STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL NASON,

Petitioner-Appellee,

v

STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Appellant.

Supreme Court No. Opn 1/28/10

Court of Appeals No. 290431

Marquette Circuit Court No. 08-45798-AA

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

T. Sylka

APPLICATION FOR LEAVE TO APPEAL

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4/4
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STATEMENT OF QUESTIONS

I. Ever since its decision in *Knauss v State Employees' Retirement Sys*, twenty five years ago the Court of Appeals has consistently held – for purposes of meeting the eligibility criteria for disability retirement – that a person is totally incapacitated from State employment under MCL 38.24 only when that person cannot engage in any and every gainful occupation for which that person is fitted by his education, training, or experience. In this case the Court of Appeals repudiated the decision in *Knauss,* saying that it did not comply with a plain language reading of MCL 38.24. Did the Court of Appeals err in holding that it had been misinterpreting MCL 38.24 for the past twenty five years?

Appellant's answer: "Yes."

Appellee's answer: "No."

II. Respondent denied Petitioner-Appellee's application for a non-duty disability retirement because no medical advisor certified that Petitioner was totally and permanently incapacitated, as required by MCL 38.24. To the contrary, the medical advisor opined that his condition would not permanently preclude him from returning to work as a corrections officer, nor would it prevent him from working in another capacity for which he has the training, education, or experience. Thus, he was not totally or permanently incapacitated. Did the Court of Appeals err when it remanded the case to the Board to address only whether Petitioner is totally incapacitated relative to his job as a corrections officer?

Appellant's answer: "Yes."

Appellee's answer: "No."

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

On October 28, 2010, the Court of Appeals determined that whether a member was "totally incapacitated for further performance of duty" under MCL 38. 24 "solely allows consideration of whether a member can perform the state job from which the member seeks retirement." As a result, the Court of Appeals vacated the Circuit Court's January 28, 2009 order and remanded the case to the State Employees Retirement Board (Board) to determine whether Petitioner was totally incapacitated relative to his job as a corrections officer.

This case presents a substantial question as to the interpretation of a legislative act. The Court of Appeals' decision departs from 25 years of reliance on *Knauss v State Employees' Retirement Sys*,[1] which held that "totally incapacitated for further performance of duty" under MCL 38.21 means that a member must be unable to engage in "any and every gainful occupation for which the member is fitted by education, training, or experience,"[2] failed to apply proper principles of statutory interpretation, ignored the Legislature's 2002 amendment to MCL 38.24, and failed to consider relevant Board rules properly promulgated under the Administrative Procedures Act having the full force and effect of law.

Therefore, Respondent-Appellant (Respondent) requests that this Honorable Court grant its Application for Leave to Appeal and affirm the Board's decision to deny non-duty disability retirement benefits, and endorse the *Knauss* interpretation of "totally incapacitated."

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[1] *Knauss v State Employees' Retirement Sys*, 143 Mich App 644, 372; NW2d 643 (1985).
[2] *Knauss*, 143 Mich App at 649-650.

INTRODUCTION

A disability pension is reserved for those individuals who must be retired due to a *total* and *permanent* disability. An individual who is merely incapable of working in his or her current job is not entitled to the benefits of retirement. Only when a person is incapable of performing any work for which that person has the training, education, or experience to perform, can it be said that person is entitled to receive a lifetime disability pension. The Court of Appeals first articulated this standard in 1985 and the Retirement System has adhered to this standard ever since. Here, however, the Court of Appeals, without benefit of proper briefing by the parties, did an about-face that eviscerates the fundamental principles underlying the disability pension framework.

Petitioner, a former corrections officer, applied for a disability pension from the State Employees' Retirement System (Respondent) claiming that he could no longer work due to a heel injury. To receive disability retirement benefits, Petitioner had to establish that he met all the conditions of MCL 38.24, which includes the requirement that a medical advisor certify that he was totally and permanently incapacitated for further performance of duty. Here, however, the medical advisor did not certify that he was totally and permanently incapacitated for further performance of duty. To the contrary, the medical advisor concluded that Petitioner's foot condition would not permanently preclude him from returning to work as a corrections officer, nor would it prevent him from working in another capacity for which he has the training, education, or experience. Since Petitioner was not certified by a medical advisor as being totally and permanently incapacitated and, hence, failed to meet the standard for receiving a disability pension, Respondent denied his application and the Board affirmed the denial.

Petitioner appealed the Board's decision to the Circuit Court. The Circuit Court, however, improperly substituted its judgment for that of the Board and found that Petitioner was totally

and permanently disabled, based on the holding that the Petitioner's ability to perform past occupations was irrelevant for purposes of determining Petitioner's disability retirement eligibility.[3] Following leave granted, the Court of Appeals held that "total incapacitat[ion] for further performance of duty" under MCL 38.24 "solely allows consideration of whether a member can perform the state job from which the member seeks retirement because of the nonduty related injury or disease, not other employment positions or fields for which the member may be qualified by experience and training."[4]

Therefore, Respondent respectfully requests that this Honorable Court grant its Application for Leave to Appeal, and reinstate the Board's decision to deny non-duty disability retirement benefits under MCL 38.24.

[3] Attachment A, Circuit Court transcript, January 14, 2009, p. 18.
[4] Attachment B, Slip Opinion, p 10.

STATEMENT OF PROCEEDINGS AND FACTS

A. Procedural Facts

On or about May 17, 2005, Petitioner filed an application for non-duty disability retirement benefits under section 24 of the State Employees' Retirement Act, 1943 PA 240, as amended by 2002 PA 93, MCL 38.1 *et al*, (the Act).[5] (CR, 138-147)[6] Petitioner claimed that his ability to work was limited because of a "severe fracture of the right calcaneous, requiring surgery with placement of numerous screws." (CR 139) On August 11, 2006, Independent Medical Advisor (IMA) Russell E. Holmes reviewed the medical evidence, including the July 7, 2006 independent examination findings of Dr. R. Scott Lazzara, and determined that the "evidence shows that his condition continues to improve and that he should be able to return to his past job in the near future. Thus, he does not have a total and permanent disability." (CR, 180) On October 26, 2006, IMA Dr. Holmes issued a supplemental statement of disability and concluded that the "evidence still does not show a total and permanent disability." (CR, 175) As a result, Respondent denied Petitioner's application for non-duty disability retirement benefits and he requested a contested case hearing to dispute that decision. (CR 198)

On June 6, 2007, the Hearing Officer conducted an administrative hearing during which Petitioner testified and presented evidence of his alleged disability. (CR 82-123) On December 11, 2007, the Hearing Officer issued a Proposal for Decision (PFD) which recommended that the Board grant Petitioner's application for non-duty disability retirement benefits. (CR, 51-68) Respondent filed Exceptions to the PFD, to which Petitioner responded. (CR, 26-30 and 20-21)

On April 10, 2008, the Board considered the matter and issued a final Decision and Order denying Petitioner's application, in part due to the fact that the IMA concluded that "Petitioner

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[5] MCL 38.24.

[6] This refers to pages in the Certified Record filed with the Circuit Court on July 21, 2008, under MCL 24.304(2).

was not totally disabled and the disabling condition was not permanent, likely to last throughout the Petitioner's lifetime," and that Petitioner "should be able to return to his past job in the near future." (CR, 3-13 and 11) Additionally, the Board recognized that Petitioner was not totally incapacitated because he retained the ability to perform other occupations for which he was fitted by reason of his training, education, and experience; including driving a truck (CR, 91), selling cars (CR, 91), and selling residential satellite services (CR, 92). Ultimately, Respondent concluded that "Petitioner has not established by a preponderance of the evidence that he cannot engage in employment reasonably related to his past experience and training" and was therefore not totally incapacitated under MCL 38.24. (CR, 13) In issuing its final decision and order, the Board specifically relied on the intermediate standard of "total disability," as set forth in *Knauss*: that a disability applicant is totally and permanently disabled when the applicant is unable to engage in any and every gainful occupation for which the petitioner was fitted by education, training, or experience."[7] (CR, 13)

On May 16, 2008, Petitioner appealed Respondent's final agency decision to the Marquette County Circuit Court. On January 14, 2009, after its review of the parties' briefs and hearing argument, the Circuit Court opined that Respondent had misinterpreted the Court of Appeals' decision in *Knauss v State Employees Retirement Sys*[8] and, therefore, Respondent's decision was affected by an error of law.[9] In making its determination, the Circuit Court concluded that Respondent erred in considering Petitioner's ability to perform past occupations:

> the questions is, is [Petitioner] able to return to employment, based on his training and his experience, that he is qualified to perform . . . I think, frankly, the board

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[7] *Knauss*, 143 Mich App at 649-650.
[8] *Knauss*, 143 Mich App 644.
[9] Attachment A, Circuit Court transcript, January 14, 2009, pp 15, 16.

reached too far back into [Petitioner's] employment history . . . before he had any real training and experience."[10]

Thus, the Circuit Court held that Petitioner had established that he was totally and permanently disabled. In ruling from the bench, the Circuit Court stated that it was remanding the matter to Respondent to adopt the PFD as its decision, thereby granting Petitioner's application for non-duty disability retirement benefits.[11] The Circuit Court's January 28, 2009 Order, however, not only remanded the matter, but further directed Respondent to issue an order granting Petitioner non-duty disability benefits.[12]

On February, 18, 2009, Respondent filed an Application for Leave to Appeal with the Court of Appeals, which was granted on June 3, 2009. On October 28, 2010, the Court of Appeals, without notice to the parties or a request for briefing, overruled *Knauss* and held that "total incapacitat[ion] for further performance of duty" under MCL 38.24 "solely allows consideration of whether a member can perform the state job from which the member seeks retirement because of the nonduty related injury or disease, not other employment positions or fields for which the member may be qualified by experience and training."[13] The Court of Appeals, in the instant case, did not consider Board rule 2008 AACS, R 38.21(o) or 2008 AACS, R 38.39(3) in making its determination. Thus, the Court of Appeals effectively adopted the "extreme view" of total disability discussed in *Knauss*, where "total disability exists whenever the [petitioner] is unable to perform the duties of his particular occupation."[14]

Respondent timely appealed this Court of Appeals decision by filing this Application for Leave to Appeal.

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[10] Attachment A, Circuit Court transcript, January 14, 2009, p 18.
[11] Attachment A, Circuit Court transcript, January 14, 2009, p 18.
[12] Attachment C, Circuit Court Order.
[13] Attachment B, Slip Opinion, p 10.
[14] *Knauss*, 143 Mich App at 646.

B. Substantive Facts

Petitioner was born on November 29, 1962 and is 48 years old. (CR, 90 and 138) After graduating from high school, he held a number of occupations. These positions included driving a truck for a bottling company for approximately five years (CR, 91), selling cars for two and a half years (CR, 91), and selling satellite dishes door-to-door (CR, 92). Petitioner was then without a full-time job for approximately a year (he worked at his parents' store part-time) before he went back to school and earned 16 credits to become a corrections officer in 1988. (CR, 92) After obtaining his certification, he applied for a job with the Michigan Department of Corrections (MDOC) and was hired as a corrections officer.

In February 2006, while on vacation in Tobago, a wave hit Petitioner from behind and drove his feet into the sand, fracturing his right calcaneous (heel). Petitioner returned to Michigan where he had surgery to repair the injury. At the time of the administrative hearing, Petitioner had some relief from his injury, but still had lingering problems including the inability to walk comfortably on uneven ground. (CR, 124)

In conjunction with his application for disability retirement benefits, Respondent gathered medical evidence pertinent to Petitioner's condition. Petitioner submitted medical documentation relevant to the issue of the totality and permanence of his alleged disability, including records from Dr. Robert Blotter, the surgeon who repaired Petitioner's heel fracture on March 10, 2006. Dr. Blotter provided two significant reports from office visits dated September 29, 2006 (CR, 156) and January 5, 2007 (CR, 124). In his September 29, 2006 report, Dr. Blotter did not know if Petitioner's condition was "permanent and stationary." Although Dr. Blotter indicated that Petitioner was "going to have some disability as a result of the fracture," including the possibility of a fusion of his ankle in the future, he concluded that it was too early to determine whether Petitioner's limitations would be permanent. (CR, 156)

In the January 5, 2007 report, Dr. Blotter again did not opine that Petitioner was totally and permanently disabled, stating instead that Petitioner is not expected to run on his right heel or walk effectively on uneven surfaces in the future. Moreover, Dr. Blotter stated that Petitioner "may still need further surgery, such as subtalar fusion." (CR, 124) Despite the possibility of surgery, Dr. Blotter opined that Petitioner would not be able to return to his former job with the Corrections Department. (CR, 124) The only other document supportive of Petitioner is the Disability Extension Form apparently filled out by Dr. Blotter on May 17, 2006. (CR – 161, 162) While Dr. Blotter checked the box indicating that Petitioner was disabled from any occupation (CR - 161), he also stated on the form that Petitioner's release to work date was August 31, 2006. Thus, Dr. Blotter did not state that Petitioner was permanently disabled. (CR - 162) The remainder of the Certified Record is void of any opinions supportive of Petitioner's assertion that he is totally and permanently disabled.

Consistent with Respondent's two-part disability determination procedure, and to accommodate Petitioner (who lives approximately 400 miles from Lansing), IMA Dr. Russell Holmes directed Dr. Lazzara, a physician with an office near Petitioner's residence, to personally examine Petitioner. Dr. Lazzara determined that Petitioner would not be able to obtain the mobility or functional capacity that he previously had due to the nature of his fracture, but noted that his orthopedic maneuvers would continue to improve over time. (CR, 185) Dr. Lazzara did not opine that Petitioner was totally and permanently disabled from future employment, either in his former capacity as a corrections officer or another occupation. (CR, 185) Based on his review of the medical documentation in the record, including all of the evidence from Petitioner's treating physicians and Dr. Lazzara's report, IMA Holmes opined that Petitioner "should be able

to return to his past job in the near future," and twice opined that Petitioner was not totally and permanently disabled from further employment. (CR, 173-176 and 177-180)

Finally, Petitioner does not consider himself totally and permanently disabled from further employment as he testified during the administrative hearing that he spends his days looking for employment. (CR, 98)

ARGUMENT

I. The Court of Appeals erred in overturning *Knauss*.

A. Standard of Review

The Michigan Constitution provides for judicial review of administrative decisions and provides in relevant part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.[15]

The application of the standard of review, however, is contingent upon the type of challenge at issue and must be in accordance with separation of power principles.[16] If a rule making function is at issue, the reviewing court must first determine whether the Legislature properly delegated authority to the agency to promulgate the rule at issue. The legality of the delegation is subject to *de novo* review. If the delegation was proper, the reviewing court must examine whether the agency exceeded the authority granted by the statute.[17] If the examining court is asked to review the agency's fact-finding function in contested cases, the court examines whether the findings were supported by competent, material, and substantial evidence on the entire record. The factual findings, particularly the review of credibility of witnesses and the weight of the evidence, are entitled to deference by the reviewing court.[18]

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[15] Const 1963, art 6, § 28.
[16] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97-100; 754 NW2d 259 (2008).
[17] *Rovas*, 482 Mich at 101.
[18] *Rovas*, 482 Mich at 101.

The agency's interpretation of a statute, however, "is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue."[19] Rather, a reviewing court must give "respectful consideration" to the agency's construction of the statute and provide "cogent reasons" for overruling an agency's interpretation. Nevertheless, when the law is doubtful or obscure, the agency's interpretation is an aid in discerning the Legislature's intent.[20]

Thus, when a reviewing court examines an agency interpretation of a statute, the primary question is whether the interpretation is consistent with or contrary to the plain language of the statute.[21] Respectful consideration is not equal to deference.[22] Statutory construction is the domain of the judiciary, and therefore, the agency's interpretation is not entitled to more weight.[23] Rather, the agency's interpretation may be particularly helpful for doubtful or obscure provisions.[24]

The rules regarding judicial review of statutory language are well-established. Questions involving statutory interpretation and constitutionality present questions of law subject to review *de novo*.[25] The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature.[26] Once the intention of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary.[27] The language of

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[19] *Rovas*, 482 Mich at 103.
[20] *Rovas*, 482 Mich at 103.
[21] *Rovas*, 482 Mich at 108.
[22] *Rovas*, 482 Mich at 108.
[23] *Rovas*, 482 Mich at 108.
[24] *Rovas*, 482 Mich at 108.
[25] *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).
[26] *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989); *Amburgey v Sauder*, 238 Mich App 228, 231-232; 605 NW2d 84 (1999).
[27] *In re Certified Question*, 433 Mich at 722.

the statute expresses the legislative intent.[28] The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation.[29] Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case.[30]

A statutory provision is ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning.[31] A statutory provision should be viewed as ambiguous only after all other conventional rules of interpretation have been applied and found to be wanting.[32] If a statute is ambiguous, judicial construction is appropriate.[33] "Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose."[34] When reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language,"[35] and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal.[36] A court should consider the plain meaning of a statute's words and their "placement and purpose in the statutory scheme."[37] "Where the language used

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[28] *Dep't of Transportation v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008).
[29] *Tomkins*, 481 Mich at 191.
[30] *Tomkins*, 481 Mich at 191.
[31] *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007).
[32] *Fluor Enterprises,* Inc, 477 Mich at 177 n 3.
[33] *Capitol Properties Group, LLC v 1247 Ctr St, LLC*, 283 Mich App 422, 434; 770 NW2d 105 (2009).
[34] *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994).
[35] MCL 8.3a.
[36] *McCormick v Carrier*, 487 Mich 180, 192; ____ NW2d ____; 2010 Mich LEXIS 1654, *12-*13, citing *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).
[37] *McCormick v Carrier*, 487 Mich at 192, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted."[38] It is a "fundamental rule of statutory construction that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question."[39]

When construing statutory sections, the terms of statutory provisions with a common purpose should be read in pari materia.[40] The objective of the pari materia rule is to give effect to the legislative purpose as found in statutes addressing a particular subject.[41] "Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies whenever possible."[42] When construing a statute, a court should not abandon the canons of common sense.[43] This court has stated that it "may not read into the law a requirement that the lawmaking body has seen fit to omit."[44] When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose.[45] Therefore, when necessary to interpret an ambiguous statute, the appellate courts must determine the reasonable construction that best effects the Legislature's intent.[46]

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[38] *McCormick*, 487 Mich at 192, citing *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937).
[39] *DiBenedetto v West Shore Hosp,* 461 Mich 394, 403-404; 605 NW2d 300 (2000).
[40] *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999).
[41] *World Book,* Inc, 459 Mich at 416.
[42] *World Book, Inc*, 459 Mich at 416-417.
[43] *Marquis*, 444 Mich at 644.
[44] *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951).
[45] *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142; 662 NW2d 758 (2003).
[46] *Houghton Lake*, 255 Mich App at 142.
[47] *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 198; 631 NW2d 733 (2001).

Administrative agencies are created by the Legislature as repositories of special competence and expertise uniquely prepared to examine the facts and develop public policy within a particular field.[47] "[A]dministrative agencies possess specialized and expert knowledge to address issues of a regulatory nature. Use of an agency's expertise is necessary in regulatory matters in which judges and juries have little familiarity."[48] The relationship between the courts and administrative agencies is one of restraint, and courts must exercise caution when called upon to interfere with the jurisdiction of an administrative agency.[49] "Judicial restraint tends to permit the fullest utilization of the technical fact-finding expertise of the administrative agency and permits the fullest expression of the policy of the statute, while minimizing the burden on court resources."[50]

B. Analysis

In *Knauss*, the Court of Appeals recognized that Michigan follows an intermediate standard of the term "total disability," such that a person is only totally disabled where he or she cannot perform any occupation reasonably related to his or her past training, education, or experience. In the instant case, the Court of Appeals incorrectly determined that whether a member was "totally incapacitated for further performance of duty" under MCL 38.24 "solely allows consideration of whether a member can perform the state job from which the member seeks retirement, not other employment positions or fields for which the member may be qualified by experience and training."[51] In so narrowly construing the term "totally incapacitated," the Court of Appeals improperly substituted its opinion for that of the Board, and eviscerated 25 years of well-established case law and agency decisions. In making its

[48] *Travelers Ins Co*, 465 Mich at 198-199.
[49] *Judges of the 74th Judicial Dist v Bay Co*, 385 Mich 710, 727; 190 NW2d 219 (1971).
[50] *Judges of the 74th Judicial Dist*, 385 Mich at 728.
[51] Slip Opinion, p 10.

determination, the Court of Appeals did not apply proper principles of statutory interpretation and failed to consider Board rules 2008 AACS, 38.21(o) and 2008 AACS, 38.39. The term "duty," as used in MCL 38.24, is not defined in the Act, and is only susceptible to meaning "work." Moreover, in 2002 the Legislature amended MCL 38.24 nearly 17 years after the Court of Appeals decided *Knauss*, and removed language providing that duty must be "to the state."

1. "Totally incapacitated for further performance of duty" under MCL 38.24 means that a member is unable to perform any work for which the member is fitted by training, education, or experience.

In the case at hand, the Court of Appeals relied on MCL 38.21(1)(b) in determining that "duty" in section 24(b)(1) "refers or relates to state employment."[52] Section 24(1) of the Act provides the disability retirement eligibility criteria where the injury or disease "is not the natural and proximate result of the member's performance of duty,"[53] whereas section 21(1)(b) provides the disability retirement eligibility criteria for a member whose injury or disease "is the natural and proximate result of the member's performance of duty."[54] The Court of Appeals concluded that the "performance of duty" language in both sections "clearly and unambiguously refers to work-related or job-related activities, which necessarily means that 'duty' can only relate to state employment."[55]

In *Chalmers v Metropolitan Life Ins Co*, the Court of Appeals recognized that there are three ways of interpreting the term "total disability:"

> 1) the extreme view in favor of the insured that total disability exists whenever the insured is unable to perform the duties of his particular occupation; 2) the extreme view in favor of the insurer that total disability exists only when there is incapacity to pursue any occupation whatever, and 3) the intermediate view, which regards total disability as a relative term . . .[56]

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[52] Slip Opinion, p 7.
[53] MCL 38.24(1).
[54] MCL 38.21(1)(b).
[55] Slip Opinion, p 7.
[56] *Chalmers v Metropolitan Life Ins Co*, 86 Mich App 25, 30-31; 272 NW2d 188 (1978).

The *Chalmers* Court determined that Michigan insurance cases follow the intermediate view of "total disability."[57] In *Knauss*, a duty disability case involving section 21, the Court of Appeals applied the intermediate view in determining that a disability retirement applicant is "totally disabled" if he or she is unable to perform any occupation for which he or she has the training, education, or experience to perform.[58] At the time *Knauss* was decided, section 21 provided:

> Subject to the provisions of sections 33 and 34, upon the application of a member, or his department head, or the state personnel director, a member who becomes totally incapacitated for duty in the service of the state of Michigan without willful negligence on his part, by reason of a personal injury or disease, which the retirement board finds to have occurred as the natural and proximate result of the said member's actual performance of duty in the service of the state, shall be retired: Provided, The medical advisor after a medical examination of said member shall certify in writing that said member is mentally or physically totally incapacitated for the further performance of duty *in the service of the state*, and that such incapacity will probably be permanent, and that said member should be retired: And provided further, That the retirement board concurs in the recommendation of the medical advisor.[59]

Respondent has consistently applied *Knauss*' interpretation of "totally incapacitated for further performance of duty in the service of the state," under section 21, and granted disability retirement benefits when a member was unable to engage in any gainful occupation for which the member was fitted by education, training, or experience. Further, it is the Board that must ultimately decide whether a petitioner is totally and permanently disabled.

In this context, and consistent with statutory construction principles, the term "duty" in the phrase "totally incapacitated for further performance of duty in the service of the state" is synonymous with "work." Moreover, when reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the

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[57] *Chalmers*, 86 Mich App at 31.
[58] *Knauss*, 143 Mich App at 649-650.
[59] 1943 PA 240, as amended by 1951 PA 200, MCL 38.21. (Emphasis added)

language,"[60] and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal.[61] The term "duty" is not defined in the Act, however, *The American Heritage College Dictionary* defines "duty" to mean, *inter alia*, "function or work; service."[62]

The *Knauss* interpretation of "totally incapacitated for further performance of duty" remained the controlling interpretation at the time of the Legislature's 2002 amendments to sections 24(1) and 21(1)(b). On March 27, 2002, the Legislature amended section 21 and eliminated all references to duty "in the service of the state." Section 21 now provides, in relevant part:

> (1) Except as may be provided otherwise in sections 33 and 34, a member who becomes totally incapacitated for duty because of a personal injury or disease shall be retired, if all of the following apply:
>
> * * *
>
> (b) The retirement board finds that the member's personal injury or disease is the natural and proximate result of the member's performance of duty.
>
> (c) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the total incapacitation is probably permanent, and that the member should be retired.
>
> (d) The retirement board concurs in the recommendation of the medical advisor.[63]

In like manner, the Legislature amended section 24 and removed similar language. Before the 2002 amendment, section 24 provided:

> Subject to the provisions of sections 33 and 34, upon application of a member, or his department head, or the state personnel director, a member who has been a

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[60] MCL 8.3a.
[61] *Oakland Co Bd of Co Rd Comm'rs*, 456 Mich at 604.
[62] *The American Heritage College Dictionary* (1997).
[63] MCL 38.21(1)(b)-(c).

> state employee at least 10 years becomes totally and permanently incapacitated for duty as the result of causes not occurring the performance of duty *to the state*, may be retired by the retirement board: Provided, the medical advisor after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, and such incapacity is likely to be permanent and that such member should be retired.

Section 24 now provides:

> (1) Except as may otherwise be provided in sections 33 and 34, a member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply:
>
> > (b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired.

It is a fundamental rule of statutory interpretation that where the language used in a statute has been subject to judicial interpretation, the Legislature is presumed to have used particular words in the sense in which they have been interpreted.[64] Further, the substantial reenactment in later legislation of provisions previously construed by the courts, or administrative authorities, gives rise to a strong inference in determining the Legislature's intent that the Legislature approves of and adopts the prior construction.[65] Finally, the Legislature is presumed to be aware of long-standing judicial precedent affecting an area in which the Legislature undertakes exhaustive codification of law.[66]

In the instant case, the Legislature should be presumed to be aware of *Knauss* and the interpretation it gave to "totally incapacitated for further performance of duty in the service of

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[64] *McCormick*, 487 Mich at 192, citing *Powell*, 280 Mich at 703.
[65] *Gwitt v Foss*, 230 Mich 8, 12; 203 NW 151 (1925).
[66] *Hunter*, 484 Mich at 271 n 47.

the state."[67] The Legislature eliminated any and all language from sections 21 and 24 that could be construed in conflict with *Knauss*; namely that "duty" must be "in the service of the state." Since *Knauss* interpreted "totally incapacitated for further performance of duty in the service of the state" to mean that a member is disabled only when that member is unable to engage in any gainful occupation for which the member was fitted by education, training, or experience, any and all references to "in service of the state," or the like, became nugatory. Thus, the Legislature amended sections 21 and 24 to provide for disability retirement eligibility where a member, *inter alia*, becomes "totally incapacitated for duty" as the phrase was interpreted by *Knauss*.

Notwithstanding these principles of statutory interpretation, which this Court recently applied in *McCormick*, the Court of Appeals, in the instant case, opined that "duty" could *not* be construed to mean anything other than state employment:

> It would be nonsensical and unworkable to conclude, for purposes of causation under §§ 24(1) and 21(1)(b), that performance of 'duty' related to performance of a job or jobs, unrelated to state employment, for which a member had prior relevant training and experience.[68]

The Court of Appeals went on to hold that "further performance of duty" referred only to the member's last position. In support of this rationale, the court noted that section 21(1)(b) provides for duty disability retirement eligibility only when a "*member's* personal injury or disease is the natural and proximate result of the *member's* performance of duty."[69] (Emphasis added) The court explained that, in this context, "duty" can only refer to the state job held by the member. On the contrary, prior to the 2002 amendments, the term "duty," standing alone, was not capable of referring to state employment as the phrase "in the service of the state" modified "duty" such that "duty," standing alone, could only have meant "work." It is incongruent to construe the

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[67] 1943 PA 240, as amended by 1951 PA 200, MCL 38.21.
[68] Slip Opinion, p 7.
[69] MCL 38.21(1)(b).

Knauss era definition of the term "duty" to mean "the state job held by the member" because of the resulting redundancy arising from that interpretation.

Moreover, the Court of Appeals' reliance on section 21(1)(b) is misplaced where the court focuses on the word "duty" rather than the "*member's* performance of duty."[70] The word "work" may be substituted for "duty" in section 21(1)(b) without altering the statute's meaning. Section 1f of the Act provides the definition of the word member: "'Member' means a state employee included in the membership of the retirement system, as provided for in section 13."[71] Under section 13(1), "membership in the retirement system consists of state employees occupying permanent positions in the state civil service."[72] Thus, the phrase "member's performance of duty" inherently refers to the work the person is performing for the state.

In addition, any work that an individual may perform outside of state employment would be as a private citizen and not as a member. Therefore, a person who sustains an injury or disease as a result of performing private work, even though an employee of the state, would not be eligible for duty disability retirement benefits because that person did not sustain an injury or disease in his or her capacity as a member. There are multiple references to "member" and "person" throughout the Act, such that any reference to "member" must be construed as a reference to a person in that individual's capacity as a member.[73]

Finally, section 67a(7)[74] provides further support for this interpretation where it is the only statute in the Act that still refers to "performance of duty to this state:"

> If a qualified participant who has been a state employee for the number of years necessary to vest under Tier 1 dies as a result of causes occurring not in the

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[70] MCL 38.21(1)(b). (Emphasis added)
[71] MCL 38.1f.
[72] MCL 38.13(1).
[73] See MCL 38.10, MCL 38.13, and MCL 38.33.
[74] MCL 38.67a(7).

> *performance of duty to this state* a supplemental benefit shall be granted equivalent to the amount provided for in section 25 had the former qualified participant been considered retired under section 24, which supplemental benefit shall be offset by the value of the distribution of his or her accumulated balance as determined by the retirement system upon becoming a former qualified participant pursuant to section 67.[75]

For purposes of disability retirement, the terms "member" and "qualified participant" are interchangeable in the sense that a "qualified participant" is defined as a participant in a Tier 2 retirement plan who: (1) would have been eligible for membership except that the individual was hired after March 31, 1997; or, (2) was a member, but elected to terminate membership in Tier 1 and participate in Tier 2.[76] Therefore, if section 67a(7) did not specify that the state employee's duty was "to this state," the statute would have read, in part: "If a state employee dies as a result of causes occurring not in the performance of duty [work], a supplemental benefit shall be granted." In summary, the Legislature had to use the phrase "performance of duty to this state" in section 67a(7) to clarify the type of work at issue, *i.e.* state work. Finally, section 67a(7) also supports that the term "duty," standing alone, does not only refer to state employment, because the phrase "duty to this state" as used in section 67a(7) would be redundant.

Thus, the term "duty," as used in section 24 means "work" and is incapable of relating only to state employment without violating fundamental principles of statutory interpretation. Further, the 2002 Legislative amendments indicate that the Legislature was aware of the *Knauss* interpretation of "totally incapacitated" and amended the Act in conformity with this interpretation.

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[75] MCL 38.67a(7). (Emphasis added)
[76] MCL 38.55(2).

2. The phrase "further performance of duty" means additional performance of work.

As mentioned in subsection 1, the Court of Appeals concluded that the "performance of duty" language in sections 21 and 24 "clearly and unambiguously refers to work-related or job-related activities, which necessarily means that 'duty' can only relate to state employment."[77] Moreover, the court determined that the use of the word "further" as a modifier of "performance of duty" "indicates that the Legislature was speaking of a duty the performance of which would have been *continuing or extended*, but for the injury or disease suffered by the member."[78] Thus, the court determined that "total incapacitation necessarily relates solely to the incapacity of the member to continue performing, or to further perform, the member's state job from which he or she seeks retirement."[79]

As shown in subsection 1, the term "duty" is synonymous with "work." Thus, the word "further" essentially modifies the phrase "performance of work." When used as an adjective, *The American Heritage College Dictionary* defines "further" to mean: "additional."[80] At the time of *Knauss*, section 21 provided for duty disability retirement eligibility, *inter alia*, where a medical advisor certified that a member was "mentally or physically totally incapacitated for the further performance of duty in the service of the state . . . [and] the retirement board concurs in the recommendation of the medical advisor."[81] Stated otherwise, a medical advisor certified whether a member was totally incapacitated for the further performance of work in the service of the state.

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[77] Slip Opinion, p 7.
[78] Slip Opinion, p 7.
[79] Slip Opinion, p 7-8.
[80] *The American Heritage College Dictionary* (1997).
[81] 1943 PA 240, as amended by 1951 PA 200, MCL 38.21.

The 2002 amendment removed "in the service of the state" and all similar references from section 21. Thus, the Legislature intended to ensure that a member was totally incapacitated from additional work before that member could be considered for duty disability retirement benefits. Under the *Knauss* intermediate interpretation of "total disability" or "total incapacity," of which the Legislature was aware, a person must be unable to engage in any gainful occupation for which the member is fitted by education, training, or experience.[82]

As the Court of Appeals properly articulated, where the identical language, "further performance of duty," also modified "totally incapacitated" in section 24(1)(b), its definition, for purposes of cohesiveness and harmony, must parallel its meaning as used elsewhere in the statute and the Act overall.[83] Thus, under sections 24(1)(b), 67a(1)(c), and 67a(5)(b)[84] "totally incapacitated for further performance of duty" means that a member is unable to perform any work for which the member is fitted by training, education, or experience.

3. The Court of Appeals improperly relied upon MCL 38.33.

The Court of Appeals improperly relied upon MCL 38.33(a) and MCL 38.33(b) in support of its determination that a member's "total incapacitat[ion] for further performance of duty" means that a member is unable to continue performing only his or her most recent state job. Specifically, the court misconstrued the language of MCL 38.33 as being applicable to MCL 38.24. The language of MCL 38.24 is clear and unambiguous when read in the context of the *Knauss* interpretation of "totally incapacitated" combined with the 2002 Legislative amendments. Thus, the doctrine of *in pari materia* does not apply.[85]

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[82] *Knauss*, 143 Mich App at 649-650.
[83] Slip Opinion, p 7.
[84] MCL 38.24(1)(b), MCL 38.67a(1)(c), and MCL 38.67a(5)(b), respectively.
[85] *Tyler v Livonia Pub Schs*, 459 Mich 382, 392; 590 NW2d 560 (1999).

a. "Physically capable of resuming employment" under MCL 38.33(a) is not the same standard as "totally incapacitated for further performance of duty" under MCL 38.24.

Section 33(a) provides that Respondent must restore a disability retirant to active state service, and terminate his or her benefits, when the disability retirant is physically capable of resuming employment as outlined by the statute:

> The retirement board may, and upon the application of anyone retired pursuant to section 21, 24, or 67a shall, require anyone retired under section 21, 24, or 67a who has not attained age 60 years to undergo a medical examination. The retirement board shall not require a person retired under section 21, 24, or 67a to undergo more than 1 medical examination in any calendar year. The examination is to be made by or under the direction of the medical advisor at the retirant's place of residence or other place mutually agreed upon. Should anyone retired under section 21, 24, or 67a who has not attained age 60 years refuse to submit to the medical examination, his or her disability retirement allowance or supplemental benefit provided for in section 67a may be discontinued until his or her withdrawal of the refusal. If the refusal continues for 1 year, all rights in and to his or her disability retirement allowance or supplemental benefit provided for in section 67a may be revoked by the retirement board. If upon the medical examination of a person retired under section 21, 24, or 67a, the medical advisor reports and his or her report is concurred in by the retirement board, that the person retired under section 21, 24, or 67a is physically capable of resuming employment, he or she shall be restored to active service with the state and his or her disability retirement allowance or supplemental benefit provided for in section 67a shall cease.[86]

The Court of Appeals concluded that to "resume employment means that the member would be picking up where he or she left off, *i.e.*, continuing the state job from which the member retired," and added "[d]etermining the physical capacity to work under section 33(a) is thus related to the capacity to perform the state job from which the member retired."[87]

While Respondent agrees with the Court of Appeals' analysis of MCL 38.33(a), the analysis is irrelevant as to section 24.[88] A retirant under MCL 38.24 is totally and permanently incapacitated from performing work reasonably related to his or her training, education, and

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[86] MCL 38.33(a).
[87] Slip Opinion, p 8.
[88] MCL 38.24.

experience.[89] For example, a corrections officer is totally and permanently disabled when he or she cannot perform the corrections officer position or any other position reasonably related to their training, education, or experience, including, for example: security guard, jailor, or youth corrections officer.

Whether a disability retirant is physically capable of resuming employment under section 33(a)[90] only contemplates whether the disability retirant is physically capable of performing the job from which he or she retired. Once Respondent grants a member's application for disability retirement benefits, Respondent cannot prevent the retirant from gaining training, education, or experience to perform other work. Rather, Respondent can only reduce a retirant's retirement allowance to ensure that the retirant's total earnings do not exceed his or her final compensation under section 33(b).[91] Thus, it is nonsensical to imply that Respondent may return a retirant to active service who, years later, has acquired the training, education, and experience to perform a job other than the job from which the retirant retired. Moreover, if the Board could terminate a retirant's disability benefits because it later determined that the retirant could perform work reasonably related to his or her training, education, or experience, other than his or her state job, then that individual would be without benefits and without a job, as the state cannot return someone to a job other than a state job. The Legislature determined that a physically capable disability retirant must be afforded the opportunity to earn the benefits of state employment, including health care, before Respondent may terminate his or her disability benefits. It is important for this Court to consider that the benefits of disability retirement are not exclusive of a disability *retirement* allowance, but often include health care and life insurance benefits.

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[89] MCL 38.24; *Knauss*, 143 Mich App at 649-650, *VanZandt*, 266 Mich App at 596.
[90] MCL 38.33(a).
[91] MCL 38.33(b).

In addition, the Court of Appeals erred in relying on section 33(a) where the statute is practically obsolete. There are several instances where a disability retirant may *not* be returned to active service, even if that retirant is physically capable of resuming employment. For example, if a member receives a disability retirement from a job that no longer exists in state service, the disability retirant can never be restored to that position. Further, if a disability retirant was terminated for cause before receiving a disability retirement, he or she cannot be restored to that position. Moreover, if a disability retirant quit his or her job before obtaining a disability retirement, he or she cannot be restored to that position; and Respondent cannot return a disability retirant to active service who is unwilling to return to active service. Finally, the various state departments cannot be expected to hold every disability retirant's job in abeyance pending their physical capacity to return to that job.

b. The Court of Appeals' reliance on MCL 38.33(b) is misplaced.

The Court of Appeals determined that section 33(b)[92] also supported its conclusion that a member's "total incapacitat[ion] for further performance of duty" means that a member is unable to continue performing only his or her most recent state job. Section 33(b) provides:

> If the secretary reports and certifies to the retirement board that a person retired under section 21, 24, or 67a is engaged in a gainful occupation paying more than the difference between his or her disability retirement allowance and his or her final compensation, and if the retirement board concurs in the report, then his or her retirement allowance shall be reduced to an amount which together with the amount earned by him or her shall equal his or her final compensation. Should the earnings of the person retired under section 21, 24, or 67a be later changed, the amount of his or her retirement allowance shall be further modified in like manner.[93]

Respondent agrees with the Court of Appeals that this language clearly and unambiguously contemplates situations in which a member is employed, yet has also retired

[92] MCL 38.33(b).
[93] MCL 38.33(b).

from state employment due to a non-duty related injury or disease and is collecting state disability retirement benefits.[94] Respondent notes, however, that like section 33(a), this analysis is irrelevant to section 24. Respondent cannot terminate a disability retirant's benefits until he or she is returned to active state service.[95] Respondent can only return a disability retirant to active state service if he or she is physically capable of performing his or her last state job. Thus, a disability retirant may engage in gainful employment outside of state service and continue to receive disability retirement benefits.

If a disability retirant voluntarily returns to any position in state service, however, the retirant forfeits his or her retirement allowance along with all other benefits of retirement.[96] As a practical matter, a *member* cannot also be a *retirant*; therefore a retirant forfeits his or her benefits upon becoming a member.[97] An illustration of this situation arose in *Nicholas v State Employees Retirement Sys*, where the Court of Appeals envisioned a scenario where a retirant is totally and permanently disabled from performing his or her former state job, but may be able to engage in other work with the state.[98] In that instance, *Nicholas* stated that the retirant's retirement allowance would be reduced as appropriate under section 33(b).[99]

Currently, however, such a scenario presents a legal impossibility. Under MCL 38.1h(2): "'Retirant' means a person who has ceased to be a member of the retirement system by reason of retirement with a pension or retirement allowance payable from the funds of the retirement system." Moreover, MCL 38.16(4) provides that "[i]f a member becomes a retirant or dies, he or she ceases to be a member." Nevertheless, MCL 38.13(1) generally provides that "membership

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[94] Slip Opinion, p 8.
[95] *Nicholas v State Employees Retirement Sys*, 144 Mich App 70, 75; 372 NW2d 685 (1985).
[96] MCL 38.68c(1).
[97] See MCL 38.1f(1) and MCL 38.1h(2).
[98] *Nicholas*, 144 Mich App at 75.
[99] *Nicholas*, 144 Mich App at 75.

in the retirement system consists of state employees occupying permanent positions in the state civil service." Thus, if a disability retirant engaged in state employment other than the job from which he or she retired, the retirant's retirement allowance would not be "reduced," but rather terminated or suspended because a retirant cannot also be a member of the retirement system.[100] Further, MCL 38.68c ensures that a retirant may not also be engaged in state employment without forfeiting his or her retirement allowance. Thus, MCL 38.33(b) solely contemplates situations where a disability retirant is engaged in gainful employment outside of state service, and is wholly irrelevant to section 24.

4. The Court of Appeals failed to consider relevant Board rules, which were properly promulgated under the Administrative Procedures Act and have the force and effect of law.

The Court of Appeals' opinion has already been relied upon by other petitioners in contested cases to invalidate Board rules properly promulgated under the Administrative Procedures Act, (APA), 1969 PA 306, MCL 24.201 *et al*, (APA).[101] The APA provides the definition of a rule:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.[102]

In *Clonlara, Inc v State Bd of Educ*, this Court stated that rules properly promulgated under the APA have the force and effect of law.[103] This Court further explained that such rules

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[100] OAG, 1991-1992, No 6693, p 71 (August 16, 1991).
[101] *Fox v State Employees' Retirement System*, 2010 SERS 25664; *Limmer v State Employees' Retirement System*, 2010 SERS 44837.
[102] MCL 24.207.
[103] *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 239; 501 NW2d 88 (1993).

"fill in the interstices of the statute and presumably carry out its intent in greater detail."[104] Further, "a court may not substitute its judgment of the content of a legislative rule, but may only strike the rule if the agency lacked statutory authority to adopt it, the agency failed to follow proper procedure, or the rule is unreasonable."[105] In determining whether a rule is a valid legislative rule, courts employ a three-prong test:

> "(1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and (3) whether it is arbitrary and capricious."[106]

In contrast, an "interpretive" rule interprets and applies the provisions of the statutes under which the agency operates: "[interpretive rules] state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts."[107] This Court stated in *Clonlara* that "[l]egislative rules are enforceable in and of themselves. But an agency must rely on the underlying statute to support its reading of a statute set forth in an interpretive 'rule.'"[108]

Section 2(2) of the Act grants the Board the authority to promulgate rules:

> Except as otherwise provided in this section, the administration and management of the retirement system and the responsibility for making effective the provisions of this act are vested in a retirement board. Except as otherwise provided in this section, the retirement board may promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, for the implementation and administration of this act.[109]

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[104] *Clonlara*, 442 Mich at 240, citing Bienenfeld, Michigan Administrative Law (2d ed), ch 4, p 18.
[105] *Clonlara*, 442 Mich at 240, citing Bienenfeld, ch 4, p 18.
[106] *Blank v Dep't of Corrections*, 462 Mich 103, 127; 611 NW2d 530 (2000), citing *Luttrell v Dep't of Corrections* 421 Mich 93, 100; 365 NW2d 74 (1984).
[107] *Clonlara*, 442 Mich at 240 citing 1 Cooper, State Administrative Law, pp 174-175.
[108] *Clonlara*, 442 Mich at 240.
[109] MCL 38.2(2).

Based on this statutory grant of authority, the Board, in accordance with the APA, promulgated and enacted 2008 AACS, R 38.21(o) (Rule 38.21(o)) and 2008 AACS, R 38.39(3) (Rule 38.39(3)). Rule 38.21(o) defines the term "totally incapacitated," as used in MCL 38.21 and MCL 38.24 to mean: "the member is unable to perform the duties of his or her current position, or any other position reasonably related to the member's education, training, or experience."[110] Rule 38.39(3) emphasizes the Board's definition of "totally incapacitated," and provides as follows:

> For purposes of MCL 38.21 and 38.24 of the act, the board shall not retire a member if the member can perform any job for which the member has experience, training, or education. If the board determines that a member is not mentally or physically totally incapacitated for further performance of duty or that a member's total incapacity is not probably permanent, the retirement system does not have the obligation to find employment for a member.[111]

Although these Board rules were enacted after Petitioner's application for non-duty disability benefits, the Court of Appeals should have taken them into consideration, where its decision could materially affect the overall validity of the rules. As a result, the Court of Appeals failed to follow fundamental rules of statutory interpretation and binding case law.

In *Rovas*, this Court stated that where the Legislature has properly delegated rule-making authority, "the only question before the court is whether the agency 'has exceeded its authority granted by the statute.'"[112] This Court declined to adopt the federal *Chevron*[113] doctrine in *Rovas*;[114] however, that case dealt with an agency interpretation of a statute during a contested case, not a rule. In the instant case, the Board's definition of "totally incapacitated" under Rule

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[110] 2008 AACS, R 38.21(o).
[111] 2008 AACS, R 38.39(3).
[112] *Rovas*, 482 Mich at 101.
[113] *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 U.S. 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).
[114] *Rovas*, 482 Mich at 111.

38.21(o) is not a mere "interpretation," but is a rule having the force and effect of law. Thus, a court may not substitute its opinion of the meaning of "totally incapacitated" for that of the Board's, unless the Board rule is: (1) outside the subject matter of the enabling statute; (2) does not comply with the legislative intent underlying the enabling statute, and; (3) is arbitrary or capricious.

The Board's ability to promulgate a rule defining "totally incapacitated" under MCL 38.21 and MCL 38.24 is within the subject matter of the Act which provides that the retirement board may promulgate rules under the APA for the "implementation and administration of this act."[115] The intent of the Act, as expressed in the first line of its title, includes: "[providing] for a state employees' retirement system" and "[creating] certain accounts and [providing] for expenditures from those accounts." Creating retirement accounts and providing for expenditures from those accounts, for example, requires a high level of expertise. It would be impractical for the Legislature to establish rules and regulations of requisite specificity to properly administer the Act, therefore this function must be performed by the designated administrative authority. Thus, the standards enunciated by the Legislature to govern Respondent in the exercise of its rule-making authority are "as reasonably precise as the subject matter requires or permits."[116] The Board promulgated Rules 38.21(o) and 38.39(3) to facilitate the practical implementation and administration of providing for expenditures from certain retirement accounts.

Board Rules 38.21(o) and 38.39(3) are consistent with the legislative intent underlying the Act. The Legislature gave the Board broad authority to promulgate rules necessary to manage and implement the retirement system. The Legislature's grant of authority coupled with the Act's intent, as manifested in the first line of its title, expresses the Legislature's intent that

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[115] MCL 38.2(2).
[116] *Dep't of Natural Resources v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976).

Respondent address specific issues, such as the manner and conditions upon which retirement allowances are distributed. Moreover, due process necessitates that the Board promulgate rules defining the ambiguous nature of the phrase "totally incapacitated for further performance of duty," viewed in isolation of long-standing case law and legislative amendments, in order to avoid arbitrary or capricious disability denials. Nevertheless, when viewed in context of long-standing case law and legislative amendments, the Board's promulgated rules do not conflict with the clear and unambiguous meaning of the phrase "totally incapacitated for further performance of duty," as used in MCL 38.21 and MCL 38.24.

The Board rules are not arbitrary or capricious. A rule is not arbitrary or capricious if it is rationally related to the purpose of the enabling act.[117] As stated earlier in this section, the Board promulgated Rules 38.21(o) and 38.39(3) to facilitate the practical implementation and administration of providing for expenditures from certain retirement accounts. Thus, the Board rules are rationally related to the purpose of the Act, where that purpose is to "create certain [retirement] accounts and provide for expenditures from those accounts."

The purpose of the State's disability retirement statutes is to provide the applicant with all the benefits of retirement, where the applicant has "finished his or her active working life"[118] due to a mental or physical total and permanent disability.[119] A member or a qualified participant who is able to engage in work for which he or she is fitted by training, education, or experience has no need for state disability retirement payments or the benefits of retirant status. For example, a qualified participant in the Respondent's Tier 2 plan, who is granted disability retirement status, not only receives a monthly payment from the State of Michigan, but may also

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[117] *Blank*, 462 Mich at 128.
[118] Definition of "retired" provided by *The American Heritage College Dictionary* (1997).
[119] See: MCL 38.49(1) which expresses the Legislature's intent that the State Employees' Retirement System be maintained as a qualified pension plan under the Internal Revenue Code.

receive a waiver of the federal 10% excise tax penalty on his or her 401k earnings and qualify for additional tax credits under 26 USC § 22.[120] A member or qualified participant who is able to perform jobs for which he or she is fitted by training, education, or experience should not reap the benefits of retirant status.

Finally, if a member or qualified participant is able to perform jobs for which he or she is fitted by training, education, or experience, then that individual is not only capable of being a part of the productive workforce, but is well qualified to engage in work. An individual who is not of retirement age and is qualified for certain types of employment should not, as a matter of public policy, be declared eligible to collect a disability retirement pension. Such an individual is not "totally incapacitated" where "totally" is defined by the dictionary to mean "complete[ly]; utter[ly]; absolute[ly]" and "incapacitated" is defined to mean "disabled."[121] Thus, the Board's definition of "totally incapacitated" complies with Legislative intent and ensures that disability retirement benefits are granted only when required.

II. The Court of Appeals erred when it remanded the case to the Board to address only whether Petitioner is totally incapacitated relative to his job as a corrections officer

A. Standard of Review of Review in the Court of Appeals

In *Boyd v Civil Service Comm*, the Court of Appeals rejected application of the "direct review" standard when reviewing a lower court's decision that reversed an agency's decision, noting that:[122]

> To hold that this Court—an intermediate appellate court—must also conduct a direct review of the agency's findings is to contravene the plain terms of our state constitution and to vitiate the sieve-like nature of the appellate process.

This Court then identified the proper standard of review in cases such as the instant case:

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[120] See also, 26 USC § 72(q)(2)(C); *Dwyer v Comm'r*, 106 TC 337, 340-341 (US Tax Court) (1996).

[121] *The American Heritage College Dictionary* (1997).

[122] *Boyd v Civil Service Comm*, 220 Mich App 226, 233; 559 NW2d 342 (1996).

> We therefore hold that when reviewing a lower court's review of an agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. n5
>
> n5 See, e.g., *Silver Dollar Café* [441 Mich 110; 490 NW2d 337 (1992)] n 4, 441 Mich at 116-117; *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976).[123]

Thus, the standard of review in this Court is to determine whether the Court of Appeals applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test when it reviewed Respondent's decision.

B. Standard of Review in the Circuit Court

Const 1963, art 6, § 28 provides for the scope of review of appeals of final orders of administrative agencies and requires that, where a hearing is required by law, the final decision of the agency is subject to judicial review. Under art 6, § 28, the agency ruling must be "authorized by law" and its findings "supported by competent, material and substantial evidence on the whole record." Section 106(1) of the Administrative Procedures Act, MCL 24.306, implements art 6, § 28.

In *Dignan v Michigan Pub School Employees' Retirement Board*, the Court of Appeals explored, in great detail, the scope of review of administrative agency decisions.[124] The Court held that a circuit court's review "is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was

[123] *Boyd*, 220 Mich App at 234-235.

[124] *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).

arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law."[125]

The Court of Appeals explained that substantial evidence means "evidence which a reasoning mind would accept as sufficient to support a conclusion."[126] The reviewing court must "accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views."[127] Where there is competent, material, and substantial evidence in support of an agency's decision, the circuit court is prohibited from substituting its judgment for the agency's judgment, even if the court might have reached a different result.[128] Under this test, "it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn."[129]

In 2005, the Court of Appeals re-affirmed *Dignan* in *VanZandt v State Employees' Retirement System.*[130] The Court reiterated that a circuit court must uphold an agency's decision, if it is not arbitrary or capricious and is supported by competent, material, and substantial evidence on the whole record.[131] Substantial evidence means "more than a mere scintilla, but

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[125] *Dignan*, 253 Mich App at 576.
[126] *Dignan*, 253 Mich App at 576.
[127] *Dignan*, 253 Mich App at 576.
[128] *Dignan*, 253 Mich App at 579.
[129] *McBride v Pontiac School District* (on remand), 218 Mich App 113, 123; 553 NW2d 646 (1996).
[130] *VanZandt v State Employees' Retirement System*, 266 Mich App 579, 583-588; 701 NW2d 214 (2005).
[131] *VanZandt*, 266 Mich App at 583.

less than a preponderance of the evidence."[132] To be classed as capricious, the decision would have to be "freakish; whimsical; [or] humorsome."[133]

A circuit court's order may not require an agency to issue specific findings or come to a particular result, since such an order would be "inconsistent with well-established authority holding that circuit courts may not direct the manner in which an agency exercises its discretion."[134] A court's function in reviewing an agency decision is not to resolve conflicts in the evidence or to pass on the credibility of witnesses.[135] The Court repeated that, where there is substantial evidence to support the agency's decision, the circuit court must uphold that decision even if it would have reached a different result.[136]

The Court of Appeals has also held that matters of statutory interpretation are questions of law subject to *de novo* review[137] and that the Petitioner has the burden of proving that there are cogent grounds for overruling Respondent's decision.[138]

C. Analysis

In rejecting Petitioner's application for non-duty disability retirement benefits, the Respondent applied the standards mandated by MCL 38.24:

> (1) Except as may otherwise be provided in sections 33 and 34, a member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply:
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> > (a) The member, the member's personal representative or guardian, the member's department head, or the state personnel director files

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[132] *VanZandt*, 266 Mich App at 584.
[133] *VanZandt*, 266 Mich App at 585.
[134] *VanZandt*, 266 Mich App at 585.
[135] *VanZandt*, 266 Mich App at 588.
[136] *VanZandt*, 266 Mich App at 584.
[137] *Glennon v State Employees' Retirement Board*, 259 Mich App 476, 478; 674 NW2d 728 (2003).
[138] *Hay v Highland Park*, 134 Mich App 624, 631; 351 NW2d 622 (1984), *lv den* 419 Mich 867; 347 NW2d 457 (1984).

> an application on behalf of the member with the retirement board no later than 1 year after termination of the member's state employment.
>
> (b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired.
>
> (c) The member has been a state employee for at least 10 years.

Thus, to qualify for non-duty disability retirement under MCL 38.24, Petitioner had the burden of proving, by a preponderance of the evidence, that he met each and every requirement of MCL 38.24.[139] Specifically, Petitioner had the burden to show that a medical advisor certified in writing that he was totally incapacitated, that his incapacitation was probably permanent, and that he should be retired. A person is totally incapacitated when he cannot engage in any and every gainful occupation for which he is fitted by his education, training, or experience.[140] Respondent denied Petitioner's request for non-duty disability retirement benefits under MCL 38.24 because he failed to meet the statutory requirements. (CR, 3) A review of the entire record demonstrates that Respondent's Decision and Order is supported by competent, material, and substantial evidence and should be affirmed.

1. The medical evidence support's the Board's decision.

At the request and direction of the medical advisor, IMA Dr. Holmes, Petitioner's medical condition was independently examined by Dr. R. Scott Lazzara. Dr. Lazzara determined that Petitioner would not be able to obtain the same level of mobility or functional capacity that he previously had due to the nature of his fracture, but noted that his orthopedic maneuvers would continue to improve over time. (CR, 185) Dr. Lazzara did not opine that Petitioner was

[139] *Stoneberg v State Employees' Retirement System*, 139 Mich App 794, 797-801; 362 NW2d 878 (1984); *Blue Cross Blue Shield v Governor*, 422 Mich 1, 89; 367 NW2d 1 (1985).
[140] *Knauss,* 143 Mich App at 648-650.

totally and permanently disabled from further employment in any capacity. (CR, 185) IMA Dr. Holmes reviewed all of the medical evidence in the record, including Dr. Lazarra's report and all of Dr. Blotter's reports, and issued two medical opinions in this matter. In a report dated August 11, 2006, Dr. Holmes determined that the "evidence shows that [Petitioner's] condition continues to improve and that he should be able to return to his past job in the near future. Thus, he does not have a total and permanent disability." (CR, 180) After IMA Dr. Holmes reviewed additional medical information submitted by Petitioner, he still concluded in an October 26, 2006 report that Petitioner was not totally and permanently disabled from further employment, including his corrections officer job. (CR, 173-176)

Petitioner has only been treated by Dr. Blotter for his right heel fracture. Dr. Blotter's records are not definitive on the issue of the permanence and totality of Petitioner's condition. The strongest statements he gave in his office reports were, "I do not think he will be able to return to his old job in corrections" (CR, 75) and "I do not think he is going to be able to return to his regular work." (CR, 156) Although Dr. Blotter noted in a worker's compensation form that Petitioner was totally disabled from his usual occupation or any reasonable occupation, Dr. Blotter simultaneously gave Petitioner a return to work date of August 31, 2006. (CR, 162) Thus, Dr. Blotter concluded that Petitioner's condition was not likely to be permanent.

It is unclear from the record whether Dr. Blotter ever considered Petitioner's ability to perform any of his past occupations since the focus of his reports was always on the corrections officer position. Dr. Blotter never gave any medical opinion on limitations to Petitioner's future ability to sit, stand, lift, drive, carry, speak, write, bend, crouch, etc. The dearth of medical evidence in the record regarding any physical or functioning limitations was a factor to both

IMA Holmes and Respondent in their consideration of whether Petitioner had established that he was totally and permanently disabled from further employment. (CR, 3, 173-176, 177-180)

2. The Board correctly determined that Petitioner was not entitled to non-duty disability retirement benefits under MCL 38.24.

As the medical evidence establishes, IMA Dr. Holmes correctly opined that Petitioner was not totally and permanently incapacitated. Further, *no doctor* opined that Petitioner had a disability that was both total and permanent. IMA Dr. Holmes concluded on two occasions that Petitioner was not totally or permanently incapacitated. (CR 173-176, 177-180) Moreover, Dr. Blotter never gave an unequivocal medical opinion that Petitioner was totally and permanently disabled from further employment. In addition, no doctor stated that Petitioner could not work in any of his former occupations; jobs which he could still physically and mentally perform and in which he had training and experience.[141] Finally, the Board's findings of fact specifically stated that Petitioner's "condition continues to improve and he should be able to *return to his past job* in the near future." (CR, 11) (Emphasis added) Thus, the Board's decision that Petitioner was not totally and permanently incapacitated was supported by competent, material and substantial evidence and should be affirmed.

In reviewing the language of MCL 38.24, the Court of Appeals stated in *VanZandt* that Respondent lacked the ability to grant non-duty disability retirement benefits unless the medical advisor certified that the applicant is incapacitated:

> The language of MCL 38.24 clearly provides that, although the Board has discretion in the decision whether to retire a state employee [for disability], it cannot exercise that discretion unless and until the medical advisor certifies that the employee is incapacitated.[142]

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[141] *Knauss*, 143 Mich App at 648-650.
[142] *VanZandt*, 266 Mich App at 587.

Here, IMA Dr. Holmes concluded that Petitioner was not totally and permanently incapacitated, and was capable of returning to work in *any* of his former occupations. Thus, Respondent did not have the authority to approve Petitioner's application because he failed to obtain a certification that he was totally and permanently incapacitated as required under MCL 38.24. Therefore, Respondent's denial of Petitioner's application is supported by competent, material and substantial evidence.

The Court of Appeals erroneously substituted its judgment for that of the Respondent Board when it found that the Board's decision was affected by a substantial and material error of law. Further, the Court of Appeals erroneously determined that it "is unclear from its decision whether the Board found that petitioner was totally incapacitated relative to his job as a corrections officer."[143] The Board properly applied the facts and law from *Knauss*, and, consistent with its long held disability determination procedure, concluded that Petitioner was not totally and permanently incapacitated under MCL 38.24 because he could engage in a gainful occupation for which he is fitted by his education, training, or experience. Moreover, the Board denied Petitioner's request for disability retirement benefits, in part, because it found that Petitioner "should be able to return to his past job in the near future." Finally, the Board's decision was supported by competent, material and substantial evidence on the entire record.

Thus, the Court of Appeals misapprehended or grossly misapplied the substantial evidence test to the Respondent's decision, and erroneously determined that the Board may not have found Petitioner totally incapacitated relative to his job as a corrections officer; therefore this Court should grant Respondent's Application for Leave to Appeal and ultimately reverse the

[143] Slip Opinion, p 10.

Court of Appeals' October 28, 2010 decision and affirm the Board's April 10, 2008 final decision and order denying Petitioner's application for non-duty disability retirement benefits.

RELIEF SOUGHT

For the reasons stated in this Application, Respondent requests that this Honorable Court grant its Application for Leave to Appeal, and reinstate the Board's decision to deny non-duty disability retirement benefits under MCL 38.24.

Respectfully submitted,

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