questions:

Was Dowrick fired for being unwilling to perform the duties or because he was unable to perform the duties?

Why was there no subsequent application for disability benefits when Dowrick aggravated his back in June 2000?

Was Dowrick interested in proving he was fit to perform the duties of a firefighter?

Interesting questions, but it lays a basis for the strong duty of Firefighter Pension trustees to keep in mind the purpose of these beneficial provisions for firefighters when considering disability applications.

Other Cases

Bowlin vs. Murphysboro Firefighters Pension Board of Trustees, 2006 WL 2666074 (app 5th Dist.) In this case a firefighter applied for a disability due to injuries sustained on April 2, 2002 and March 7,

2003; both incidents were documented and it was undisputed that Bowlin suffered from congenital spondylolisthesis at L5-S1. Bowlin applied for a duty disability based upon his inability to perform duties as a firefighter. Bowlin was examined by three board selected physicians; all three found Bowlin disabled to varying degrees from complete to moderate with the possibility that surgery may permit his return to full time duties as a firefighter.

The testimony of Bowlin established that he had gone elk hunting and white water rafting and in both instances he had taken precautions to avoid exceeding restrictions for lifting. Bowlin testified he no longer engaged in other physical activities, such as rock climbing, due to his condition.

The Pension Board unanimously denied Bowlin's disability citing the reports which indicated a moderate degree of disability and possible surgery. The Circuit Court confirmed the Pension Board's Decision.

The Appellate Court reversed the decision. The court said the Pension Board had substituted its lay opinions for medical opinions of the five physicians. All the physicians stated Bowlin had some degree of disability. The court also said even if Bowlin is incapable of performing the highly strenuous duties involved in firefighting, he is not relegated to sitting in front of a television. The fact that Bowlin may still lead a somewhat full life is immaterial to the Board's inquiry.

McKee vs. Champaign Police Pension Fund, 2006 WL 2615848 (4th Dist 2006). Due process was

not denied an officer when deliberations by the Pension Board were made in closed session. The Illinois Open Meetings Act 5 ILCS 120/2 (c) (4) and Boards Rules and Regulations permitted deliberations in closed session to consider evidence presented in open hearing or closed hearing specifically authorized by law.

SEDLCOK vs. Board of Trustees of Police Pension Fund of City of Ottawa, 2006 WL 2465648 (3rd Dist 2006). This case determined that the Police Pension Board under section 40 ILCS 5/1-101.2, 1-109 and 3-132 of the Pension Code had statutory authority to determine police officers salary for purposes of calculating officers retirement. Section 4-123 of the Pension Code permits Firefighters Pension Funds to manage and control the Pension Fund. A police chief was given a 30% pay increase his last week of work.

Calibraro vs. Buffalo Grove Firefighters Pension Fund, 2006 WL 2494354. The Village of Buffalo Grove Firefighter's Pension Fund Board of Trustees had conducted an open hearing at which the firefighter was present and had proper notice of the hearing to consider evidence regarding firefighter's application for disability benefits. The Firefighters Pension Board was authorized under the open Meetings Act to conduct deliberations in closed session to consider the evidence and testimony presented at open hearing.

Property Ownership: Tenancy by Entirety

Joseph Crimmins

This article is on the topic of owning property in tenancy by the entirety. It is the first of two parts concerning asset protection from creditors and lawsuits, etc. Although our newsletters have primarily concerned police and fire pensions, we will expand into other similar and relevant topics in the future.

The estate of tenancy by the entirety came into existence in Illinois in 1990. The statute is found at 765 ILCS 1005/1c, Joint Tenancy Act. It only applies to married couples, and only to homestead property, not investment property or vacation homes, etc. When title is held this way, a judgment against only one spouse cannot be enforced against the property, as long as the spouses own the home together. It is still a lien on the land, and can be enforced upon the sale of the home. It is the timing of the transfer into tenancy by the entirety that has led to litigation

between homeowners and creditors. Until the law was developed, creditors used the Uniform Fraudulent Transfer Act (UFTA) to argue that the transfer was made with fraudulent intent. The following cases have developed the law in this area:

In 1994, the Appellate Court,

2nd District, decided the case of McKernan v. Gregory. A creditor obtained a judgment against the husband, he subsequently transferred his home into tenancy by the entirety, and the creditor argued that the transfer was made with intent to defraud and should therefore be nullified pursuant to the UFTA. The Court decided that the husband could make the transfer regardless of his intent to defraud. "It simply cannot be fraudulent to engage in conduct that is specifically sanctioned by statute." In 1997, the Appellate Court, 1st District, made the opposite decision with the same facts. The Court decided that the legislature did not intend to encourage or promote fraudulent conduct.

In 1997, the Legislature clarified the tenancy by the entirety statute with an amendment that stated a transfer could not be made *if the property was transferred with the sole intent to avoid the payment of debts existing at the time of the transfer, beyond the transferor's ability to pay those debts.*" Part of the confusion at this time was that under the UFTA, a transfer was fraudulent if it was made with actual intent to defraud. The statute then listed some "badges of fraud" that the Court could use to decide if fraud

was involved. The *sole intent* standard of the 1997 amendment provides greater protection from creditors for transfers of property to tenancy by the entirety. A transfer that would have been fraudulent under the UFTA's actual intent standard would not be fraudulent under the sole intent standard, as long as the transfer accomplished some other legitimate purpose, in addition to avoiding payment of a creditor or judgment.

In 2000, the Illinois Supreme Court put the matter to rest in the case of Premier v. Chavez. The Court ruled that the UFTA's actual intent standard may not be used to set aside a transfer of property into tenancy by the entirety. "The General Assembly intends to provide spouses holding homestead property in tenancy by the entirety with greater protection from the creditors of one spouse than that provided by the Fraudulent Transfer Act."

"It simply cannot be fraudulent to engage in conduct that is specifically sanctioned by statute."



Enter: Marconi and Turcol

Continued from page 1

pension. However, the appellate court then went on to address the plaintiff's argument that section 3-115 of the Pension Code was unconstitutional and rejected it. We then granted the plaintiff's petition for leave to appeal in order to resolve a conflict regarding the construction of the three-physician requirement contained in section 3-115. We subsequently determined, however that leave to appeal in *Turcol* had been improvidently granted, as "[i]t is fundamental that courts should consider the constitutionality of a statute only when necessary to decide the case." *Turcol*, 214 Ill.2d at 524. We noted that the record revealed that the pension board in that case had declined to award the plaintiff a disability pension on the alternative ground that the plaintiff had failed to prove his

disability. Therefore, the appeal in *Turcol* was dismissed.

Based upon the above cited language, for purposes of emphasis, it is evident that manifest weight controls that the *Rizzo v. Board of Trustees of Village of Evergreen Park Police Pension Fund*, 338 Ill.App.3d 490 (1st Dist. 2003), and *Daily v. Board of Trustees of the Springfield Police Pension Fund*, 251 Ill.App.3d 119 (4th Dist. 1993), decisions, holding that if one of the three pension board doctors determines that a police officer is not disabled, then the police officer loses his disability pension, no longer control.

In fact, the Illinois Supreme Court in *Marconi* referenced neither *Rizzo* nor *Daily*, but emphasized that *Turcol* controls when, in *Turcol v. Pension Board of*

Trustees of the Matteson Police Pension Fund, 214 Ill.2d 521 (2005), supervisory order, the Illinois Supreme Court in no uncertain terms unequivocally asserted that manifest weight is the principle that applies, with the consequence that both *Turcol* and *Marconi* dramatically changed the law.

At least, a police applicant cannot be denied a disability pension because one board doctor determined that the police officer is not entitled to a disability pension.

Therefore, enter *Marconi* and *Turcol*, exit *Rizzo* and *Daily*.

Editors Note: Jerome Marconi represented Marconi and Stanley and Danny Jakala represented Turcol.

IPPAC FALL INFORMATIONAL SEMINAR AND HOLIDAY CELEBRATION

Don't forget the Fall Informational Seminar is

DECEMBER 8, 2006

and starts later than usual at **11:00 am!**

The **Holiday Celebration** begins at 5:00 pm. You don't want to miss out on the great prizes that will be raffled off!

The **Chicago Hounds Hockey Game** begins at 7:30 pm. There are a limited amount of Hounds tickets so reserve your seat today!

If you need a place to stay overnight, the **Hilton Hotel** is offering special room rates of \$49.00 for Friday night!

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