COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Kevin Sanko,**

 Petitioner

**Worcester Regional**

**Retirement Board,** Docket No.: CR-12-659

RespondentDate Issued: April 27, 2018

**Appearance for Petitioner:**

Theresa Benoit, Esquire

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**Appearance for Respondent:**

Michael Sacco, Esquire

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**Administrative Magistrate:**

Judithann Burke

**AMENDED SUMMARY AFTER REMAND**

 This Decision following the CRAB remand was issued on April 13, 2018. It is hereby being amended to reflect that the Petitioner underwent a regional medical evaluation on September 13, 2012. The unanimous panel answered the certificate in the affirmative. This case summary, the Findings of Fact and the first and final sentences of the conclusion are hereby amended to reflect this fact. The Petitioner has met his burden of proving that he is entitled to accidental disability retirement benefits. Further, he did not commit willful misconduct in the performance of his duties and he was injured in the performance of his duties on February 26, 2018.

**DECISION**

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Kevin Sanko, is appealing the November 27, 2012 decision of the Respondent, the Worcester Regional Retirement Board (WRRB), denying his application for Section 7 accidental disability retirement benefits. (Exhibit 1.) The appeal was timely filed on December 4, 2012. (Exhibit 2.) A hearing was scheduled to be held on January 6, 2015 at the Worcester Registry of Deeds, 90 Front Street, Worcester, MA. Thirty-one (31) exhibits were marked. Both parties submitted pre-hearing memoranda. (Respondent-Attachment A; Petitioner-Attachment B.) On the day of hearing, The parties submitted their cases on the respective documents, pursuant to 801 CMR 1.01(10)(c), and filed post hearing briefs on the narrow issues for determination: (1) whether the Petitioner committed serious and willful misconduct, which resulted in his disability, and (2) whether the Petitioner was in the performance of his duties when the injury occurred. The last of the submissions was received on February 18, 2015, thereby closing the administrative record at that time. (Respondent-Attachment C; Petitioner Attachment D.)

I issued a Decision on July 10, 2015 wherein I concluded that the Petitioner committed “willful misconduct” in the performance of his duties and that he was in violation of G.L. c. 90, §§ 13 & 13A at the time he was injured. Both parties filed appeals with the Contributory Retirement Appeal Board. The Petitioner appealed the finding of “willful misconduct.” The Respondent appealed the finding that the Petitioner was “injured in the performance of his duties.”

On May 25, 2017, the Contributory Retirement Appeal Board remanded the matter to the Division of Administrative Law Appeals on the basis that the original record was not sufficient to allow a determination of whether the Petitioner’s conduct was “willful.” I was directed to conduct an evidentiary hearing and take the testimony of the Petitioner. I was further instructed to consider whether the Petitioner would have injured his right shoulder on February 26, 2008 if he had been wearing his seatbelt; and, if the answer is “no,” whether he has failed to show that his injury occurred “as a result of” his work duties.

I held a remand hearing on December 7, 2017 at the offices of the Worcester Registry of Deeds, 90 Front Street, Worcester, MA. The Petitioner testified at the hearing. The Respondent presented the testimony of retired Leicester Highway Department Superintendent Thomas Wood.

I marked additional Exhibits 32-35B. The record was left open in order that the parties obtain a written transcript and file post-hearing memoranda. The last of these submissions was received on April 6, 2018, thereby closing the record. (Petitioner-Attachment E; Respondent-Attachment F.)

**ORIGINAL FINDINGS OF FACT**

Based upon the testimony and documents submitted at the hearing in the above-captioned matter, I hereby render the following findings of fact:

1. The Petitioner, Kevin Sanko, was hired as a Heavy Equipment Operator with the Leicester Highway Department in February 1997. (Exhibit 3.)
2. The Petitioner suffered a right shoulder injury on July 12, 2007 when he slipped on fuel oil while alighting from his truck. (Exhibits 3, 4, 22.)
3. The Petitioner was diagnosed with a superior labrum, anterior to posterior (SLAP) tear and tendonitis after receiving an MRI on September 18, 2007. To repair damage from these injuries, the Petitioner underwent decompression surgery with a resection of the right clavicle on December 12, 2007. (WebMD, Exhibit 20.)
4. While on duty on February 26, 2008, the Petitioner was operating a town-owned dump truck in a rain/snow storm when the truck malfunctioned. He radioed the break-down to his supervisor, who sent a mechanic out to attempt to repair it. The mechanic determined that the dump truck would have to be towed back to the Highway Garage, and attached the dump truck to a front-end loader with one chain. The Petitioner was instructed by his supervisor to stay in the cab of the dump truck in order to operate the steering and breaking mechanisms. At one point during the move, the dump truck’s breaks malfunctioned, causing the dump truck to rear-end the front-end loader, throwing the Petitioner to the passenger-side floor where he re-injured his right shoulder. (Exhibit 12, 20.)
5. The Petitioner’s seatbelt had not been buckled. (Stipulation.)
6. It was common practice at the Leicester Highway Department to have an operator remain in a vehicle which was being towed. (Exhibit 12.)
7. The Petitioner underwent right shoulder arthroscopic surgery after an arthrogram on June 11, 2008. (Exhibit 20.)
8. The Petitioner underwent right shoulder surgery for decompression, debridement, and a SLAP repair on July 9, 2008. (*Id.*)
9. The Petitioner began physical therapy for his should on October 7, 2008. (Exhibit 24.)
10. The Petitioner returned to work on January 23, 2009 with continued right shoulder pain. (Exhibit 20.)
11. After persistent complaints of right shoulder pain, the Petitioner underwent an MRI on September 2, 2011. The MRI revealed postoperative changes: a small rotator cuff tear and tendinitis. (Exhibit 20.)
12. The Petitioner underwent right shoulder surgery for bicipital tenodesis and arthroscopic debridement decompression on September 28, 2011. (Exhibit 20.)
13. The Petitioner filed for accidental disability retirement benefits on March 26, 2012 on the basis of a personal injury that resulted from the events of July 12, 2007 and February 26, 2008. (Exhibit 3.)
14. The Petitioner’s application was denied on February 21, 2012 by the Respondent without the convening of a medical panel. (Exhibit 1.)
15. The Petitioner filed a timely appeal on March 6, 2012. (Exhibit 2.)

**ORIGINAL CONCLUSION**

G.L. c. 32, § 7(1) provides the conditions for the successful application for accidental disability retirement benefits within the Commonwealth’s retirement system. This section

provides, in pertinent part:

[a]ny member in service . . . who is unable to perform the essential duties of his job and that such inability is likely to be permanent before attaining the maximum age for his group **by reason of a personal injury sustained or a hazard undergone** as a result of, and **while in the performance of his duties** at some definite place and at some definite time on or after the date of his becoming a member . . . **without serious and willful misconduct on his part** . . . shall be retired for accidental disability[.] (Emphasis added.)

 The issues for determination in this appeal are: whether the Petitioner committed serious and willful misconduct; and, whether the Petitioner was in the performance of his duties when the latter right shoulder injury occurred.

**Serious and Willful Misconduct by the Petitioner**

G.L. c. 32 § 7(1) requires that the Petitioner have not engaged in “serious and willful misconduct” in order for accidental disability benefits to be granted. The WRRB advances the argument that the Petitioner’s injury was the result of “serious and willful misconduct”, and that it was therefore correct in denying the Petitioner’s application for accidental disability. The Petitioner was riding the dump truck to which he had been assigned while it was being towed. He was not wearing a seatbelt.

“Serious and willful misconduct" is "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." *Kenneth Jones v. Weymouth Ret. Bd.*, CR-04-181 (DALA 2005) quoting *Scaia's Case*, 320 Mass. 432, 433-434 (1946) and *Dillon's Case*, 324 Mass. 102, 106-110 (1949). “The word serious refers to the conduct itself and not to its consequences. Willful implies intent or such recklessness as is the equivalent of intent.” *Dillon’s Case*, 324 Mass. at 110. “In order to prove willful misconduct, [the Respondent would] have to establish facts to support the proposition that an employee acted with deliberate indifference to probable grave injury.” *Tripp’s Case*, 355 Mass 515, 518 (1969).

 Riding in a vehicle while it is being towed is prohibited under G.L. c. 90, § 13. Section 13 states in pertinent part: “[n]o person or persons . . . shall occupy a trailer or semi-trailer while such trailer or semi-trailer is being towed, pushed or drawn or is otherwise in motion upon any way.” A trailer is “any vehicle or object on wheels and having no motive power of its own, but which is drawn by, or used in combination with, a motor vehicle.” See G.L. c. 90 § 1. The dump truck that the Petitioner was operating was a trailer under this definition as it was broken down and as such had no motive power of its own, and was hitched to the front-end loader in order to tow it.

The dangers of riding in a vehicle while it is being towed are self-evident and could result in serious injury, as it did in the present case. These risks grow exponentially when severe weather is a factor; as there was in the present case. The Petitioner intended to be in the cab of the dump truck, as he rode in the cab of the dump truck numerous times before while it was being towed. Additionally, the Petitioner’s supervisor reported that having his workers ride in the cab of a truck while it was being towed was a common practice with the Leicester Highway Department, and that the accident involving the Petitioner was a “freak accident”. In further support of the Respondent’s contention that the Petitioner “acted with deliberate indifference to probable grave injury” the Petitioner was not wearing his seatbelt.[[1]](#footnote-1) Seatbelts are placed in vehicles to keep those in an accident in their seat to prevent additional injury.

 The Petitioner claims that 49 C.F.R. § 390.3(f)(2) exempts him from all state and federal laws, except for drug testing and weight requirements. This contention is a gross exaggeration of what the regulation actually says. The regulation states “Unless otherwise specifically provided, the rules *in this subchapter* do not apply to [t]ransportation performed by the Federal government, a State, or any political subdivision of a State, or an agency established under a compact between States that has been approved by the Congress of the United States.” 49 C.F.R. § 390.3(f)(2). Although the Petitioner was in a state-plated vehicle, 49 C.F.R. § 390.3(f)(2) exempts the Petitioner from only the rules within the subchapter of the regulation, neither of which are the requirement to wear a seatbelt nor refrain from being in a vehicle while it is being towed.

**Within the Performance of the Petitioner’s Duties**

G.L. c. 32, §7(1) also requires that the disability claimed on the application occurred “as a result of, and while in the performance of, [the Petitioner’s] duties” for it to be compensable. The Petitioner bears the burden of proof to establish a causal nexus between an injury and his disability. *Campbell v. Contributory Ret. Appeals Bd.*, 17 Mass. App. Ct. 1018 (1984). At issue presently is whether the Petitioner was injured while in the performance of his duties.

On February 26, 2008, the Petitioner was plowing in a rain and snow storm when the dump truck malfunctioned. He radioed the break-down to his supervisor who sent a mechanic out, in a front-end loader in order to repair it. The mechanic determined that the dump truck would have to be towed, and attached the Petitioner’s dump truck to his front-end loader with a chain. The Petitioner stayed in the cab of the dump truck in order to operate the steering and breaking mechanisms. At one point, the dump truck’s breaks malfunctioned, causing the dump truck to rear-end the front-end loader, throwing the Petitioner to the passenger-side floor where he re-injured his right shoulder.

Per *Namvar v.* *Contributory Ret. Appeals Bd.*, “with respect to injuries sustained in the course of travel . . . if an employee were injured while going from one place at which []he had an employment obligation to another such place, or while actually performing an employment duty during travel, then such injuries would satisfy both “as a result of” and “while in the performance of” employment duties.” G.L. c. 32, § 7(1). *See* 422 Mass 1004, 1005 (1996). In the present case, the Petitioner was moving from one employment obligation, plowing the roads during the storm, to another employment obligation, returning to the Highway Garage for further instruction. As a result, his injury did indeed occur while in the performance of his duties.

Although the injury did occur in the performance of his duties, the Respondent was correct in denying his application without convening a medical panel due to the “serious and willful misconduct” of the Petitioner. “[T]he strict causation requirement of G.L. c. 32 § 7(1) can yield harsh results for employees who have suffered disabling injuries.” *Richard v. Ret. Bd. Of*

*Worcester*, 431 Mass. 163, 167 (2000). Unfortunately, this is one such result.

For the foregoing reasons, the Petitioner’s appeal of the WRRB’s decision fails and the decision of the Board is AFFIRMED.

 **ADDITIONAL FINDINGS OF FACT**

1. The Petitioner had a class 2 CDL license at the time of his February 2008 accident. Qualifications for this license did not include any training regarding safe towing practices. The Petitioner never undertook any such training. (Petitioner Testimony and Wood Testimony.)
2. On February 26, 2008, the Petitioner was driving a Highway Department plow vehicle. The vehicle weighs more than 18,000 pounds. (*Id.* and Exhibit 32.)
3. The plow truck is not a trailer as it had motor power of its own along with brakes and steering. The Petitioner was inside the plow truck for the purpose of utilizing the steering mechanism and the brakes. (Petitioner Testimony.)
4. After completing his plowing and sanding activities on the evening of February 26, 2008,

the Petitioner’s plow truck broke down. He heard something “blow” in the engine. The Petitioner notified Leicester Highway Superintendent Wood, his supervisor. (*Id.* and Wood Testimony.)

1. Mr. Wood instructed the Petitioner to stay with the broken down vehicle and that he, the former, would notify the Highway Garage so that a mechanic would come to evaluate the vehicle. (Petitioner and Wood Testimony.)
2. The mechanic, who was also the Petitioner’s superior, came to the site and determined that the vehicle had a broken oil line and was inoperable. The mechanic determined that a front end loader was needed. Subsequently a front-end loader arrived at the scene at approximately 11:00 P.M. The operator of the loader was Stephen Robidoux. (Petitioner Testimony.)
3. Mr. Wood radioed instructions that the Petitioner was to bring the plow truck back to the Highway Garage. (*Id.* and Wood Testimony.)
4. The mechanic directed the Petitioner to chain the plow truck to the front-end loader so that it could be pulled back to the Garage. The Petitioner went into the cab of the truck and fastened his seat belt. The front-end loader pulled the plow truck from the Cornerstone Bank parking lot toward the Highway Garage at 59 Peter Salem. The front-end loader stopped pulling the plow truck at the top of the hill from where the Highway Garage was situated. The Petitioner performed these duties at the behest of his supervisors, Mr. Wood and the mechanic. (Petitioner Testimony, Wood Testimony and Exhibit 33.)
5. It was custom and practice to be towed by attaching a single chain between a truck and a front end loader. (Petitioner and Wood Testimony.)
6. The plan at the top of the hill in front of the garage was to disconnect the chain from the front-end loader. However, at that time, the brakes of the plow truck would not release. The truck would not be able to coast into the Garage. The brake pads were locked on the wheels of the plow truck so the wheels could not spin. The mechanic evaluated the truck and decided that the “air tanks would need to be charged with the valve.” (Petitioner Testimony.)
7. The Petitioner unfastened his seat belt and exited the plow truck to assist the mechanic. They determined that the plow truck was a newer model and that it did not have the valve needed to recharge the air system with the air hose. (Petitioner Testimony.)
8. The mechanic determined that the front-end loader would be necessary to pull the plow truck into the Garage. The mechanic hooked the chain back up while the Petitioner returned the air hose to the mechanic’s car. (*Id.*)
9. As the Petitioner climbed back into the plow truck, the mechanic was speaking to him and giving him orders regarding what should be done once the vehicle reached the Garage. The Petitioner got into the plow truck as the front-end loader began to move. The plow truck collided with the front end loader. The Petitioner was pushed in the forward right direction from the impact. (Petitioner Testimony.)
10. The Petitioner attempted to brace himself when the collision occurred, but injured his right shoulder when he was thrown forward. (*Id.* and Exhibits 34A-C.)
11. Superintendent Wood was contacted and informed that the accident had occurred. He immediately went to the scene. He spoke to both Robidoux and the Petitioner. (Petitioner and Wood Testimony.)
12. Following the impact, the Petitioner reported to both the mechanic and Mr. Wood that he had injured his shoulder. He was experiencing shoulder pain. He told Mr. Wood that he would “be all right”. (*Id.*)
13. Mr. Wood requested that a second front-end loader come to the scene to assist in getting the first front-end loader and the disabled plow truck uncoupled. When this was achieved, both front-end loaders departed the scene. The Petitioner operated the disabled vehicle and coasted into the DPW yard. He then went home for the evening. (*Id.*)
14. An accident report was drawn up a day after the incident. The Petitioner completed the top of the report and Mr. Wood completed the remainder of the form. Mr. Wood wrote, “it was a freak accident. We have been doing this for years.” The Petitioner described his injury on the Accident Intake Form as “jammed right shoulder & arm.” Mr. Wood described the injury, in pertinent part, “Kevin was being towed by our loader after a break-down in storm. Truck lost brakes and hit loader-Kevin hit his arm on wing levers.” (Exhibit 12 and Wood Testimony.)
15. In the report, Mr. Wood indicated that the Petitioner was wearing safety gear at the time of the incident. However, this did not refer to seat belts. (Wood Testimony.)
16. On the same day, Robidoux complained to Mr. Wood of some back pain following the collision. (*Id.*)
17. The Petitioner was never disciplined by his employer as a result of this incident on February 26, 2008. No investigation was ever done regarding the incident. (Petitioner and Wood Testimony.)
18. On September 17, 2011, Charles Kenny, M.D. examined the Petitioner in relation to his worker’s compensation claim. Dr. Kenny reported that the Petitioner described his injury as follows:

As he was being towed at the top of the hill, suddenly his brakes released and, it happened so quickly that Mr. Sanko could not control it, and he crashed into the rear of the front end (*sic*) loader with his vehicle. This pushed the front end (*sic*) loader up an embankment and his vehicle went off to the side. At that point, the front end (*sic*) loader started down the embankment again and jerked on the chain pulling him so hard that he was thrown onto the floor of his vehicle…There was such a small area in front of the passenger seat upon which he had fallen that his right shoulder and arm were jammed and the arm was up on top of the passenger seat while he was lying on the floor in front of the seat.

(Exhibit 26.)

1. On February 27, 2012, James G. Nairus, M.D. examined the Petitioner in relation to his worker’s compensation claim. According to Dr. Nairus, the Petitioner described the February 26, 2008 injury as follows:

[H]e was broken down in a plow truck that he was driving in a snow storm. A front-end loader tried to pull this back to its facility and as it was doing this, the brakes of his plow truck malfunctioned causing him not to be able to stop and hit the front end loader. This caused him to fall on the floor of the passenger side of the truck. He experienced the immediate onset of increased right shoulder pain.

(Exhibit 27.)

1. On March 26, 2012, the Petitioner completed a Member’s Application for Disability Retirement and filed it with the WRRB. In describing the incident or hazard that formed his accidental disability claim, the Petitioner wrote, “While Being (*sic*) towed in my plow truck by Front-end (*sic*) loader, I lost my brakes had Accident (*sic*) with Loader (*sic*). Fell to Floor (*sic*) of cab Re injured (*sic*) my Rt. (*sic*) shoulder. (Exhibit 3.)
2. Regional medical panel doctors Hwa-Hshieh and George Hazel, both orthopedists, and Arthur Safran, a neurologist, evaluated the Petitioner on September 10, 2012. The unanimous panel answered all three certificate questions in the affirmative. After reviewing the Petitioner’s medical records, taking a history of his injury and performing a clinical examination, the panel doctors concluded that the Petitioner is totally and permanently disabled due to right shoulder impingement, bicipital tendinitis, SLAP tear, and multiple decompressive surgeries including bicipital tenodesis. (Exhibit 20.)

 **AMENDED DECISION AFTER REMAND**

 The Petitioner is entitled to prevail in this appeal. He has met his burden of proving that he is entitled to accidental disability retirement benefits.

 It was revealed during the testimony at the December 2017 hearing that the Petitioner was required to remain with his disabled vehicle while it was being towed. As questionable a practice as the use of one chain to tow an 18,000 pound plow truck was, this was the custom and practice of the Leicester Highway Department. At the time of the breakdown, the Petitioner was instructed by the Highway Superintendent and the mechanic, who was also his supervisor, as to the means and manner of the towing procedure. When the truck reached the top of the hill in front of the Garage and the brakes failed, the mechanic determined the manner in which the plow truck would be moved down to the garage. None of the Petitioner’s activities up to that point, or thereafter, constituted “willful misconduct.”

 The circumstances of the collision of the plow truck and the front-end loader are more murky. I have credited the Petitioner’s testimony regarding his exiting the truck to speak to the mechanic in order to try and assist with the air pump. I also believe that the mechanic made the call to re-chain the vehicle, and, that the situation was very fluid at that time. Further, it was dark and visibility was poor as between the vehicle operators. They did not have a clear view one another.

 I do not accept the Petitioner’s testimony that he was still partly outside of the truck when the loader began to re-tow it. An inference may be drawn from the mechanics of his injury that he was fully inside of the vehicle when it moved again. If he were only partly inside with one foot on the fuel tank and one arm on the open door, it is likely that he would have fallen outside of the truck and the consequences could have been much worse than those that evolved here. That being said, I am entitled to accept whole or part of a witness’s testimony. *See Lydon v. Boston Elevator Ry.*, 309 Mass. 205, 206 (1941); *Commonwealth v. Zanetti,* 454 Mass. 449, 457 (2009); and, *Commonwealth v. James Coffman*, 84 Mass. App. Ct. 33 (2013).

 The Petitioner’s case does not fail by virtue of his denial that he was fully in side of the plow truck when the front loader moved. Nor does it fail because he did not re-fasten his seatbelt, notwithstanding that, had he done so, the injury would not have occurred. The events of that night were moving along quickly. It may be that the Petitioner had just returned to the inside of the front seat after receiving instructions from the mechanic. The Petitioner has duly noted that G.L. c. 90, § 13A sets forth exemptions to the requirement to wear a seat belt. Specifically Section 14A(e) provides that anyone involved in the operation of taxis, liveries, tractors and trucks with a gross weight of eighteen thousand pounds or over is exempt from the provision in Section 13 requiring use of seat belts. As such, the Petitioner committed no violation of a statute or regulation. His failure to re-fasten his seat belt did not establish willful, wanton and reckless misconduct.

 Finally, the Petitioner’s injury occurred while he was in the performance of his duties. He was still involved with returning the plow truck to the garage at the time it jerked and collided with the front-end loader. *See Namvar v. Contributory Retirement Appeal Board*, 422 Mass. 1004, 1005 (1996).

 Based on the foregoing, the WRRB’s February 2012 decision to deny the Petitioner’s

Section 7 application without convening a medical panel is reversed. This matter is remanded to said board to grant the Petitioner’s application for Section 7 benefits and make the award.

 So ordered.

 Division of Administrative Law Appeals,

 BY:

 Judithann Burke

 Administrative Magistrate

DATED: April 27, 2018

1. Failure to wear one’s seatbelt is a violation of G.L. c. 90, § 13A. [↑](#footnote-ref-1)