

No. A06-2263

STATE OF MINNESOTA

In the Court of Appeals

In the Matter of the Claim for Benefits by Scott Sletten

BRIEF AND APPENDIX OF
APPELLANT SCOTT SLETTEN

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. Does Minn. Stat. §299A.465, Subdivision 1 (2006) require the City of St. Paul to continue to pay employer's contribution for health insurance coverage for appellant and his dependant's until appellant reaches age 65?

The public safety officer benefits eligibility panel determination: Denial of firefighter Scott Sletten's claim for benefits under Minn. Stat. §299A.465 Subdivision 1, because the panel determined that the evidence was inconclusive that his occupational duties or professional responsibilities put him at risk for the type of illness or injury actually sustained.

Apposite Statutory Provisions:

Minn. Stat. §299A.465 Subdivision 1 and 6
Minn. Stat. §353.656 Subdivision 1
Minn. Stat. §353.63

Apposite Statutory Provisions on Statutory Construction:

Minn. Stat. §645.08
Minn. Stat. §645.16

Apposite Cases

In the Matter of the Claim for Benefits by Jeffrey R. Meuleners (A06-14) Filed 12/19/06

In re PERA Police and Fire Plan Line of Duty Disability Benefits of Brittain, 742 N.W.2d 512 (Minn. 2006)

Conaway v. St. Louis Co., 702 N.W.2d 779 (Minn. Ct. App. 2005)

Apposite Cases of Statutory Construction

In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits, 667 N.W.2d 1 (Minn. 2003)

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J.C.Penney Co. V. Commissioner of Econ. Sec., 353 N.W.2d 243 (Minn. Ct. App. 1984)

STATEMENT OF THE CASE

The question presented in this case is whether Minn. Stat. §299A.465 obligates the City of St. Paul to continue payment of the employer's contribution of appellant's and his dependant's health insurance coverage until appellant reaches age 65.

Appellant Scott Sletten was born on July 11, 1962 and is presently 44 years old. Appellant worked as a firefighter for the City of St. Paul from May 11, 1992 until August 11, 2006. (Ap. 11, 19, 22) Although suffering other injuries while working as a firefighter, Mr. Sletten, suffered two that have resulted in his disablement and this proceeding.

On February 18, 2002, while working in Fire Station 1, participating as directed, in the maintenance and care of the quarters, as required in the job description of firefighters, (Ap. 1, 3, 4) Mr. Sletten lifted and twisted while moving a chair into the kitchen. This caused appellant to suffer a herniated cervical disc at C6-7. This was an admitted workers' compensation injury with the City accepting the injury, thereby acknowledging it "arose out of and in the course of his employment" as a firefighter. Mr. Sletten ultimately had an anterior-posterior cervical fusion with internal fixation devices at C6-7. He was ultimately given a 11.5% permanent impairment of the body as a whole. (Ap. 5)

After his medical treatment, Mr. Sletten returned to full-time unrestricted firefighting duties. In fact, he returned to the more hazardous Advanced Technical Rescue Team. (Ap. 19, 38).

On April 27, 2004, Mr. Sletten suffers his second relevant work related injury. (Ap.

6) While performing a cave rescue, while wearing self contained breathing apparatus, carrying out four young people, three of whom were dead in a cave behind 90 W. Plato Boulevard, he re-injured his neck. (Ap. 6) This time despite his desires and in spite of all his medical care he could not go back to firefighting. (Ap. 36-37) Again this was an admitted work injury accepted by the City of St. Paul, and therefore was “arising out of and in the course of employment” for workers’ compensation purposes. (Ap. 7-8)

The City of St. Paul paid 28.40 weeks of temporary total disability benefits from February 18, 2002 through September 24, 2002 when Mr. Sletten returned to work after his first injury. (Ap. 10)

The City of St. Paul paid 14.20 weeks of temporary total disability through August 13, 2006 for his second neck injury when it cut-off his benefits because he was found eligible for a PERA disability pension. (Ap. 10)

Appellant’s treating physicians unanimously opined he is disabled and physically unable to perform the duties of a firefighter. (Ap. 15-20) They also opined these two injuries were the cause. They have opined his disablement will last his lifetime. (Ap. 23-24)

PERA, exercised its right to an independent medical examination performed by a physician of its choice. Its IME doctor, Dr. Mark Larkins, a neurosurgeon, also opined appellant is disabled and physically unfit to perform the duties of a firefighter. He further opined, the disability is related to the two injuries above and is “in the line of duty”. (Ap. 46-50) Appellant, Mr. Sletten, was awarded a “duty related” disability retirement from the fire

department by PERA pursuant to Minn. Stat. §353.656 effective August 12, 2006.(Ap. 30
-32)

Pursuant to Minn. Stat. §299A.465 (2006) on September 23, 2006, appellant submitted an application form for the continuation of health insurance coverage for him and his dependants. (Ap. 33)

On October 12, 2006, the Public Safety Officer Benefit Eligibility Panel convened to review Mr. Sletten's application for benefits pursuant to Minn. Stat. §299A.465 subd. 1 (c). Appellant and the City were present and allowed to address the panel. The Panel denied appellant's application with a vote of 5 to 1. The panel determined that the evidence was "inconclusive that Mr. Sletten's occupational duties or professional responsibilities put him at risk for the type of illness or injury actually sustained." (Ap. 40)

A Writ of Certiorari was obtained and filed November 29, 2006. Mr. Sletten now appeals from the Determination Order because the Public Safety Officer Benefits Eligibility Panel erred in concluding that Mr. Sletten did not establish that his occupational duties or professional responsibilities put him at risk for the type of injury which he sustained, as required by Minn. Stat. §299A.465 subd. 6. (Ap. 41)

The language of Minn. Stat. §299A.465 is clear and unambiguous and requires the City of St. Paul to continue payment of employer's contribution for health coverage for Mr. Sletten and his dependants. Mr. Sletten's injuries were arising out of and in the course of employment for workers' compensation purposes. They were admitted. Mr. Sletten is

unable to perform the duties of a firefighter. His treating physicians and the independent medical examiner agree. There exists no contrary medical evidence. The IME for PERA opined he suffered an “in the line of duty injury.” PERA awarded “a duty related benefit.”

Both injuries occurred performing tasks required by appellant and listed in the City of St. Paul’s firefighter’s job description, as typical duties performed. Both were clearly part of his occupational duties and professional responsibilities. (Ap. 12-13)

Contrary to respondent’s statement of the case, herein, the City of St. Paul never made a job offer to Mr. Sletten. No written offer pursuant to M.S. §176 was ever made and none is in the record herein. The representative of the City of St. Paul makes no such statement in the transcript of the hearing. Appellant asks this Court to note this assertion is without an evidentiary basis.

Mr. Sletten, Appellant, requests this Court reverse the Public Safety Officer Benefits Eligibility Panel and award the benefits under Minn. Stat. §299A.465 as a matter of law.

STATEMENT OF FACTS

Appellant, Scott Sletten, was born on July 11, 1962 and is presently 44 years old. Appellant worked as a firefighter for the City of St. Paul from May 11, 1992 until August 11, 2006. (Ap 11, 19, 22) Although suffering other injuries while working as a firefighter, Mr. Sletten, suffered only two that are relevant and have resulted in his disablement.

On February 18, 2002, while working in Fire Station 1, Mr. Sletten suffers his first injury. (Ap.2) Firefighters are required to live in the fire station for periods of time. As a firefighter, they are required to keep their quarters clean. In fact, it is one of the duties listed in the job description of firefighter. (Ap. 12-13) The City requires they participate in maintenance and care of the fire station. (Ap. 12-13) It would have been an act of insubordination for Mr. Sletten to have refused to participate in the cleaning of the floors or the maintenance in the fire station.(Ap. 1,2) While carrying chairs and tables back and forth so the kitchen floor could be cleaned, he suffered a cervical disc herniation at C6-7. (Ap. 3, 4,33, 46) This was an admitted workers' compensation injury with the City accepting the injury, thereby acknowledging it "arose out of an in the course of employment" as a firefighter. The City accepted primary liability. (Ap. 3,4)

Mr. Sletten ultimately had an anterior/posterior cervical fusion with internal fixation devices at C6-7. He was ultimately given an 11.5% permanent impairment of the body as a whole for this incident. (Ap. 5) The City of St. Paul paid 28.4 weeks of temporary total disability benefits from February 18, 2002 through September 24, 2002 when Mr. Sletten

returned to work after his first injury. (Ap. 10)

After his medical treatment, Mr. Sletten returned to full-time unrestricted firefighting duties. In fact, he returned to the more hazardous Advanced Technical Rescue Team. (Ap. 19, 38)

On April 27, 2004, Mr. Sletten suffers his second relevant work related injury. (Ap.6) While performing a cave rescue, while wearing a self-contained breathing apparatus, he suffered a neck injury carrying out four young people, three of whom had died in a cave behind 90 West Plato Boulevard. (Ap. 6) This time despite his desires and in spite of all of his medical care, he could not go back to firefighting. (Ap. 3-5) Again this was an admitted work related injury accepted by the City of St. Paul. (Ap. 8) Again, it therefore is “arising out of and the scope of employment” for workers’ compensation purposes with the City admitting primary liability. Once again, his activities are listed under typical duties performed for the City of St. Paul’s job description for a firefighter. (Ap. 12, 13)

George Adam, M.D., F.R.C.P. neurologist, appellant’s treating physician with Neurology Specialists, LLC, in his report of May 1, 2006 opined that Mr. Sletten was disabled and physically unfit to perform the duties of a firefighter. He further opined that this is the result of the work injury of 2002 and the re-injury in 2004. Lastly he opined that Mr. Sletten’s disablement from his position as a firefighter would be a lifetime disablement. (Ap. 23-24).

The Public Employee’s Retirement Association of Minnesota pursuant to its Statutory

right, had conducted an independent medical evaluation of Mr. Scott Sletten with Dr. Mark Larkins, a neurosurgeon. Dr. Larkins evaluated Mr. Sletten on June 3, 2006. He issued his report on June 23, 2006. The PERA's IME rendered the opinion that Mr. Sletten continues to have evidence of C-6 radicular symptoms and that there had been no resolution of the cervical radiculopathy since the second injury. He also rendered the opinion that Mr. Sletten was disabled and physically unfit to perform the job duties outlined in the firefighter job description that was provided to the neurosurgeon from PERA and the City. He further opined the disability is not related to a previous injury or condition, in the sense it predated his job as a firefighter, but was caused by these two events. He opines specifically the disability was "in the line of duty". (Ap. 46-50) Based on this consensus, appellant, Mr. Sletten, was awarded a "duty related" disability retirement from the fire department by PERA pursuant to Minn. Stat. §353.656, effective August 12, 2006. (Ap.30, 31, 32)

The City of St. Paul by this time had paid 14.2 weeks of temporary total disability through August 13, 2006 for Mr. Sletten's second neck injury. When the City became informed of the awarding of PERA disability benefits, it terminated Mr. Sletten's temporary total disability workers' compensation benefits. (Ap. 9, 10)

Pursuant to Minn. Stat. §299A.465 (2006) on September 23, 2006, appellant submitted an application form for the continuation of health insurance coverage for him and his dependants. (Ap. 33-39)

On October 12, 2006, the Public Safety Officer Benefit Eligibility Panel convened to

review Mr. Sletten's application for benefits pursuant to Minn. Stat. §299A.465 subd. 1(c). Appellant and the City were present and allowed to address the panel. The panel denied appellant's application with a vote of 5 to 1. The panel's Determination Order states that the evidence was "inconclusive that Mr. Sletten's occupational duties or professional responsibilities put him at risk for the type of injury or illness actually sustained." (Ap. 40)

As part of its submission to the panel, the City gave the panel an interdepartmental memorandum dated May 9, 2006 from Jerry Walthour to Ron Guilfoile, City of St. Paul Risk Manager, outlining the workers' compensation losses regarding Scott Sletten. (Ap. 51,52) In the first paragraph, there is an obvious typographical error referring to an employee Nelson which is not important. However, when this memo dated May 9, 2006 is presented to the Panel in October of 2006 without an update, it is so far out of date as to be factually inaccurate and misleading. The memo states that Mr. Sletten lost no time from work as a result of the second injury when by the time the Panel met, as reflected in its Notice of Intention to Discontinue Benefits, the City had already paid 14.20 weeks of temporary total from May 5, 2006 through August 13, 2006. In the last paragraph in this memorandum, it is indicated that there is no information indicating that Mr. Sletten was not performing all necessary duties relating to the position of firefighter, this is clearly erroneous. At the October 12, 2006 hearing, the workers' compensation claims memo administrator offers the opinion that there are no work related physical disabilities or restrictions, which flies in the face of the treating physicians report of May 1, 2006 as well as the IME obtained by the

PERA. In fact there is no evidence of any medical record to render such a comment. The opinion of Mr. Walthour, who is not a medical doctor is, on such point, is clearly without foundation.

By the time of the hearing when the City's representative makes the argument that appellant's application is premature, the City, as of September 8, 2006, had already pursuant to its obligations under the workers' compensation statute, filed a disability status report with the State that indicated that Mr. Sletten was not working, had a disability that would likely extend beyond 13 weeks and permitted the assignment of Patricia Herbulock as a QRC. This disability status report was completed by Mary Jo Kiewel of the City and is part of the record. The QRC's records filed and which Mr. Sletten brought to the panel by hand at the hearing to supplement his initial submission show that he was eligible for rehabilitative assistance under the workers' compensation system because he was not able to return to his occupation as a firefighter and that the City had taken a position that there is no job available for him within in his medical restrictions. This is quite contrary to the impression created by the oral presentation in front of the panel as well as the comment made in respondent's statement of the case herein. There was no job offer to Mr. Sletten pursuant to Minn. Stat. Ch. 176. As is well understood, if such a job offer is made, it would have had to been made in writing and the employee would have had fourteen days within which to respond. There is no written job offer in the record herein. The appellant testified in front of the panel that he did not wish to be disabled and wanted to stay as a firefighter but only applied for the

disability because he couldn't and he had no other choice. There is no evidentiary basis to argue that there was a job offer. These mischaracterizations and mis-statements of the facts in front of the panel do not justify an argument that a decision on his application was in any sense premature.

By the time the panel met, all of the medical evidence including the IME evidence indicated that Mr. Sletten's circumstance was that he was disabled, could not be a firefighter and suffered an "in the line of duty" disability. (Ap. 44-50) There is not any evidentiary basis to argue anything else in front of the panel or for the panel to have decided anything else.

It is clear from the transcript starting on page eleven, line ten, that an unidentified panel member is troubled with an issue of whether or not a person is permanently or temporarily disabled and whether or how that relates to maximum medical improvement and whether PERA reviews these things. Besides showing ignorance of the workers' compensation statute and PERA statute which permits review of disability status, this is clearly irrelevant in the decision that needs to be made. It shows that panel members were taking into consideration things beyond the scope of their duties.

Starting on page twelve of the transcript, another unidentified panel member addresses Chairman Stockman and indicates as the transcript goes to page thirteen that because the initial injury was lifting a chair in the kitchen, that he has "trouble" with granting the application of Mr. Sletten. This is in spite of the fact that this was an admitted work related injury, that the injury was arising out of and within the scope of employment and is a

required activity and duty of a firefighter, as indicated in the firefighters job description. The chairman then points out that even if that was troubling to the panel member that appellant returned to work without any trouble and was not put out until the second injury which was the cave rescue. (T. 13) The panel then votes with no further discussion to deny Mr. Sletten's application, 5 to 1, with the chairman voting in favor. (T.13-14)

A Writ of Certiorari was obtained and filed November 29, 2006. Mr. Sletten, appellant herein, now appeals from the determination order because the Public Safety Officer Benefits Eligibility Panel clearly erred in concluding that Mr. Sletten did not establish that his occupational duties or professional responsibilities put him at risk for the type of injury which he sustained as required by Minn. Stat. §299A.465 subd. 6.

STANDARD OF REVIEW

The quasi-judicial decision of an administrative agency will not be reversed unless it is fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law. Axelson v. Minneapolis Teachers' Ret. Fund Ass'n, 544 N.W.2d 297, 299 (Minn. 1996). Judicial review starts with the presumption of the correctness of an agency decision. In the matter of the Claim for Benefits by Jeffrey R. Meuleners (A06-14, filed December 19, 2006) citing Gramke v. Cass County, 453 N.W.2d 22, (Minn. 1990). The Court of Appeals is not bound by the agency's decision and need not defer to agency expertise, although a certain amount of deference is paid to the agency's interpretation of its own regulations if they are unclear or ambiguous. Courts will reverse or modify an agency decision if the agency's findings and inferences are not supported by substantial evidence or its decision is arbitrary and capricious. Meuleners, Id., citing Markwardt v. State, Water Res. Bd., 254 N.W.2d 371 (Minn. 1977). An agency's decision is not supported by substantial evidence if there is a "combination of danger signals which suggest the agency is not taking a hard look at the salient problems and the decision lacks articulated standards and reflective findings". Meuleners, Id. citing Cable Commc'ns Bd. v. Nor-west Cable Commc'ns P-ship, 356 N.W.2d. 658 (Minn. 1984). An agency acts arbitrarily if it fails to articulate a rational connection between facts found and the decision made. In Re Access Surplus Status of Blue Cross/Blue Shield of Minnesota, 624 N.W.2d. 264 (Minn. 2001). Appellate courts retain the authority to review *de novo*, "errors of law

which arise when an agency decision is based upon the meaning of words in a statute.” In re denial of Eller Media Company’s Application for Outdoor Advertising Device Permits, 664 N.W.2d 1 (Minn 2003). Statutory Construction is a question of law reviewed de novo. Brookfield Trade Ctr. #579 v. County of Ramsey, 584 N.W.2d 390, (Minn. 1998).

ARGUMENT

I. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF MINN. STAT. §299A.465 ENTITLES APPELLANT TO THE CONTINUED PAYMENT OF THE EMPLOYER’S CONTRIBUTION FOR HEALTH COVERAGE OF FIREFIGHTER SLETTEN AND HIS DEPENDANTS UNTIL FIREFIGHTER SLETTEN REACHES AGE 65.

When the language of a statute is plain and unambiguous, the plain language must be followed. Burkstrand v. Burkstrand, 632 N.W.2d 206 (Minn. 2001). Under the basic canons of statutory construction, the courts construe words and phrases according to the rules of grammar and in accord with their most natural and obvious usage unless it would be inconsistent with the manifest intention of the legislature. Minn. Stat. §645.08 (1), Vlahos v. R&I Construction of Bloomington, 676 N.W.2d 672 (Minn. 2004); See also, Amaral v. Saint Cloud Hosp., 598 N.W.2d 379 (Minn. 1999).

The first step in statutory interpretation is to simply read the statute. Gomon v. Northland Family Physicians, Ltd., 646 N.W.2d 413 (Minn. 2002). If the words of a statute are clear and free from all ambiguity, further construction is neither necessary nor permitted. Minn. Stat. §645.16 (2006); See also, Ed Herman and Sons v. Russell, 535 N.W.2d 803, (Minn. 1995). The reviewing court is not permitted to read ambiguity into an otherwise clear

statute under the guise of statutory interpretation. Tuma v. Commissioner of Economic SEC., 386 N.W.2d 702, (Minn. 1986).

To determine if a statute has been properly applied, the courts focus on the words of the statute to “ascertain and effectuate the intention of the legislature”. Meuleners, Id., citing Minn. Stat. §654.16 and First Nat’l Bank of the N. v. Auto. Fin. Corp., 661 N.W.2d 668 (Minn. App. 2003). Where the meaning of statutory language is plain and free of ambiguity, “we apply that meaning as a manifestation of legislative intent.” Meuleners, Id. citing First National Bank, 661N.W.2d at 670. “Administrative interpretations are not entitled to deference when they contravene plain statutory language, or where there are compelling indications that the agency’s interpretation is wrong.” Meuleners, Id. citing JC Penney Co. v. Commissioner of Economic Sec., 353 N.W.2d 243 (Minn. App. 1984). When statutory language is plain and unambiguous, changes or additions can only be made by the legislature. Id.

In the instance case, the statutory language at issue is clear and unambiguous. In this case it is particularly clear that the Public Safety Officer Benefit Eligibility Panel is wrong after you read this court’s decision In the Matter of the Claim of Benefits by Jeffrey R. Meuleners (A06-14) filed December 19, 2006 and the Supreme Court decision in, In Re PERA Police and Fire Plan Line of Duty Disability Benefits of Brittain, 724 N.W.2d 512 (Minn. 2006).

Let us remember that the whole point of an appellate court writing an opinion is to

explain its decision. If one reads those decisions, it is clear that the Public Safety Officer Benefit Eligibility Panel determination in the instant case is not supported by substantial evidence, that its decision is arbitrary and capricious, that there were, in fact, as shown by the transcript, a combination of danger signals which suggested the agency is not taking a hard look at the salient problems and the decision lacks articulable standards and reflective findings and it has mis-read the statute and its requirements.

In the instant case, the statutory language at issue is clear and unambiguous. Minn. Stat. §299A.465 provides in pertinent part:

Subdivision 1. Officer or firefighter disabled in line of duty. (a) This subdivision applies when a peace officer or firefighter suffers a disabling injury that:

- (1) results in the officer's or firefighter's retirement or separation from service;
 - (2) occurs while the firefighter is acting in the course and scope of duties as a peace officer or firefighter; and
 - (3) the officer or firefighter has been approved to received the officer's or firefighter's duty-related disability pension.
- (b) The officer's or firefighter's employer shall continue to provide health coverage for:
- (1) the officer or firefighter; and
 - (2) The officer's or firefighter's dependents if the officer or firefighter was receiving dependent coverage at the time of the injury under the employer's group health plan.
- (c) The employer is responsible for the continued payment of the employer's contribution for coverage of the officer or firefighter and, if applicable, the officer's or firefighter's dependents. Coverage must continue for the officer

or firefighter and, if applicable, the officer's or firefighter's dependents until the officer or firefighter reaches the age of 65. However, coverage for dependents does not have to be continued after the person is no longer a dependent.

In 2005, the legislature amended section 299A.465 by adding Subd. 6, which became effective July 1, 2005 and which states:

Subd. 6. Determination of scope and duties. (a) Whenever a peace officer or firefighter has been approved to receive a duty-related pension, the officer or firefighter may apply to the panel established in subdivision 7 for a determination of whether or not the officer or firefighter meets the requirements in subdivision 1, paragraph (a), clause (2). In making this decision, the panel shall determine whether or not the officer's or firefighter's occupational duties or professional responsibilities put the officer or firefighter at risk for the type of illness or injury actually sustained. A final determination by the panel is binding on the applicant and the employer, subject to any right of judicial review. Applications must be made within 90 days of receipt of approval of a duty-related pension and must be acted upon by the panel within 90 days of receipt. Applications that are not acted upon within 90 days of receipt by the panel are approved. Applications and supporting documents are private data.

(b) This subdivision expires July 1, 2008.

The Court in Meuleners was interpreting the relationship between subd. 1 a and 6 of Section 299A.465 for the first time. Meuleners stated "the plain language of subdivision 1 a and 6 creates a two prong test for determining whether a former firefighter is entitled to continued employer provided health insurance benefits. First, the firefighter must be

approved to receive a “duty related disability pension.” If the firefighter satisfies this requirement, **then the panel must determine whether the disabling injury occurred while the officer was acting within the course and scope of his or her duties as a firefighter. In making this determination, the panel must decide whether the officer’s occupational duties or professional responsibilities put the firefighter at risk of the type of injuries sustained.** Meuleners, Id. Citing Minn. Stat. §299A.465, subd. 6.

Here as in Meuleners, it is undisputed that PERA granted relator a duty related disability pension; the first prong of the test is therefore satisfied. In the instant case, appellant’s treating neurologist in his April 1, 2006 report to the City and to the PERA board, opined that appellant was disabled and physically unable to perform the duties of a firefighter. Dr. Adams, opined that this was related to the two work injuries involved herein and that appellant was disabled from his position as a firefighter for his lifetime. PERA’s IME physician, Dr. Larkins, a neurosurgeon, has rendered the same opinions, specifically that Mr. Sletten’s disability is related to the two injuries we were looking at, that he continues to have evidence of C6 radicular symptoms, that he is disabled and physically unfit to perform the job duties outlined in the firefighter job description, that the disability is not related to a previous injury or condition, and the disability occurred “in the line of duty”. There was no contrary medical opinion evidence.

Next it must be decided whether the firefighter suffered the disabling injury while the firefighter was acting within the course and scope of his or her duties as a firefighter. In

making that determination, the panel must decide whether the firefighters occupational duties or professional responsibilities put the firefighter at risk for the type of injuries sustained. Just as in Brittain, Id. , 299A.465 does not have the words “unique” or “hazardous.” Here it is undisputed that the appellant suffered his injuries at work, that his employer accepted those injuries in the sense of primary liability, that is, they were “arising out of and within the scope of his employment” as that is used in the workers’ compensation statutes. If that were not enough, it is also clear that in both instances that appellant was injured, he was performing job duties as a firefighter which are listed specifically in the City’s job description of a firefighter. Whether or not you focus on the first injury or the second injury or the combination, is a red herring. They were both clearly by the plain language, suffered while performing occupational duties and within the professional responsibilities of the appellant. The job description makes that undisputable. In the first instance, it is clear that the employee could not refuse to clean the firestation as is required. To do so would result in his being subject to discipline, if not firing. When panel members who are unidentified in the transcript focused on the first injury and indicated that they were “troubled by it”, it is clear they were engaging in the same mistake as indicated in the Brittain case. Whether he was lifting a chair and tables to wash the kitchen floor does not matter, it does not make it outside his occupational duties or professional responsibilities. Nothing in 299A.465 just as nothing in the Brittain case, and the PERA statute requires that the case have “unique” or “hazardous” engrafted into the statute.

Additionally, as the chairman of the panel tried to point out on the transcript, even if one were to make that engrafting into the statute here, this firefighter returned to full duty work after his first injury and it wasn't until he suffered his second neck injury while working on the rescue team rescuing young people and bodies from the caves behind 90 West Plato Boulevard in 2004, and after going through much therapy in an effort to get back to work, which failed, that he became disabled from the job.

The panel in this case engaged in activity that is similar to what was wrong and what they did in the Meuleners. Id. Just as in Meuleners Id., where the statute did not provide for a pre-existing condition as a factor relevant to whether an injury occurred while an officer was acting within the course and scope of his or her duties as a peace officer, there can be no distinction allowed here as between some preferred occupational duties or professional responsibilities over others as the transcript shows the panel was engaging in.

Again, under Subd. 6 (a), the relevant inquiry is whether the officer's occupational duties or professional responsibilities put the officer at risk for the type of injuries sustained. It is beyond dispute the job duties are a "but for" cause. The panel again failed to articulate any rationale for why performing maintenance and care duties in the station as required in the job description warrants treating that injury different or in a way that is a disqualifying factor. Again the panel relied on factors that are not directly relevant to whether the appellant's occupational duties or professional responsibilities put him at risk for the type of injuries sustained. The panel failed to determine whether appellant suffered an injury while

acting in the course and scope of duties as a peace officer. Since the record clearly shows that appellants disabling injuries occurred while he was acting in the course and scope of his duties at a firefighter, the panel's decision is arbitrary and capricious and not supported by substantial evidence.

The transcript clearly shows the board was engaging in differentiating injuries that are all within a firefighter's occupational duties or professional responsibilities seemingly being willing to approve those that are somehow "unique" or "hazardous" but not any of those that are routine and just as necessary. Even worse, if any are routine they deny. Both the Supreme Court's decision in Brittain Id. and this Court's decision in Meuleners Id. case show why this is wrong.

As in Conway v. St. Louis County, 702 N.W.2d 779 (Minn. App. 2005) examining the legislative history here is not proper statutory construction nor necessary. Even though the legislature's action of transferring the financial responsibility for continued health coverage without guaranteeing funding might arguably be unfair, it does not allow the panel to read into the statute things that are not there to protect the City.

CONCLUSION

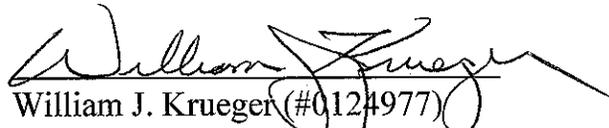
Appellant respectfully requests that this Court reverse the Public Safety Officer Eligibility Panel's Determination. Following the proper law of statutory construction, the clear and unambiguous language of the statute requires the City of St. Paul to pay the employer's contribution for health coverage for appellant and his dependents until appellant

reaches 65. The Public Safety Officer Benefits Panel applied improper standards, took into account improper considerations, ignored unopposed medical opinion and mistakenly misconstrued the statute thereby acting unreasonably and arbitrarily.

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Dated:

January 12, 2006


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