

2014 IL App (2d) 131002-U
No. 2-13-1002
Order filed August 13, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MICHAEL SHAFER,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellant,)	
)	
v.)	No. 13-MR-138
)	
LAKE IN THE HILLS PENSION BOARD)	
and its members, DAN HUDSON, President,)	
STAN HELGERSON, Vice President, TED)	
ZIARKOWSKI, Secretary/Trustee, MARY)	
FRAKE, Trustee, and LARRY HOWELL,)	
Trustee,)	Honorable
)	Michael T. Caldwell,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

- ¶ 1 *Held:* The Board properly ruled that plaintiff's disability was not caused by an act of duty: although plaintiff was duty-bound to bench-press a minimum amount of weight, he was not duty-bound to go on to attempt to bench-press the heavier weight that he was lifting when he was injured.
- ¶ 2 Plaintiff, Michael Shafer, appeals from an order of the circuit court of McHenry County affirming the decision of the Lake in the Hills Pension Board (Board) denying plaintiff's

application for line-of-duty disability benefits and instead awarding him nonduty benefits. We affirm.

¶ 3 On November 6, 2011, plaintiff, who was then employed by the Village of Lake in the Hills (Village) as a police officer, participated in physical fitness testing specified in the collective bargaining agreement between the Village and the Metropolitan Alliance of Police Lake in the Hills Police Chapter #90. Section 17.8 of the agreement provided as follows:

“Officers agree to participate upon the implementation of a department policy requiring all sworn personnel to participate in a wellness program. The program shall consist of an annual P.O.W.E.R. TEST as described by the Illinois Local Governmental Law Enforcement Officers Training Board and effective January 1, 1990. The physical fitness test shall be limited to: sit and reach test, 1 minute sit up test, 1 repetition maximum bench press, 1.5 mile run, and/or the 3 mile walk. All participants shall be required to meet the same percentile rank in terms of their respective age/sex group. The performance requirement shall be that level of physical performance that approximates the 40th percentile for each age and sex group. Participants failing to meet the performance requirements shall be subject to progressive discipline. Participants who meet that level of performance that approximates the 50th percentile for that participant’s age/sex group shall receive six (6) hours of compensatory time, 60th percentile for the participant’s age/sex group shall receive eight (8) hours of compensatory time, 70th percentile for the participant’s age/sex group shall receive ten (10) hours of compensatory time, 80th percentile for the participant’s age/sex group shall receive twelve (12) hours of compensatory time, 90th percentile for the participant’s age/sex group shall receive

fourteen (14) hours of compensatory time, and 100th percentile for the participant's age/sex group shall receive sixteen (16) hours of compensatory time.”

¶ 4 Each test is pass/fail. If a participant achieved the 40th percentile on the first attempt, he or she would pass the test. Participants were not obligated to attempt to bench press more than the minimum weight necessary to achieve the 40th percentile. A participant could elect to do so, however, to qualify to earn additional compensatory time. Using free weights, plaintiff successfully completed the bench-press test by lifting the minimum weight. He was then asked if he wished to attempt to increase the weight to the 80th-percentile level. Plaintiff decided to attempt to lift the heavier weight. When he lifted the bar off the bench, he felt his shoulder “give out.” He was later found to have torn his right rotator cuff. An attempt to repair the injury surgically was unsuccessful. The Board concluded that plaintiff was disabled as a result of the November 6, 2011, incident, but that he did not sustain the disabling injury in the performance of an act of duty. Plaintiff filed a complaint for administrative review of the decision and, as noted, the trial court affirmed the Board's decision.

¶ 5 As pertinent here, section 3-114.1(a) of the Illinois Pension Code (Code) (40 ILCS 5/3-114.1(a) (West 2012)) provides, “If a police officer as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, the police officer shall be entitled to a disability retirement pension equal to *** 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement.” Under section 3-114.2 of the Code (40 ILCS 5/3-114.2 (West 2012)), a police officer who becomes disabled as a result of any cause other than an act of duty is entitled to a pension equal to 50% of the salary attached to the

officer's rank at the date of suspension of duty or retirement. The Board concluded that plaintiff was disabled from service as a police officer as a result of his shoulder injury. The Board concluded, however, that the injury was not the result of, or incurred in, the performance of an act of duty. Although plaintiff applied only for a line-of-duty disability pension under section 3-114.1(a), the Board awarded him a nonduty pension under section 3-114.2.

¶ 6 On appeal from a judgment in an administrative-review proceeding, we review the agency's decision, not the trial court's. *Fedorski v. Board of Trustees of the Aurora Police Pension Fund*, 375 Ill. App. 3d 371, 372 (2007). As we noted in *Fedorski*:

“The agency's findings of fact will be upheld unless against the manifest weight of the evidence, but rulings of law are reviewed *de novo*. [Citation.] An administrative agency's decision on a mixed question of fact and law will be upheld unless clearly erroneous. [Citation.] ‘A mixed question exists where the historical facts are admitted or established, the rule of law is undisputed, and the only issue is whether the facts satisfy the settled statutory standard.’ [Citation.]” *Id.* at 372-73.

Here the relevant facts are not in dispute. The outcome of this appeal depends on the meaning of the statutory term “act of duty.” It is not, however, clear whether we need to interpret the statutory term or to apply it to the undisputed facts. One line of cases holds that where the facts are undisputed, the interpretation of a statutory term nevertheless raises a question of law and our review is *de novo*. *Id.* at 373; *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595, 598 (2004). Another line of cases holds that applying the law to the undisputed facts presents a mixed question of law and fact to which the clearly erroneous standard of review applies. *Jones v. Board of Trustees of the Police Pension Fund of the City of Bloomington*, 384 Ill. App. 3d 1064, 1068 (2008); *Merlo v. Orland Hills Police Pension Board*, 383 Ill. App. 3d 97, 100 (2008).

We need not decide definitively which standard we are applying as the result is the same under either standard.

¶ 7 Our supreme court has held that, for purposes of section 3-114.1(a), the definition of “act of duty” set forth in section 5-113 of the Code (40 ILCS 5/5-113 (West 2012)) applies. *Robbins v. Board of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 540-41 (1997). As pertinent here, section 5-113 defines an “act of duty” as “[a]ny act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment.” 40 ILCS 5/5-113 (West 2012). In *Fedorski*, we explored the body of case law considering the scope of this definition:

“We have noted that ‘[o]ur supreme court has expressly rejected the notion that the term “special risk” encompasses only inherently dangerous activities.’ [Citation.] In *Johnson v. Retirement Board of the Policemen’s Annuity & Benefit Fund*, 114 Ill. 2d 518, 521 (1986)], a citizen involved in a traffic accident requested assistance from a police officer who was directing traffic. As the officer walked across the street in response to the request, he slipped and suffered a disabling injury. Even though crossing the street did not itself involve any special risk, our supreme court concluded that the officer was entitled to a line-of-duty disability pension because he was performing an act of duty—responding to a citizen’s request for assistance—when he was injured. *Johnson*, 114 Ill. 2d at 522. As we noted in *Alm*, ‘*Johnson* teaches that in determining whether an officer is entitled to a line-of-duty benefit, “[t]he crux is the capacity in which the police officer is acting” rather than the precise mechanism of injury.’ [Citation.] *Johnson* ‘preserves the requirement that an act of duty be something involving a risk not shared by ordinary

citizens.’ [Citation.] But ‘an officer performing duties involving special risks will be entitled to line-of-duty benefits even if the immediate cause of injury is an act involving only an ordinary risk.’ [Citation.]” *Fedorski*, 375 Ill. App. 3d at 373-74.

¶ 8 In *Johnson*, our supreme court emphasized that “unlike an ordinary citizen, the policeman has *no* option as to whether to respond [to a citizen’s request for assistance]; it is his duty to respond regardless of the hazard ultimately encountered.” (Emphasis in original.) *Johnson*, 114 Ill. 2d at 522. The *Johnson* court added that “[t]here is no comparable civilian occupation to that of a traffic patrolman responding to the call of a citizen.” *Id.*

¶ 9 It is not entirely clear whether *Johnson* should be read to mean that only the *occupational* hazards of ordinary civilian life are germane to the risk-calculus that defines “act of duty.” The pertinent language of section 5-113 draws no distinction between occupational and nonoccupational risks of civilian life. Notably, in *Alm*, where a divided panel of this court held that an officer injured while assigned to bicycle patrol was entitled to a line-of-duty disability pension, the majority focused not merely on the fact that, in ordinary walks of life, riding a bicycle is a recreational activity. Rather, we noted how bicycle patrol duty differed from recreational cycling:

“While on patrol, plaintiff faced risks not ordinarily encountered by civilians. He was required to ride his bicycle at night over varying terrain, looking after his own personal safety while also remaining vigilant in the performance of his patrol duties. Plaintiff was also carrying a significant amount of additional weight. Under these conditions, risks include falls and collisions as well as dangerous encounters with unsavory elements of society. This particular duty has no clear counterpart in civilian life.” *Alm*, 352 Ill. App. 3d at 601.

¶ 10 Here, plaintiff was injured while performing a bench press. Plaintiff does not dispute that citizens in ordinary walks of life perform the same exercise and are at risk of injury when they do so. Plaintiff argues, however, that “[a]lthough the injury could have happened to a civilian while lifting weights, the Plaintiff suffered the injury while performing a police act that involved a special risk, because ordinary citizens are *not* required to take ‘mandatory physical tests.’” (Emphasis in original.) This argument seems to focus solely on the occupational risks of ordinary civilian life. As discussed above, that focus might be too narrow. We need not resolve the issue, however. Because plaintiff was under no duty to attempt the particular “physical test” that led to his injury, his argument fails regardless of whether the test would *otherwise* be deemed to involve a special risk.

¶ 11 An “act of duty” is not merely an act involving “special risk”; the act must also be one that is “imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment.” 40 ILCS 5/5-113 (West 2012). After successfully lifting the minimum weight necessary to pass the bench-press test, plaintiff was given the option of increasing the weight so as to earn additional compensatory time. It is clear, however, that the collective bargaining agreement did not impose any duty on plaintiff to attempt to exceed the minimum requirement. Plaintiff has not identified any statute, ordinance, regulation, or special assignment that imposed such a duty. Once plaintiff passed the bench-press test, his election to attempt to lift a heavier weight was for his personal benefit.

¶ 12 Plaintiff protests that the Board’s decision to deny his application for a line-of-duty pension “effectively thwarts and frustrates the [collective bargaining agreement’s] contractual language and turns Section 17.8 *** into a ‘personal risk’ to each police officer who chooses to

exceed the minimum standards.” Why, plaintiff asks, “would any police officer attempt to exceed the minimum standards, and face the same outcome as Plaintiff?” Plaintiff fails to explain the legal significance of this point. Our task is to interpret and apply the language of the *Code*. Plaintiff cites no authority, and we are unaware of any, that the terms of a collective bargaining agreement between a municipality and a labor union representing its police officers have any bearing on the meaning of statutory language.

¶ 13 Plaintiff argues that, in choosing to attempt to lift more than the minimum required weight, he was simply exercising discretion in the performance of his duty to participate in physical fitness testing. Relying on *Alm*, plaintiff argues that the existence of such discretion does not foreclose the conclusion that he was performing an act of duty. The argument is meritless.

¶ 14 In *Alm*, the Lincolnshire Police Pension Board concluded that, pursuant to *Johnson*, because an officer injured while on bicycle patrol was not responding to a call for assistance but was merely riding at his own pace and discretion, he was not performing an act of duty. We rejected the conclusion:

“The *Johnson* court explained that the officer did not have discretion with regard to whether or not he would help the motorist. [Citation.] This supported the court’s conclusion that the actions performed by the officer were not those of an ordinary citizen because ‘unlike an ordinary citizen, the policeman has *no* option as to whether to respond; it is his duty to respond regardless of the hazard ultimately encountered.’ (Emphasis in original.) [Citation.] In short, the *Johnson* court discussed whether or not the officer had discretion to perform the act, not discretion with respect to the manner in which the precise physical components of the act were performed. Whether an officer

has discretion to perform an act is relevant to determine whether the capacity in which he is acting involves special risk and is, therefore, an act of duty. However, the discretion involved in performing specific physical activities is not relevant because such discretion does not bear upon the capacity in which the officer is acting.” *Alm*, 352 Ill. App. 3d at 602.

Here, plaintiff was duty-bound to attempt to bench-press the minimum weight to achieve the 40th percentile for his age and sex. Once he did so, however, he had fulfilled that duty. When plaintiff elected to attempt to bench-press a heavier weight, he was not exercising discretion *with respect to the manner in which to perform his duty*; he was simply exercising *personal* discretion in balancing the risk of injury against the possibility of earning additional compensation. *Alm* is therefore inapposite.

¶ 15 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 16 Affirmed.