



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. Box 295
TRENTON, NEW JERSEY 08625-0295

FORD M. SCUDDER
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

Telephone (609) 292-7524 / Facsimile (609) 777-1779
TRS 711 (609) 292-6683
www.state.nj.us/treasury/pensions
September 21, 2017

Sent via email to [redacted]

GAYLORD & POPP, LLC
Lawrence E. Popp, Esquire

[redacted]

RE: Joseph Conti
[redacted]

Dear Mr. Popp:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At its meeting of August 16, 2017, the Board of Trustees ("Board") of the Public Employees' Retirement System ("PERS") reviewed the June 26, 2017 Initial Decision ("ID") of the Honorable Laura Sanders, Acting Director and Chief Administrative Law Judge ("ALJ") in the above captioned matter¹ together with the parties' joint stipulation of facts, the items submitted into evidence, the exceptions filed by former Deputy Attorney General Will Hanna, and your reply to those exceptions. At that time, the Board voted to reject the ALJ's recommendation to approve the Accidental disability retirement of Joseph Conti ("Conti"), and directed the Board's secretary to prepare findings of facts and conclusions of law in support of its decision. As set forth below, the Board adopted the ALJ's factual findings but rejected her legal reasoning as to whether the disabling event was the result of Conti's willful negligence, and rejected her implied conclusion

¹ The Board requested and was granted an extension of time until September 25, 2017 to issue its final decision.

that the event was “undesigned and unexpected.” At its meeting on September 20, 2017, the Board voted to adopt the findings of fact and conclusions of law set forth below.

FINDINGS OF FACT

The Board voted to adopt the ALJ's findings of fact. On December 4, 2008, while employed as a maintenance worker 2 with the New Jersey Department of Transportation (DOT), Conti was cleaning the rear of a dump truck in the Hamilton Yard. Conti stated that a ladder that was normally used to climb onto the truck was “rusted and broken.” (J-1) Conti therefore climbed down the rear tire of the dump truck to get off the truck. While he did so, his boot, which had become wet with an unidentified liquid, slipped on the tire, and he fell. In the process, he twisted his left ankle, causing him to tear his Achilles tendon and leading to his disability.

The Board rejects the ALJ's reliance on Conti's testimony that “[b]ecause he was not the driver, it was not his responsibility inspect the truck.” ID at 3. This testimony is directly contradicted by the DOT Safety Manual, which (as the ALJ recognized) states, “[w]hen a safety item issued is not in good condition, the employee shall report this to their immediate supervisor as soon as possible.” (J-8 at 5-6) ID at 3. The Safety Manual does not say that only the driver is required to report safety items that are not in good condition. Instead, it requires the employee, i.e., Conti, who indisputably received the Safety Manual on or about July 22, 2008 (J-7), to report safety items that are not in good condition. In adopting the ALJ's factual finding that Conti testified that it was not his responsibility to report the condition of the ladder, the Board does not adopt Conti's reasoning.

Given the ALJ's finding that the ladder in question was “broken for a significant period of time,” ID at 6, Conti failed over a significant period of time to report the dangerous condition to his supervisor. The Board noted and agreed with the ALJ's conclusion that “[i]t is also clear from the DOT manual that Conti had a duty to report the defective ladder, which he breached.” *Ibid.* Thus,

the ALJ, like the Board, disagreed with Conti's opinion that he was not required to report the defective ladder.

CONCLUSIONS OF LAW

While the Board adopted the ALJ's findings of fact, the Board rejected her conclusions of law, which the Board finds are erroneous and would set a dangerous precedent by rewarding willful negligence. Here, the ALJ determined that Conti's disability was not the result of his willful negligence. The Board disagrees. Additionally, although the subject was not addressed in the Initial Decision, the ALJ's recommendation that Accidental disability retirement be approved implies that she found the described event to be "undesigned and unexpected." Here, too, the Board disagrees.

N.J.S.A. 43:15A-43 provides that a PERS member is entitled to Accidental disability retirement if he or she is:

[p]ermanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties...

As explained by the Supreme Court in Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189, 212-13 (2007), in order to establish eligibility for Accidental disability retirement, an applicant must show each of the following five elements:

1. That he is permanently and totally disabled;
2. As a direct result of a traumatic event that is
 - a. identifiable as to time and place,
 - b. undesigned and unexpected, and
 - c. caused by a circumstance external to the member (not the result of preexisting disease that is aggravated or accelerated by the work);
3. That the traumatic event occurred during and as a result of the member's regular or assigned duties;

4. That the disability was not the result of the member's willful negligence; and
5. That the member is mentally or physically incapacitated from performing his usual or any other duty.

Ibid. at 212-13 (emphasis added). The applicant bears the burden of proof on each of these prongs. Id. at 212.

The issues before the ALJ were whether Conti was disabled by an undesigned and unexpected mishap (prong 2(b) and whether his disability was a result of his willful negligence (prong 4). The Board finds that the disabling incident was not unexpected under the circumstances and that Conti's disability was the result of his willful negligence. The Board rejects the ALJ's express conclusion to the contrary regarding willful negligence, as well as her implied finding that the disabling incident was undesigned and unexpected.

The ID correctly recognized that the "DOT and the pension boards have compelling policy reasons for trying to ensure a safe working environment, and rewarding employees for ignoring or even creating safety hazards runs counter to those interests." ID at 9. In spite of these compelling reasons, the ALJ apparently excused Conti's repeated, intentional actions and inactions based on the principle that one person should not be penalized for alleged "group negligence." Ibid. This reasoning is problematic because it ignores the fact that Conti's willful negligence was two-fold. First, Conti's failure to report an allegedly broken ladder constituted a "deliberate failure to act" under N.J.A.C. 17:4-6.5.² Second, even if Conti's willful negligence in failing to report the broken ladder could be considered to be mitigated based on the failure of others to report the ongoing safety violation, Conti still violated DOT safety rules when he climbed in and out of the truck using

² N.J.A.C. § 17:2-6.5 Willful negligence

(a) Willful negligence is defined as: (1.) Deliberate act or deliberate failure to act; or, (2.) Such conduct as evidences reckless indifference to safety; or, (3.) Intoxication, operating as the proximate cause of injury.

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the wheel in place of a ladder.³ The decision to climb in and out of the truck using the wheel was Conti's alone. While Conti may blame others for not reporting the broker ladder, he cannot blame others for his own deliberate unsafe act of climbing down the wheel from the wet surface of the truck on the day of the incident.

The ALJ cites no precedent to support her conclusion that the failure of others to act in accordance with accepted rules and regulations should excuse Conti's failure to act. The Board notes that willful-negligence case law indicates that a failure to comply with rules can result in a finding of willful negligence. Recently, in Irma Pinto v. Board of Trustees, Public Employees' Retirement System, Docket No. A-3263-15T4 (August 3, 2017), the Appellate Division affirmed the PERS Board's finding of willful negligence where a disability was caused by an employee's reckless decision to walk on a freshly-waxed floor in spite of warnings that walking there was unsafe. See also Dale v. PERS, 96 N.J.A.R. 2d (TYP) 172 (petitioner willfully negligent when he was operating vehicle in violation of safety procedures and while intoxicated), DeInnocentes v. PERS, 94 N.J.A.R.2d (TYP) 26 (petitioner willfully negligent when he deliberately ignored his supervisor's orders and was disabled as a result).

The Board finds that the Initial Decision recommends a dangerous policy that would excuse the willful negligence of one employee based on the alleged comparable negligence of others. As the ALJ recognized, employers and the pension boards have compelling policy reasons for trying to ensure a safe working environment. Holding no one responsible for continued failures to abide by safety rules and regulations undermines this compelling policy, a policy that is reflected in the denial of Accidental disability retirement where the disability is the result of willful negligence. Employees should be incentivized to report dangerous conditions, not

³ The ALJ recognizes this on p.9 of the ID; "Here, there is no doubt that climbing in and out of the truck using the wheel instead of the ladder violated DOT rules."

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rewarded for failing to report them and for actively violating safety regulations instead. For the aforementioned reasons, the Board finds that Conti's deliberate repeated action of failing to report a broken ladder, combined with his deliberate action of climbing a truck's wheel in contravention of DOT safety rules supports the Board's finding of willful negligence and is a bar to Conti's proposed Accidental disability retirement.

Secondly, the Board finds that because Conti knowingly, after working on a wet surface, climbed down onto the wheel of the truck in an unsafe manner (as evidenced both by common sense and by the fact that it was against DOT's safety rules), the event cannot be considered undesigned and unexpected. Specifically, it is to be expected that climbing off a truck's wet surface via a wheel rather than a ladder is so obviously unsafe that losing one's footing and falling is to be expected. Thus, although the ALJ did not address the issue of whether the disabling incident was undesigned and unexpected, the Board finds that it was not.

For the foregoing reasons, the Board rejects the ALJ's conclusion that Conti is entitled to Accidental disability retirement.

You have the right, if you wish to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey.

Sincerely,



Mary Ellen Rathbun, Secretary
Board of Trustees
Public Employees' Retirement System

G-13/MER
C: V. McManus (ET); DAG Amy Chung (ET)
Joseph Conti;