RESPONSE TIME

QUARTERLY NEWS FOR FIRST RESPONDERS

KARLSON GARZA LLC

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First Responders' Mental Health

Continuing a trend, this issue has several articles regarding first responder mental health and the law. We need to do something different. The steady increase of suicide is an unacceptably accepted reality of first responder culture. In a recent conversation with counsel for many Illinois municipal employers, one of our attorneys was told "PTSD is a disease of an affluent society." Sadly, this dismissive sentiment, while not publicly espoused, is not uncommon. However, the "rub some dirt on it and get back in the game" mentality is killing our first responders.

In the years we have been representing first responders, litigation over PTSD pensions and fitness for duty examinations has consistently escalated. Poor managers commonly paint first responders suffering from PTSD as "weak" and "troublemakers." Instead of providing a path to return to work, many chiefs address mental health problems with a disciplinary process, which then forces the first responder to seek a disability pension, shifting the burden to the pension fund.

Obviously, we need fit and stable first responders to respond to emergencies. At the same time, we need first responders to feel they will not be punished for seeking help. Recently, there has been a trend of arbitration awards where management is terminating police officers for "not being fit for duty" while simultaneously opposing that same officer's disability pension.

This is a complex and evolving issue involving the interplay of medicine, labor law, the pension code, contracts, workers' compensation, PEDA, PSEBA, and other applicable laws/regulations. Solutions are not obvious or easy. However, first responders cannot be lost in the mix. The current manner by which first responder stress is addressed is expensive, complicated, and in some ways ineffective. **Resources for first responders are provided on page 4 of this issue**.

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Ashmore Line of Duty Benefit

Ashmore v. Bloomington Police Pension Board

Mark Ashmore was a police officer for the Bloomington Police Department. He responded to an abandoned vehicle stuck in snow blocking a driveway entrance. Ashmore contacted his Lieutenant to determine if a tow truck should be called. Ashmore testified he was not ordered to call a tow truck and did not discuss pushing the vehicle. Ashmore testified that pushing vehicles was a routine part of his job as a patrol officer. The driver of the vehicle returned after the phone call. Ashmore, alongside another officer, pushed the vehicle out. In doing so, he slipped on ice and fell on his left arm.

After the incident, Ashmore sought medical treatment where it was determined he had sprained his arm and had a partial tear of his distal bicep. From May of 2014 to February 2016, Ashmore underwent surgeries, cortisone and Botox shots, and physical therapy to treat his pain. However, the pain persisted and his arm's physical condition deteriorated. He reported less range of motion, dexterity, and weakness. Ashmore was placed on permanent work restriction limiting him to lifting no more than five pounds with his left arm and restricting him from repetitive grasping activities with his left hand by his treating physician, Dr. Jeffrey Greenberg.

Ashmore testified, after his injury in February 2014, he had not worked "full-duty." He supplemented this by working a "light-duty" position, using vacation time and sick leave, and collected worker's compensation.

In April of 2016, the Bloomington Police Department fired Ashmore for not being able to work in the full capacity of a patrol officer. There were no permanent "light-duty" positions available.

Ashmore filed for a disability pension in December of 2015. The Board conducted hearings in May 2016, October 2016, and January 2017.

At hearing, the Lieutenant confirmed Ashmore was injured while pushing the stuck vehicle. Williams testified there is no rule that says not to push a stranded vehicle, though the police department does not like when officers do so because it can cause injury. Williams also testified he did not order or discuss pushing the car out with Ashmore during their phone conversation.

Dr. Joshua Alpert, Dr. David Anderson, and Dr. James Stiehl were appointed by the Board for medical evaluations. Dr. Alpert declared Ashmore disabled, and while treatment with Botox could lead to improvement, that the duration was likely permanent. Dr. Alpert determined the cause of the disability to be falling while pushing the vehicle. Dr. Anderson opined that the disability was likely permanent and the cause was the fall. Dr. Stiehl declared Ashmore not disabled. Stiehl opined that while Ashmore did have chronic pain it did not impact his role as a patrol officer per the job description provided to the doctor.

Dr. Greenberg reported that Ashmore should be considered, in his current condition, to be at the height of his improvement and the previously implemented work restrictions should remain permanent.

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The Board determined Ashmore was not disabled and not a credible witness, given that he told Dr. Greenberg the three Board doctors told him to file for disability when one of the doctors in fact determined he was not disabled. Ashmore's claim was denied and no determination regarding whether his injury was an act of duty was issued.

Ashmore filed for administrative review and the Circuit Court affirmed the Board's decision to deny the disability claim. Ashmore appealed.

The Appellate Court determined the Board was wrong when determining that Ashmore was not disabled. The Appellate Court found the Board relied too heavily upon one doctor's opinion, while three other doctors determined that Ashmore was disabled. The Court determined that Dr. Steihl was not credible because he opined that being a patrol officer is a largely administrative task, disregarding other aspects of the job description.

The Appellate Court determined that Ashmore was injured in the line of duty due to the nature of needing to clear a traffic way to avoid accidents being part of his regular duties.

IDOI Instituting Changes to Annual Statement Filing Requirement in PASS

The changes pertain to beneficiary information. The new sections requires beneficiaries include information about their spouse. This change was requested by actuaries to refine actuarial valuation reports.

Union Counter to *Janus* Moves Forward

In February, Judge Sharon Johnson Coleman determined IUOE Local 150 could proceed with its lawsuit against the State. The lawsuit, claimed because of the *Janus* decision, the union could not be forced to represent non-union state workers because it is an infringement on its first amendment right of association and speech. The Illinois Attorney General moved for dismissal, which Judge Coleman denied.

The AG argued the case was premature as the Union had not yet been forced to represent non-union employees under IPLRA. However, Judge Coleman found while the Union had not yet been forced, it is certainly more than "speculative."

Judge Coleman dismissed the portion of the Union's lawsuit asserting portions of IPLRA law restricting what could be bargained over were now unconstitutional under Janus. Judge Coleman also dismissed Union claims that the IPLRA violated the First and Fifth Amendments.

Buffalo Grove Appeals FF Death Case

In February, Lake County Judge Diane Winter ruled in favor of upholding the Buffalo Grove Fire Department's decision to grant the family of Kevin Hauber a line-of-duty death pension.

Buffalo Grove firefighter/paramedic Kevin Hauber passed away in January 2018 after fighting colon cancer. Two medical experts determined his cancer was likely the result of "acts of duty." The Buffalo Grove Firefighters' Pension Board decided to award the family a line-of-duty survivor benefit, but the Village of Buffalo Grove filed suit challenge the fallen firefighter's family's benefit.

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In early March the Village appealed, arguing there is insufficient evidence to support the pension board and trial court's decision. The Village believes the Hauber family should receive a non-duty benefit.

FIRST RESPONDER MENTAL HEALTH RESOURCES

MAP: (630) 759-4925

IAFF: 202-824- 8626

FOP: (866) 535-1078

PBPA: http://www.pbpa.org/Resources/Links.aspx

Text BLUE to 741741: Crisis Text Line free, 24/7, and confidential crisis text service.

The National Suicide Prevention Hotline 1-800-273-TALK

Cop 2 Cop 1-866-COP-2COP

Safe Call Now 1-206-459-3020

Serve & Protect 1-615-373-8000

Share the Load 1-888-731-3473

Copline 1-800-267-5463

Frontline Helpline 1-800-676-7500 (First Responder Call-Takers)

CIST (Critical Incident Support Team): 866-535-1078

Slip and Fall is Not Line-of-Duty

Frisby v. Bolingbrook Firefighters' Pension Fund, et al.

Bethany Foy Frisby was a firefighter for the Village of Bolingbrook. On December 28, 2013 at 6:40am, twenty minutes prior to her start time, Frisby slipped on ice in the parking lot of the firehouse, injuring her shoulder. Later that day, she sought treatment. After some time, it was determined Frisby was disabled and she applied for a line-of-duty disability benefit, or, in the alternative, a non-duty related benefit.

During the hearing, Frisby presented an email from the Village Superintendent of Public Safety, Tom Ross, saying, "If you're not early—you're late." She also included performance reviews that described her timeliness to work and readiness at the start of shifts.

The Board ultimately denied her line-of-duty application saying because her shift had not yet started, she was not on duty. Further, the Board said Frisby was not performing a life or property saving act, was not on an assignment by the chief related to fire protection, and was not acting pursuant to any Village ordinance or department rule. The Board found Superintendent Ross' email did not constitute a department rule.

Frisby filed for administrative review. The Circuit Court reversed the Board's decision. That court determined in order to be ready in uniform for start time, and if she kept her uniform at work, she had to arrive early so as not to violate any rules. The Court also determined Frisby's performance reviews could be considered a rule because they examined her compliance with department rules. The Court referred to the Workers' Compensation Act which has been interpreted to include time before and after a shift.

The Village appealed. The Appellate Court determined using punctuality as an imposed requirement was flawed because the point of the problem was Frisby's fall when she arrived

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at work before her scheduled time, not how early she was. The court determined the Board was correct in determining Frisby was not performing an "act of duty." The court rejected plaintiff's expansive reading of "act of duty" to include all efforts to be punctual. The Appellate Court opined by Frisby's interpretation of compliance with department rules requiring punctuality would put "on duty" and "act of duty" acts outside the scope of their intention.

The Appellate Court reversed the Circuit Court's decision and affirmed the Board's denial of line-of-duty benefits.

Federal Law Enforcement Must Be Taxed Same As State Officers

Dawson v. Steagar, West Virginia State Tax Commissioner

James Dawson worked for the US Marshals Service. He retired to West Virginia where his pension was taxed by the State. However, there is a provision allowing certain state and local law enforcement employees to be exempt from state taxes. Dawson filed a lawsuit arguing the state tax violated the intergovernmental tax immunity doctrine. According to this doctrine, the federal government grants taxation of federal employees if the state does not discriminate based on the source of pay and the compensation. A trial court in West Virginia determined Dawson's role as a federal marshal was equivalent to roles held by tax exempt state and local law enforcement, thereby violating the tax immunity statute. On appeal, the West Virginia Supreme Court reversed the trial court's decision finding the tax exemption was intended to only apply to certain state employees, not federal marshals.

The retired US Marshal was granted *certiorari* (leave) to appeal to the United States Supreme Court. The Court determined taxing Dawson violated the tax immunity doctrine. West Virginia argued the tax exemption was intended to apply to a certain subset of State and local employees. However, the Supreme Court determined Dawson's role as a federal marshal paralleled the work of the state police, firefighters, and deputy sheriffs receiving the tax break. Then, per the immunity tax doctrine, Dawson was eligible to receive that same exemption. The State argued there were other State employees with similar roles as the police, firefighters, deputy sheriffs, and Dawson who did not receive the tax relief. However, the Supreme Court determined the intent of the tax immunity statute was not to parallel those who do not receive a benefit, but those who do.

Criminal Not Entitled to Attorney Fees for FOIA Denial

Turner v. Joliet

Darius Turner filed a FOIA request with the Joliet Police Department for records regarding himself and a specific arrest. Joliet granted the request in part and denied it in part, providing redacted portions of records.

Turner filed a complaint alleging Joliet had failed to explain why the redactions were in compliance with FOIA. The complaint sought the records, a finding that Joliet was not in compliance with FOIA, and civil penalties and costs. Joliet moved to dismiss the lawsuit, acknowledging it did miss some records, but included them in the motion. Joliet also asserted by fulfilling the request, the

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complaint was moot, the redactions were appropriate under FOIA, and the penalties were improper because Turner had not sufficiently proven Joliet had willfully and wantonly redacted information.

Turner requested the Court conduct an *in-camera* review of the records alongside an index describing the redactions. The Court did so and granted Joliet's motion to dismiss.

Turner was convicted in the criminal case related to the FOIA request. After the conviction, Joliet released the previously redacted records from Turner's FOIA request and included them in their subsequent appellate brief.

Turner appealed the dismissal of his FOIA complaint. The Appellate Court determined because Joliet released the information at the conclusion of the criminal case unredacted, the dismissal was properly concluded.

Joliet had previously argued Turner should not have made a FOIA request for information relating to his criminal case under Illinois Supreme Court Rule 415(c). Turner appealed arguing Joliet improperly interprets that rule. However, the Appellate Court determined Joliet's interpretation was correct. According to the rule, Turner could view the documents with his counsel, but could not possess them himself.

The Appellate Court also determined the trial court's denial of Turner's request for civil penalties was sound. Because Joliet had provided reasons to Turner of why portions of his request were denied and redacted and the trial court had reviewed the documents *in-camera*, there was no factual basis for willful and wanton FOIA violations.

The Appellate Court affirmed all judgments of the Will County circuit court in its determination.

Opioid Pandemic: Unions Sue Big Pharma

The Chicago Regional Council of Carpenters and the IUOE Local 150 filed a lawsuit against pharmaceutical manufacturers, distributors, and prescribers. The lawsuit aims at exposing the companies for things like misleading the public into believing opioids were not as addictive as we now know. Union attorneys have stated they are not looking for a settlement offer and want to go to trial to force information to be released to the public.

Grand Jury Process Remains Secret and Court Order Supersedes FOIA

In re Appointment of Special Prosecutor

In 2004 an altercation between two men, Richard Vanecko and David Koschman, escalated to Vanecko punching Koschman in the face. Koschman fell and hit his head. A few weeks later, Koschman died from the injuries. Law enforcement investigated the incident from 2004 to 2011, but no charges were filed.

In 2011, Koshman's family filed a petition to appoint a special counsel within the Cook County Criminal Division because they believed the investigation was obstructed by the fact Vaneckio was nephew of then-Mayor Richard M. Daley. In April 2012, the petition was granted. Dan K. Webb was appointed to determine if any criminal charges should have been filed for Koschman's death and if any officials of the Chicago Police Department and/or Cook County State's Attorney's Office obstructed justice regarding the investigation.

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Webb was also ordered to report any progress, results, and criminal proceedings.

In May 2012, Webb petitioned for a special grand jury. The petition was granted and in June 2012 the court granted a motion for protective order sealing all materials related to the special grand jury as well as prohibiting dissemination of said materials by anyone who receives materials related to the special grand jury.

The special grand jury obtained a bevy of information eventually leading to the indictment of Vanecko for involuntary manslaughter of Koschman.

On September 18, 2013, the special investigation concluded and Webb issued his final report. No other criminal indictments were pursued and the report was sealed to ensure Vanecko had a fair criminal trial. Vanecko pled guilty to manslaughter on January 21, 2014. Webb's report was then released to the public on February 4, 2014.

Shortly thereafter, the Chicago Sun-Times made a FOIA request to the City for copies of all subpoenas from Webb's office and all documents provided to the office. The City denied the request per the, June 2012, protective order. The City then requested to remove the protective order. The criminal court lifted the order in March 2014, but also, on the City's motion, made a new order in June 2014. This new order clarified the June 2012 order, stating the City was prohibited from complying with FOIA requests regarding any documents or information that were disseminated to the special investigation in connection to the Koschman investigation. The order also stated the previous, June 2012, order was still in effect and that only the identification of documents and records were grand jury materials.

In January 2015, the Better Government Association (BGA) filed a FOIA request for the special counsel's documents regarding interviews; any communication between Daley family members, their attorney, and the City's corporation counsel during that time; and itemized invoices and billing records. The City and special investigator denied the request explaining they were prohibited from disclosure by state law.

In March 2015, the BGA filed a complaint against the special investigator's office, the mayor's office and the law department of the City of Chicago, and the Chicago Police Department. The City and special investigator both filed motions to dismiss on grounds that the information was FOIA exempt. The chancery court granted the special investigators motion, but did not grant the City's on grounds that a court order did not constitute state law. The City returned to criminal court to request modification of the protective orders. The court granted the BGA's order and permitted delayed disclosure until appeals were made.

The BGA appealed the chancery court's decision to dismiss the FOIA request to the special investigator. The appellate court upheld the chancery judge's decision, but also said billing was not protected. This was remanded to the chancery court to review *in-camera*. The City appealed the chancery court's decision for judgment in favor of the BGA. The appellate court reversed the decision determining a protective order was outside of FOIA disclosures.

The BGA appealed to the Supreme Court. In regard to the special investigation FOIA request, the Supreme Court determined the appellate court correctly interpreted "matters occurring before the grand jury" to include everything in the FOIA request, excluding billing and invoices. The Supreme Court determined disclosure would publicize matters

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occurring before a grand jury, which is prohibited. And further, if the Court were to take the BGA's interpretation, it would make the grand jury secrecy provision completely void through a FOIA request. The BGA argued disclosure was for public interest. The Supreme Court determined disclosure could only happen when there was a particularly heightened need that allowed for superseding of law and public interest does not constitute such matters. The Supreme Court upheld all appellate decisions in matters relating to the special investigation appeal.

The BGA appealed the appellate court's reversal of the chancery court's judgment. The Supreme Court again disagreed with the BGA. The BGA argued the courts should not have referred to federal cases as the statutes varied too greatly between the state and federal level. However, the Supreme Court disagreed. And further, it was decided the City was required to obey the protective order and therefore did not improperly withhold information, upholding the appellate court's decision.

Criminal Code Trumps FOIA

Hosey v. City of Joliet

Joseph Hosey, a journalist for the Joliet Patch, filed a FOIA request for videotaped interviews for four murder suspects. Joliet denied the claim on the grounds of unwarranted invasion personal privacy, interference with actual or pending law enforcement proceedings, and disclosure of confidential course or information. Hosey turned to the Illinois Attorney General for review of the denied request. The AG's office ordered Joliet to provide a copy of the tapes to them alongside an explanation of denial. However, Joliet did not comply with the request and the AG determined Hosey was entitled to the tapes. Again, Joliet did give Hosey a copy.

Hosey filed a complaint for relief, fees, and a penalty for denial of the request. Joliet, in turn, argued it would be unduly burdensome, disclosure would invade of privacy, and, for the first time, it was exempt due to the Illinois Criminal Code. Hosey argued the City could not prove the videos were FOIA exempt, the request was not an invasion of privacy, and retrieving the tapes is not burdensome. The trial court ruled in favor of Joliet on grounds of the Criminal Code. Hosey appealed.

On appeal, Hosey argued the tapes were not protected under FOIA because the defendants named in the original case were no longer "accused" when the request took place and the City should have supplied a written notice of the basis for its denial but did no such thing. The Appellate court found Joliet had not waived any potential claims when it initially failed to supply its reasoning for denial. Therefore, its later reasoning remains valid.

The Appellate Court further found the tapes were in fact protected from disclosure by the Illinois Criminal Code because it "prohibits transmission of *any* electronic recording of *any* statement made by an accused" whether they were convicted or exonerated. The Appellate Court also found one of the accused was in the process of appealing when the FOIA appeal was filed and the other defendants had not yet exhausted all of their appeal options. These facts supported the Criminal Code disclosure restriction. The court elected to not address other arguments presented by the parties in its affirmation of the Circuit Court's decision.

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Senate Bill 1596

The State recently enacted a bill lifting the restrictions on the time-frame workers had to make claims against employers for occupational diseases. The Workers' Compensation Act and Workers' Occupational Disease Act previously gave a time frame of 25 years to file for occupational injury and only 3 years to file for occupational disease. SB 1596 lifts the restriction entirely. The bill has been passed by the Illinois General Assembly and was sent to Governor Pritzker on March 20, 2019.

Substitutes Are Permissive

City of Mattoon Fire Department v. Mattoon Firefighters Association, Local 691 (non-binding counsel opinion)

The City of Mattoon's fire department sought to use ambulance service provided by two private paramedic companies. The City and the Union had a collective bargaining agreement with a term ending on April 30, 2018. A city ordinance was referenced in the CBA outlining how the Department was to provide "Emergency Advance Life Support Ambulance Rescue Services." In July 2017, the City Council repealed the ordinance and voted on adopting a "Resolution Eliminating the City-Operated Ambulance Service Effective May 1, 2018." The Union was not notified of these changes and were not given a chance to bargain. Following the vote, the Union filed a grievance.

Before the grievance was resolved, negotiations for a new CBA began in December 2017. During negotiations, ambulance service provisions were eliminated, and it was proposed that Union members would no longer perform ambulance work as of May 1, 2018.

In February 2018 the Union triggered the interest arbitration process by filing for mediation.

In April 2018, the grievance was settled the arbitrator sided in favor of the City citing the contract management rights clause.

In May 2018, the Union filed a request for compulsory interest arbitration and declaratory ruling to determine if the City's changes were bargainable.

In June 2018, the City proposed changes to the CBA that removed all reference to private ambulance service. The City also proposed retaining its authority to subcontract work and the language regarding the Substitutes Act. The proposal also read: "Notwithstanding the elimination of the ambulance service, no current member of the Bargaining Unit as of the date of this proposal shall be laid off, suffer a loss or diminution of regular hours, or not be afforded overtime opportunities as provided for in the CBA."

The Union argued accepting the City's proposal would waive Substitutes Act rights and privately hired ambulance workers providing paramedic care are not qualified substitutes for firefighters. The City countered saying the Substitutes does not bar them from hiring third party contractors for paramedic work and the Union waived their rights previously by allowing the City to hire private ambulatory services in the past.

The Illinois Labor Relations Board found the changes were permissive subjects of bargaining and further explained the Union has the right to insist the Employer only hire those qualified for regular appointment as a firefighter to be substitutes for classified members of its fire department. This extends

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to the use of paramedics. The Substitutes Act bars municipalities from hiring unqualified people without express consent of the Union.

BGA Ordered to Not Republish Documents Related to Student's Death

Cook County Judge Peter Flynn ruled the Better Government Association not release records regarding the drowning of a CPS student. The BGA received documents in response to a lawsuit, however CPS lawyers said the release was made by mistake. Judge Flynn said he needed time to review the documents to determine what documents could be released to the public. BGA attorneys argued this was a violation of prior restraint of the press and they plan to appeal the decision.

Not Fired for Protected Act

Koester v. County of Sangamon

Travis Koester is a member of the Sangamon County Sheriff's Department employed as a specialized member of the Tactical Response Unit, or TRU, a unit that concentrates on high-risk situations and specialized security details.

Koester filed two grievances in 2014 and 2016, challenging promotions of other individuals in the unit alleging he was entitled to the promotions over the people who received them. The grievances did not advance.

Following the filing of the second grievance, members of TRU approached superiors regarding Koester. These members were granted a meeting to discuss these concerns in February of 2016. Koester attended the meeting.

Miller, a member of TRU, drafted a memo after the meeting summarizing the concerns shared at the meeting. Hayes, another member, submitted a memo, despite not being at the meeting. Both summarized the meeting and feelings of the other members of TRU. Essentially, members did not like that Koester was filing grievances against them, found him to be manipulative, and recommended he be removed from the TRU.

An Administrative Law Judge (ALJ) determined Koester met the threshold of a *prima facie* case for a retaliation ULP because: (1) Koester engaged in a protected activity by filing his grievances, (2) Respondents were aware Koester engaged in protected activities, and (3) adverse action was taken for engaging in a protected activity when the employer removed him from the TRU because of the grievances, specifically in 2016.

Upon review, the ILRB found the ALJ incorrectly established Koester was removed from the TRU because of the filing of the grievances. The record indicated, to the ILRB, Koester's removal was from more than filing the grievances as indicated in the memos submitted by Miller and Hayes. The memos indicated the "subject and nature" of the grievances was what was so off putting for the other members of the TRU. Further, the ILRB did not find, as the ALJ had previously found, that Hayes, who was a commander in the TRU, failed to conduct an investigation and submit results to the entire team before passing the memo to superiors. The ILRB found there was nothing substantial to investigate as the trust problems with Koester had been identified and submitted in a memo by Miller. Further, the ILRB found if Hayes had not always consulted with the team as a whole when considering removing a member, then it was not applicable in this scenario.

The ILRB dismissed the ULP Complaint.

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Court Publishes & Updates *Prawdzik* Opinion

We covered this case in our January 2019 newsletter. The Pension Board denied Firefighter Prawdzik a PTSD line-of-duty disability pension benefit because it was aggravated by his duty as a firefighter. The judgment was appealed the case was remanded back to the Board to award Prawdzik a line-of-duty benefit finding a work related incident aggravated his PTSD and that according to the Code, it is sufficient. The decision by the appellate court has now become binding law for courts and boards moving forward.

IMRF Disability Still Elusive

Miller v. IMRF, et al.

Theresa Miller filed administrative review for the IMRF's decision to deny her a total and permanent disability benefit. Miller's complaint stated the decision "was an abuse of discretion" because she was unable to work gainfully due to "Lumbago, with lumbar strain, post laminectomy syndrome."

Appealing the credibility of the doctor, Dr. Noel Rao, who delivered the "not disabled" verdict because the doctor only reviewed medical records, but never treated, met, or spoke to Miller. Miller's attorneys argued this discounted the opinions of Miller's other physicians who declared her disabled. Further, IMRF used a report supplied by rehabilitation specialist, Teri Soyster, which listed several jobs available to Miller that fit the criteria of her "restrictions." However, Miller's attorneys contend Soyster, like Dr. Rao, never met with Miller to discuss her restrictions and the generated report had serious errors regarding whether or not Miller had actually been released to any sort of modified work by her treating physicians. Miller argued, because the Social Security Administration had determined she was permanently disabled, IMRF should have likewise done so. By not doing so, Plainitff argued IMRF's decision was against the manifest weight of the evidence.

In its defense, IMRF argued all available evidence was used, including Miller's doctors and medical history, with guidance from Dr. Rao and Teri Soyster. Included in its response, IMRF cited a report by one of Miller's treating physicians stating she was released back to work with restrictions. Further, IMRF consulted Miller's treatment providers through an "Assessment of the Individual's Work-Related Abilities and Limitations" from which Dr. Rao used to support his determination. It should be noted, the Appellate Court found IMRF was not held to any decision made by the Social Security Administration when considering disability. However, IMRF argues they took all aspects of Miller's evidence into consideration, including the Social Security Administration's decision.

The appellate court affirmed the decision of the board, finding IMRF made its conclusion considering all evidence provided by Miller and the plaintiff did not prove she was totally and permanently disabled.

This case highlights the difference in the benefit structure of Article 3 and 4 funds and IMRF. In simple terms, it is nearly impossible to qualify for an IMRF disability pension.

Clarifying IME Opinions Permitted

McCumber v. Oswego Fire Prot. Dist. FFPB, et al

Brian McCumber was a full-time firefighter and paramedic for the Oswego Fire Protection District in 2009. Prior to 2009, he worked part-time in the same capacity for Oswego. McCumber worked without issue, sighting no

anxiety during his part-time work and full-time work until October 2014. That October, McCumber attended a training exercise in which he had to practice a rescue mission and respond as if it was a real emergency. He was dressed in full gear and had to retrieve a mannequin from the basement of a training tower. McCumber became disoriented while bringing the mannequin up and a "mayday" call was issued, the training stopped, and McCumber was taken to the hospital via ambulance. Two witnesses expressed seeing McCumber show signs of exhaustion, trouble breathing, and taking his mask off.

In March 2015, McCumber, during another training exercise, encountered similar problems. McCumber reported disorientation and difficulty breathing. Again, a "mayday" call was initiated, the exercise stopped, and McCumber went to the hospital. He reported the situation was more severe than it had been in 2014. He had wanted to remove his mask again, but other firefighters would not let him due to the hazardous conditions.

In May 2015, McCumber attended another search and rescue exercise. He was informed by a Union Representative that if this did not go well, it "wasn't going to be good for him." McCumber was able to pull out one "victim" but upon re-entering, he tripped and became disoriented. Another "mayday" call was issued, and he was transported to the hospital. McCumber did not return to work and filed a disability application in November 2015.

The Board held a hearing in December 2016. At the hearing, the Board questioned McCumber about a 2006 incident in which McCumber experienced difficulties similar to the later events. McCumber had become overheated, felt lightheaded, and had muscle cramping. The Board also brought up a "new recruit" evaluation McCumber had undergone after becoming a full-time employee where struggles with his SCBA in an IDLH situation and signs of anxiety were cited. The Board brought up a 2009 diagnosis of depressive disorder and a 2013 diagnosis of morbid obesity.

McCumber was evaluated by three psychiatrists - Drs. Shaw, Reff, and Weine. Shaw found McCumber had an Anxiety Disorder not directly caused from a work situation, but rather a preexisting condition surrounding wearing a SCBA. Reff found McCumber had a pre-existing condition first documented in 2009. Further, Reff believed McCumber had outside stressors not related to his job affecting his ability to do his job. Reff, in a supplemental report, concluded McCumber had a pre-existing condition aggravated by work training exercises. Both Shaw and Reff found McCumber disabled. Weine, however, did not and further found McCumber did not meet diagnostic criteria for any disorders. Rather, Weine believed it was weight related and McCumber had inadequate training.

In April 2015, McCumber had undergone a "Fitness for Duty" evaluation where Dr. Williamson-Link, an occupational physician for the District, determined McCumber's issues were outside not job related and recommended McCumber for outside consultation. In June 2015, Williamson-Link found McCumber unfit for duty because he was not cleared to wear a SCBA.

McCumber's clinical counselor, Sara Gura's, notes and evaluations were also considered by the Board. Gura believed McCumber's problems stemmed from the facility in which the training occurred, rather than the SCBA equipment. She gave several diagnosis of generalized anxiety, specific anxiety, limited symptom attacks, and occupational problems.

In denying McCumber's line-of-duty benefit application the Board concluded he failed to prove the training exercises caused or contributed to his disability. On administrative

review the circuit court affirmed the Board's denial. McCumber then appealed.

The Appellate Court found McCumber's argument that the Board failed to recognize the related injury need not be the primary cause of the disability unconvincing. The Appellate Court found the Board repeatedly acknowledged this in their initial decision. McCumber also argued the Board failed to consider portions of the Reff and Shaw examinations which indicated his disability was aggravated by work-related activities because neither mentioned the training exercises as being triggers. Rather, the doctors, Shaw in particular, suggested McCumber had "an underlying pre-existing predisposition to anxiety in such situations" and it "was not caused by his job." Considering Reff's report, the training exercises did not cause or exacerbate McCumber's anxiety, but were a "manifestation of his underlying pre-existing condition." The Appellate Court found the administrative record established a sufficient basis to affirm the Board's decision.

McCumber also argued he was denied due process of a fair hearing. McCumber asserts the Board relied on depressive disorder as the basis for pre-existing anxiety disorder. McCumber further complained the Board attempted to influence the evaluating physicians when asking the following question via email to one of the doctors: "I would assume some individuals are neither mentally nor physically equipped to perform services required by either fire or police. Does the same necessarily suggest that an individual is *disabled* (psychological) merely because they do not have the physical or mental capacity to perform this type of employment (firefighter)?" (Emphasis in original.)

The Appellate Court determined there was no violation of due process. They found while the Board did discuss McCumber's depression, it did not rely on that condition when making the decision. The Appellate Court specifically found seeking clarification for medical opinions was not improper. The Pension Board's decision was affirmed.

Ray Garza named General Counsel for Heroes' Family Fund

The Heroes' Family Fund is a charity supporting injured and fallen first responders and their survivors. The HFF was formerly known as the IPPFA Remembrance Fund.

Chicago Fire Forced to Award First Psych LOD Disability Benefit

Siwinski v. Chicago Firefighters' Pension Board

Leah Siwinksi was hired as a paramedic for the Chicago Fire Department in December 2008. In December 2010, she responded to a "mayday" call that involved injured firefighters, specifically one she knew. She reported she had transported non-responsive victims before, but seeing someone she knew dead on "her stretcher" caused her to "mentally and emotionally turn off" and the rest of the shift was a "blur" for her.

Following the, December 2010, incident, Siwinski became "hypervigilant," anxious, and withdrawn. In June 2011, she was hospitalized after becoming "near syncopal" after taking the blood pressure of a patient. In August 2011, Siwinski took non-duty related leave and sought the opinions of multiple doctors. She was told her "syncope related to anxiety" but she did not seek further treatment as she was unwilling to acknowledge it at the time. In March 2012, she returned to work.

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In October 2012, Siwinski responded to an incident near her home where someone had been shot in the head. A crowd had formed and began throwing objects, yelling, and threatening the responders. Siwinski described herself as having a "break down" after this incident, but did so in private as she felt the stigma of talking about feelings as a first responder. Instead, she enrolled in college as an attempt to distract but then began failing. She also "stopped cleaning and cooking, showered less frequently, struggled to leave bed, and developed a shopping addiction."

In June 2013, Siwinski began work as a "divisional aide" to Assistant Deputy Chief O'Connell where she completed "scheduling, processing paperwork, and managing disciplinary and training files."

In November 2013, she was dispatched to a hospital to meet an ambulance crew that was transporting a firefighter she knew who had shot himself in the head. Following that incident, she began cutting herself as an unhealthy coping mechanism. In January 2014, she felt her symptoms were "unbearable" and she reported her situation to her chief who granted her medical leave.

In February 2014, Siwinski was diagnosed with Major Depressive Disorder and PTSD. She attended inpatient and outpatient treatment programs for the next six months. In October 2014, she began treatment with James Gilligan, a clinical social worker who specializes in the treatment of PTSD.

At her hearing, Siwinski agreed she was able to work as an aide in 2013 and 2014, she had failed to include a family history of depression on her initial application to the Chicago Fire Department, and in the application she did not consider mental health in the "any other medical problems" portion. She said she did disclose her mental health history to one doctor who treated her for syncope and confirmed a 2013 diagnosis of attention deficit hyperactivity disorder.

Gilligan reported Siwinski's PTSD was a result of her work and her failure to disclose was an attempt at avoidance, a "common temporary coping mechanism" in PTSD. Gilligan also said her time as aide worsened symptoms as it gave her the opportunity to think about the incidents.

Her partner, Daniel Kelly, substantiated the December 2010, June 2011, and October 2012 incidents and noted Siwinski's nervous behavior around crowds and how she had become jumpy.

The Board requested Siwinski be examined by Dr. Catherine Frank, a psychiatrist and Dr. George Motto, a physician. Dr. Frank diagnosed Siwinksi with PTSD and mild recurrent Major Depressive Disorder. Dr. Frank believed Siwinski's Major Depressive Disorder existed before applying for CFD, based on her medical history and previous suicide attempts between 8th and 11th grade. However, Siwinski's PTSD, according to Dr. Frank, was work-induced. Further, Dr. Frank believed Siwinski's PTSD kept her from work, not the Major Depressive Disorder, because she had been able to continue work with the disorder before the PTSD symptoms began. Dr. Frank found Siwinksi was not likely to be able to return to work, even as an aide, because she could not be protected from triggers working in any capacity for the department. Dr. Motto, conversely, was not convinced Siwinski had PTSD. Motto further opined her work history did not indicate she was fully disabled from working. He believed Siwinski and Myriah Vargo, her therapist, made the decision to leave for treatment but not that Siwinski could no longer perform work. Dr. Motto also included he has never diagnosed a patient with PTSD and was "was not making 'a psychiatric opinion.'"

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On December 16, 2015, the Board denied Siwinski's application for a line-of-duty disability benefit because she failed to report sooner, the triggering incidents were common to paramedics, her symptoms were self-reported, her self-reporting was not credible as she failed to report mental health history on her application, and a "secondary motivation" for applying for benefits. Further, the Board believed she was not disabled at all as she could perform her duties as an aide and if she was disabled, it was the result of Major Depressive Disorder, a pre-existing condition, combined with outside life factors.

Siwinski filed for administrative review. The Circuit Court rejected the Board's finding of Siwinski not having PTSD and remanded the matter. However, the Court determined the record was unclear as to whether Siwinski's PTSD rendered her disabled. The Board, disregarding the Circuit Court's order to present additional evidence, voted again to deny Siwinski's application. The record shows no new information was presented or considering at the March 2017 hearing.

Siwinski again sought review and the Circuit Court affirmed the Board's decision because on the original remand, it was up to Siwinski to provide supplemental proof and failed to do so. Siwinski appealed.

The Appellate Court found the Board's finding Siwinski did not have PTSD was in contradiction of the manifest weight of the evidence presented. Both Gilligan and Dr. Frank, professionals with experience in PTSD, said PTSD is often self-reported and takes time to present. The Appellate Court found Siwinski's credibility was sound because the omissions on the application were unconnected. The Appellate Court found the Board's relating any alleged disability to Siwinski's Major Depressive Disorder was unfounded because it disregarded Dr. Frank's testimony that symptoms of PTSD did not occur until certain traumatic events happened, the stress and anxiety Siwinski exhibited in her personal life were not the same as those she experienced at work, and Siwinski functioned at work previously with Major Depressive Disorder and PTSD and Major Depressive Disorder were not the same thing. The Appellate Court also found just because Siwinski worked for some time as a paramedic and eventually an aide, does not mean her PTSD was not there as it can at times present later.

The matter was remanded back to the Board to grant a line-of-duty disability pension to Siwinski.

Experts in Admin. Hearings Don't Need to Disclose Supporting Documents

Biestek v. Berryhill

Biestek was denied benefits for Social Security. During the hearing of evidence, an expert was used to assess if Biestek could find work and perform. The expert used private market survey data to make the conclusion that Biestek could work. Biestek asked to see the data and the expert declined. Biestek appealed on grounds that the expert's testimony should be stricken for the refusal. The Supreme Court found the denial does not discount her testimony as substantive evidence. Further, the Supreme Court found Biestek pushing for a rule saying testimony should not count when data reveal is rejected was unsatisfactory because each situation varies and sometimes not revealing data can discount testimony and sometimes it cannot. In short, per the US Supreme Court, experts need not disclose the bases for decisions in SSA disability cases.

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Janus Loses Round 2 (so far)

Now (in)famous former State employee and TEA-party darling, Mark Janus, sought a court order requiring AFSCME to refund fair-share fees he had paid throughout his years as a non-member beneficiary of Union representation. Judge Robert Gettleman denied the order and sided with AFSCME because the actions were in line with past state statute and constitutional interpretations. The judge dismissed the case. Janus and his right wing benefactors are likely to appeal

Causation in Psych Cases Still Murky

Miller v. Oak Lawn Police Pension Board (unpublished)

Miller served in the United States Marine Corp. from 1987 to 1991. After 1991, he was in the reserves and hired by Oak Lawn as a police officer in 1996. In 2004, Miller was activated and deployed to Iraq. While serving, Miller killed a 12-year old enemy combatant who aimed an assault rifle at him. Miller finished his deployment and completed a post-deployment survey which released him for police duty. At this time, Miller's wife noticed he became "obsessive-compulsive, lacked patience, and [he] was temperamental."

In 2007, Miller was activated again. During this deployment, Miller was in a truck accident where he was thrown from his vehicle and landed on a piece of metal resulting in a broken tailbone.

Miller went to "intensive counseling" at the VA from 2005 to 2008. After his 2007 deployment, the Police Department sent Miller for a psychological examination, which cleared him for active police duty. After his second tour, Miller's wife noticed him having "disturbed sleeping patterns" and he "withdrew from the family."

In early April 2010, Miller responded to two calls related to firearms. The first at a mall where Miller would testify he a citizen commit suicide. This was not, however, in his police report and the log showed Miller arrived after the shooting. The second call was a murder suicide. Miller allegedly knew the victim and was first on the scene. Miller said he did not touch the victim on the scene, but notes from the VA stated, "Miller held his friend as she died." Records do not show Miller took any immediate action towards therapy after these events. In later testimony, another officer, Officer Cihocki, reported that he (Cihocki) was actually first to arrive to the murder/suicide.

On April 27, 2010, Miller was awarded 80% of a military service connected disability. Included was a 50% disability for PTSD.

In October 2010, Miller participated in an inpatient alcohol treatment at the request of his wife. While at the VA, Miller was involved in an altercation with another officer resulting in an internal investigation. Miller was eventually released by two physicians at the VA for police duty. Miller later served a 30-day suspension in May 2011 for the altercation.

In 2013, Miller responded to a call where a baby had been stabbed. Though he did not leave his vehicle, Miller reported he watched emergency room staff work on the child and delivering a bloody piece of clothing to detectives. There were no reports corroborating this and Miller was not sure if he was on the evidence log.

In February 2014, Miller was guarding a house after a fire and murder/suicide. He witnessed the bodies being taken out of the house and he relayed that it brought back memories of his deployment.

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In March 2014, Miller was served with a divorce. On the day he was served, Miller went out drinking while armed. An internal investigation showed Miller had taken his gun out and pointed it at two uniformed police officers and refused to listen to commands to put it down. The officers admitted Miller to the hospital for alcohol intoxication and he did not report any psychological problems to staff at that time. Miller was placed on administrative leave.

In April 2014, Miller filed for a line-of-duty disability pension. In November 2014, Miller was charged with two counts of misdemeanor aggravated assault and driving under the influence.

Miller was examined by three different psychiatrists - Drs. Weine, Tuder, and Frank, for independent medical evaluations. Dr. Weine determined Miller was disabled from PTSD and had been since 2010 from both police duty and non-duty related events. Dr. Tuder also found him disabled and reported the cause of his PTSD was related to police duty, but predicated his opinion on whether Miller was telling the truth. Miller did not disclose several important factors to Dr. Tuder including: he had previously sought treatment for PTSD at the VA, was (at that time) on administrative leave, his drinking problem, and the firearm incident. Dr. Frank found Miller disabled as the result of initial trauma in the military with some aggravation from police work.

The Board denied Miller's line-of-duty disability pension request, but granted Miller a non-duty disability pension. The Board reasoned no specific act of "Police Duty" caused his disability and Miller lacked credibility due to his dishonesty with the doctors, frequent misrepresentations, and exaggeration of events. Miller filed for administrative review and the Circuit Court affirmed the Board's decision. Miller appealed.

The Appellate Court found the Board properly determined Miller was not credible because his testimony frequently contradicted the record. For instance, Miller said he did not receive treatment for PTSD prior to August 2010, but he had been granted disability from the military in April 2010 for PTSD.

The Appellate Court also found while Miller's PTSD was related to his police duties, there was no one specific event, specific to police duties that caused or exacerbated his PTSD. Miller's PTSD was the result of cumulative events according to two of the three doctors, and the one dissenting opinion was from a doctor Miller omitted information from. With this information, the Appellate Court affirmed the judgment of the Circuit Court and the Board.

MaryKate Gets Into Law School!!!

Our administrative assistant, MaryKate Hresil has been admitted into law school. We are very proud of her. MK's hard-work and dedication to our clients has made her the backbone of our firm. We hope we can keep her around. Congrats MK!!!

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July-Sept (3rd Quarter) Agenda Items

- Semi-Annual Review of Closed Session Meeting Minutes
- Status of Affidavits of Continued Eligibility
- Status Actuarial Valuation
- Fire: Board Officer Elections - President and Secretary
- Police: Board Officer Elections - President, Vice President, Secretary and Assistant Secretary
- FOIA Officer and OMA Designee
- Status of Annual Independent Medical Examinations (if necessary(
- Review/Approve Actuarial Valuation and Tax Levy Request
- Review/Approve Municipal Compliance Report

KG LLC News

- From April 10-13, 2019, KGLLC Partner Keith A. Karlson will be participating in the Securities Litigation and Shareholders' Rights Conference in New Orleans, Louisiana.
- Partner Keith Karlson is speaking at the IPPFA Illinois Conference in East Peoria on May 2-3, 2019. He will be covering pension legal updates and the interplay between collective bargaining and pensions.
- Partner Keith Karlson will be participating in the IAFF Attorney's Conference June 6-8, 2019 in National Harbor, MD.
- In January 2019, KG LLC filed a friend of the court brief on behalf of MAP and IPPFA in support of an injured firefighter in Cronin v. Skokie. The court has yet to rule on this matter.
- Please check out our recently updated website: www.KarlsonGarza.com

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