

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

**CHRISTOPHER SIMONELLI,
Petitioner-Appellee**

v.

**MALDEN RETIREMENT BOARD,
Respondent-Appellant.**

CR-16-224

DECISION

Respondent Malden Retirement Board (MRB) appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), granting petitioner Christopher Simonelli's application for accidental disability retirement benefits. The DALA magistrate heard the matter on January 19, 2017 and admitted forty-two exhibits. The magistrate's decision is dated January 12, 2018. The MRB filed a timely appeal to us.

After considering all the arguments presented by the parties and after a review of the record, we incorporate the DALA decision by reference and adopt the DALA magistrate's Findings of Fact 1- 29 as our own. We affirm the DALA decision adding the following comments.

To be eligible for accidental disability retirement benefits under G. L. c. 32, § 7, an applicant must establish that he is "unable to perform the essential duties of his job and that such inability is likely to be permanent . . . by reason of a personal injury sustained or hazard undergone as a result of, and while in the performance of, his duties." G.L. c. 32, § 7(1). An applicant must prove that his disability stemmed from either (1) a single work-related event or series of events, or (2) if the disability was the result of gradual deterioration, that his employment exposed him to an "identifiable condition . . . that is not common or necessary to all or a great many occupations." *Blanchette v. Contributory Ret. App. Bd.*, 20 Mass. App. Ct. 479, 485 (1985).

In seeking accidental disability retirement benefits, under G.L. c. 32, § 7(1), an applicant must prove that the work-related injury was the “natural and proximate cause” of the disability. *Campbell v. Contributory Ret. App. Bd.*, 17 Mass. App. Ct. 1018, 1018-19 (1984). The applicant bears the burden of proving the causal relationship by a preponderance of the evidence. *Murphy v. Contributory Ret. App. Bd.*, 463 Mass. 333, 345 (2012); *Lisbon v. Contributory Ret. App. Bd.*, 41 Mass. App. Ct. 246, 255 (1996) (applicant must show it was “more likely” that the disabling injury, flowing from a work accident, was directly caused by or was the aggravation of a preexisting condition, “than by the natural, cumulative, deteriorative effects of his preexisting diseased condition and unhealthy habits.”).

G.L. c. 32, § 7 “requires not only that the injuries must result from one’s duties but that they must also be sustained ‘while in the performance’ of [those] duties. The requirements are conjunctive.” *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, *supra*. In other words, the causation requirement of G.L. c. 32, § 7(1), demands that the claimed injury must be sustained “during the actual performance of the duties that the employee has undertaken to perform on behalf of the public.” *Damiano v. Contributory Retirement Appeal Bd.*, *supra* at 263, 890 N.E.2d 173. See *Retirement Bd. of Salem v. Contributory Retirement Appeal Bd.*, 453 Mass. 286, 291, 901 N.E.2d 131 (2009) (benefits awarded under G.L. c. 32, § 7 [1], “only for those who experience a personal injury not merely as a result of the performance of work duties, but *during* the performance of these duties as well”). “Whether a particular activity is within the [applicant’s] duties is ultimately a factual inquiry particular to each case.” *Connolly v. Contributory Retirement Appeal Bd.*, 73 Mass. App. Ct. 1127, quoting *Damiano*, *supra*. The distinction between the actual performance of work and something incidental to such work must be made. *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 340 Mass. 109, 111 (1959).

Here, the evidence in the record establishes that Mr. Simonelli was injured at the claimed place – 655 Cross Street. The issue here is whether Mr. Simonelli proved by a preponderance of the evidence that his neck, back and leg injuries were sustained “as a result of, and while in the performance of” his job duties, resulting in his inability to substantially perform his essential duties. As the SJC explained in *Murphy*, the inquiry into whether the applicant was injured while in the performance of his duties is not about geography, but about employment activities. *Murphy v. Contributory Retirement Appeal Bd.*, citing *Retirement Bd. of Salem v. Contributory*

Retirement Appeal Bd., supra (“benefits may permissibly be awarded only when a disabling injury is sustained during the performance of work duties and not merely as a result of being at work when injured”). The inquiry as to what constitutes an employee’s work activities is determined on a case-by-case basis. *Damiano, supra*.

The MRB makes several arguments in its appeal. First, the MRB argues that Mr. Simonelli’s injuries were not sustained “while in the performance of his duties.” It contends that his duties as Director of Inspectional Services were administrative in nature because he was not licensed to perform inspections. Since he does not perform inspections, there was no reason for Mr. Simonelli to be at the site in question, and therefore, any injuries sustained there was not sustained while in the performance of his job duties. To support its argument, the MRB highlights the testimony of Mr. Christopher Webb, the current Permits, Inspection, and Planning Services Director, who testified that there was no reason or purpose for Mr. Simonelli to re-inspect the building in question. The MRB stated that “[t]he mere fact that an employee is “on the clock” does not necessarily mean that the employee is engaged in “the actual performance of the duties that the employee has undertaken to perform on behalf of the public.” *Damiano v. Contributory Retirement Appeal Board, supra*. Accordingly, because Mr. Simonelli was not required to inspect said premises, he was not injured while in the actual performance of his duties. We do not find this argument compelling.

We agree with the magistrate’s conclusion that Mr. Simonelli sustained his injuries while in the actual performance of his duties. In so deciding, the magistrate credited the testimony of Mr. Simonelli. He concluded that it was plausible for Mr. Simonelli to have presented at 655 Cross Street with Mr. George Lane, an inspector, to reinspect the premise. This was based on evidence in the record demonstrating that this property was highlighted in the local newspaper, that the Housing Taskforce discussed concerns with this property including possible squatters and reinspection of the site, and that Mr. Simonelli would on occasion perform site visits at his discretion or part of a court proceeding. Moreover, the MRB expressed in its clarification letter to the medical panel that former Malden Mayor Richard Howard testified that he “absolutely” expected Mr. Simonelli, in his capacity as Director of Inspectional Services, to present from time to time at certain properties not to inspect the property but to oversee certain inspection sites or

to otherwise be present during a particular inspection.¹ The 2007 Job Posting for the Director of Inspectional Services noted that the Director “shall have such other duties and responsibilities with respect to Inspectional Services as may from time to time be imposed by the Mayor and City Council.” The Human Resources Department of the City of Malden confirmed that Mr. Simonelli may have attended inspections in the capacity as an observer.² Based on the evidence, it was reasonable for the magistrate to conclude that Mr. Simonelli performed a site visit at the address in question.

Contrastingly, where the judge in *Murphy* failed to discuss the judicial duties he was performing when he sustained his injuries, the magistrate determined that Mr. Simonelli did testify about the duties he was performing at the time of his injury. Specifically, Mr. Simonelli testified that he was inspecting said premises that was to be reinspected as discussed in the Housing Taskforce’s meeting and for a scheduled court hearing. The record reflects that newspaper articles discussed the dilapidated condition of the building and the presence of squatters at that site. Because of the media surrounding this building, Mr. Simonelli, a member of the Housing Taskforce, testified that the Taskforce had raised concerns regarding this site and discussed reinspection of the site. Consequently, Mr. Simonelli, as Director of Inspectional Services, arrived at the site with another inspector, Mr. George Lane, to inspect and view for himself the condition of the building to view any potential damage to the property by the squatters. The magistrate found his testimony with respect to the duties he was performing in the capacity of Director of Inspectional Services credible and supported by the evidence in the record. The magistrate determined that Mr. Simonelli supplied the necessary evidence to establish that he was engaged “in the performance of his of duties as the Director of Inspectional Services. G.L. c. 32, s. 7. In our affirmance of this appeal, we give particular deference to the magistrate’s finding on credibility. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct., 85, 99-100 (1982).

Because we have concluded that Mr. Simonelli was injured while in the performance of his duties, we next turn to the question of whether the injury was the proximate cause of his disability. The MRB raised three main issues relating to the question of causation: (1) Mr. Simonelli’s credibility is lacking due to misleading statements unrelated to his application for

¹ Ex. 13.

² Ex. 11.

accidental disability retirement; (2) the Treating Physician Statement does not support Mr. Simonelli's application for accidental disability retirement based on an injury to his low back; and (3) the medical panel lacked pertinent information and employed an erroneous standard in its certification report and answers to clarification questions. We address each in turn.

With respect to MRB's argument that Mr. Simonelli's reports of the reasons for presenting to the site in question and where and how he sustained his injuries are suspect because of prior misleading statements, we conclude that this argument has no basis for the reasons we discussed above and due to our deference to the magistrate's findings on credibility.

Secondly, the MRB's argument that the Treating Physician Statement fails to specify the a disabling back injury, and therefore, its denial of Mr. Simonelli's application for accidental disability retirement must be upheld is not compelling. In this instance, to support an application for accidental disability retirement, we look to the claimed disability and injury reported on the member's application and the certification report of the medical panel and its responses to clarification questions. The member's application and the medical panel certification and answers to clarification questions reflect that Mr. Simonelli claimed an injury to his back resulting in his disability, in addition to his neck and right knee. The medical panel concluded that Mr. Simonelli presented with permanently disabling conditions³³ caused by the claimed injury. The MRB's other arguments that Mark Weiner, M.D.,'s treatment notes could not be incorporated into the Treating Physician Statement, or that the diagnosis reported was indicative or supportive of a disabling back impairment also have no merit. The Treating Physician Statement serves as some evidence with respect to Mr. Simonelli's claim for accidental disability retirement, and we see nothing preventing the doctor from incorporating his treating notes in support of that application.

In regard to the MRB's third argument, we agree with the magistrate that the medical panel had all pertinent information to complete its certification report and answer clarification questions and did not employ an erroneous standard in fulfilling its responsibilities. The MRB argues that Mr. Simonelli was not in the performance of his duties when he was inspecting the building at 655 Cross Street because his position encompassed only administrative duties. This

³³ The medical panel diagnoses included: cervical sprain/strain, status post previous fusion, posterior occipital headache, right knee medical meniscal tear, lumbosacral L5-S1 disc herniation with left L5-S1 radiculopathy. Exhibit 17.

argument has already been rejected. However, even if we were to adopt this as true, arguendo, the panel still concluded that Mr. Simonelli is permanently disabled from performing sedentary work and administrative functions, including some aspects of his position. It expressly stated:

“With regard to which diagnoses are permanently incapacitating with regard to inspection services, we felt that he could not ambulate, walk up or down stairs reliably, sit in one position reliably, and due to significant pain in his neck and low back, as well as findings that included weakness in his left lower extremity due to a likely lumbar radiculopathy, we felt that he could not do aspects of the job and it was permanently incapacitating.”

The panel further pronounced:

“We felt also, given his significant neck pain, and lumbar radiculopathy, that sitting in one position would probably be very difficult, and we believed that this would be permanent. In addition, the gentleman took medications including clonidine, 4 Vicodin a day, large doses of Neurontin, and muscle relaxants, which certainly might impede any daily occupation. For this reason, in totality, we felt that he was disabled from his occupation.”⁴

Id. Reading this together with its certification report, the medical panel described Mr. Simonelli as being permanently disabled based on the medications prescribed, as well as by the totality of his conditions and his medications, despite having a prior cervical condition. It correctly answered the question on causation. Therefore, we reject the MRB’s argument. The evidence does not reflect that the panel lacked pertinent information, nor that it employed an erroneous standard in concluding that Mr. Simonelli is permanently disabled from performing his essential job duties.

Conclusion. Mr. Simonelli is entitled to accidental disability retirement benefits. He met his burden to establish that he is “unable to perform the essential duties of his job and that such inability is likely to be permanent . . . by reason of a personal injury sustained...as a result of, and while in the performance of, his duties.” G.L. c. 32, § 7(1). The DALA decision is affirmed.

SO ORDERED.

⁴ Ex. 15.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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