2017 IL App (2d) 160010WC
No. 2-16-0010WC
Opinion filed April 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

KEVIN JOHNSTON, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (The East Dundee Fire Protection District, Appellee).	)	Appeal from the Circuit Court of Kane County No. 15-MR-736 Honorable David R. Akemann, Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justices Hoffman, Hudson, and Moore concurred in the judgment and opinion.
Presiding Justice Holdridge dissented, with opinion.

OPINION

¶ 1 On February 25, 2014, claimant, Kevin Johnston, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2012)), seeking benefits from The East Dundee Fire Protection District (employer). He alleged he suffered injuries to his person "while shoveling snow in [the] fire department parking lot." Following a hearing, the arbitrator denied benefits under the Act, finding the employer had successfully rebutted the presumption under section 6(f) of the Act (820 ILCS 305/6(f) (West

2012)) that claimant's heart or vascular disease or condition arose out of his employment as a firefighter and further, that claimant did not suffer accidental injuries which arose out of his employment nor was his current condition of ill-being causally related to the alleged accident. On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Kane County confirmed the Commission's decision.

¶ 2 On appeal, claimant asserts that the Commission erred in finding the employer had successfully rebutted the statutory presumption found in section 6(f) of the Act. In the alternative, claimant contends that the Commission's finding his heart attack did not arise out of and was not causally related to a work accident was against the manifest weight of the evidence. We affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 The following evidence relevant to this appeal was elicited at the July 14, 2014, arbitration hearing.

¶ 5 Claimant testified he was 43 years old and had been employed by the employer as a full-time firefighter, in various ranks, since 1999, most recently as a lieutenant. As a full-duty firefighter, claimant worked shifts of 24 hours on and 48 hours off, with each 24-hour shift beginning and ending at 6 a.m. Claimant explained that regardless of his rank, he always had full firefighter duties which included "responding on calls, dealing with structure fires, ceiling detectors, fire alarms[,] *** auto accidents, patient care, [and] mitigating the hazards."

¶ 6 Claimant denied any knowledge of having a heart condition, heart disease, or hypertension prior to February 5, 2014. He testified that he smoked 1 to 1½ packs of cigarettes per day since the 1990s, but in January 2014, he started smoking an electronic cigarette, which

uses liquid nicotine, in an attempt to quit smoking. In February 2014, claimant weighed approximately 265 pounds and stood six feet one inch tall.

¶ 7 Claimant testified he drove a diesel pickup truck as his personal vehicle and, in the winter, he parked his truck next to the fire department's "back garage" so he could plug the truck's engine block heater into an electrical outlet. If a parking spot next to the garage was not available when he arrived at work, he would park wherever a spot was available, and once a spot opened up by the garage, he would move his truck.

¶ 8 Claimant further testified that when snow was on the ground, the firefighters on duty would remove the snow from the sidewalks, parking lot, and driveway with shovels and snowblowers which were provided by the employer and stored in the fire department's garage. According to claimant, it was not uncommon for him to clear snow by himself, although often a group of firefighters worked together to clear the snow.

¶ 9 Claimant testified he reported to work shortly before 6 a.m. on the morning of February 5, 2014. He could not recall what the weather was like that morning. His last memory prior to suffering a heart attack that morning and waking up in the hospital was "talking to one of the guys that was coming off shortly after I got in." He did not recall using a snowblower or a shovel to clear snow that morning. He admitted he could have gone outside to smoke a cigarette that morning, but he could not recall that either.

¶ 10 Claimant underwent emergency quadruple bypass surgery on February 6, 2014. At the time of the arbitration hearing, claimant had just finished 12 weeks of cardiac rehab. He had not yet been released to return to work.

¶ 11 The evidence depositions of four fellow firefighters, Tyler Burd, Ashley Rebou, Jeremy Schwab, and Kanen Terry, were introduced into evidence.

¶ 12 Tyler Burd testified he worked for the employer as a firefighter and Emergency Medical Technician (EMT). According to Burd, on the morning of February 5, 2014, claimant walked into the fire station "around 5:59" a.m. which was "unusually late for him." Burd stated that upon entering the building, claimant walked past him on the main floor and proceeded upstairs to the dayroom where he sat down and spoke with Lieutenant Parthun for "about half an hour or so." Burd testified that after the two had finished their conversation, Lieutenant Parthun told Burd that claimant "was going outside to shovel around his car." According to Burd, there was approximately three to four inches of snow on the ground that morning. Approximately 10 minutes after Lieutenant Parthun had mentioned claimant was going outside to shovel snow, Burd looked out the back door and saw claimant lying face down at the south end of the garage. He ran over to claimant, rolled him over, and found he did not have a carotid pulse, so he ran inside to call for help and then returned to claimant. Burd testified that Schwab and Rebou rushed out. As Rebou started compressions, Burd ran back inside to get Lieutenant Parthun. Within a few minutes, they had claimant on a backboard and took him into the building where they used a defibrillator and "[b]rought him back to life." They then put claimant in an ambulance and transported him to the hospital. According to Burd, "[t]here was a lot of snow on the ground, so it was a very slow ride" to the hospital.

¶ 13 Burd did not recall hearing a snowblower on the morning of February 5, 2014, but he recalled having seen a snowblower in front of the garage which was approximately five to six feet from claimant's body. The snowblower had been removed from the garage and the garage door was closed. Burd recalled seeing claimant's truck and testified that the snow around the truck had been cleared. Burd acknowledged that the spot would have been empty of snow if

another vehicle had been parked there overnight. Burd testified that snow removal was regularly done by the firefighters and that "[i]f there's snow on the ground, we removed it."

¶ 14 Burd further testified he knew claimant smoked "quite a bit," or "at least two packs a day." According to Burd, claimant would typically smoke out by the garage. He also testified that claimant was "not the healthiest eater," as he often observed him eating fast food.

¶ 15 Ashley Rebou testified she worked for the employer as a firefighter/paramedic. She was working on the morning of February 5, 2014, and was in the dayroom when claimant came in. According to Rebou, claimant "just sat down" and "[d]idn't say anything" which was unusual, but then she got up and went downstairs to check her "rig" while claimant and Lieutenant Parthun talked. Shortly thereafter, while she and other firefighters were in the main ambulance, claimant walked past them and went outside. Lieutenant Parthun stopped to talk and told them that claimant "was going out to shovel or get the snow out of his parking spot." Rebou testified that a little later, Schwab came in and told them that claimant "was down," so she went outside, checked for a pulse, and started compressions. They later moved him inside. According to Rebou, while outside, she observed a snowblower in front of the garage door, approximately two to three feet from claimant's body.

¶ 16 Jeremy Schwab testified that, on February 5, 2014, he was working for the employer as a firefighter/paramedic. He recalled that claimant arrived to work at 5:59 a.m. He stated it was unusual for claimant to arrive so late. He observed claimant come into the dayroom, and without saying anything to anyone, he "flopped into the recliner as if something—something was off." Schwab stated that around 6:30 or 6:45 a.m., he heard claimant "was outside snow blowing." Shortly thereafter, he responded to Burd's call for assistance and saw claimant face down in the

snow. Schwab recalled seeing a snowblower and testified there was one to three inches of snow on the ground.

¶ 17 Kanen Terry testified he worked for the employer as a firefighter/paramedic. He recalled that claimant arrived to work at approximately 6 a.m. on the morning of February 5, 2014. According to Terry, this was unusually late for claimant, but he stated there was four to six inches of snow on the ground that morning. Later, as Terry was checking the rigs, Schwab ran in and said "[claimant] is down" or "[claimant] coded." Terry testified he went outside and saw claimant on the ground with Rebou "hovering" over him. He then assisted in the resuscitation efforts. Terry did not recall seeing a snowblower or a shovel near claimant's body. However, he did observe that the parking spot where claimant's truck was parked was clear of snow "from line to line," and it looked like someone had removed the snow.

¶ 18 Dr. Christopher Berry, a board certified interventional cardiologist, testified by way of evidence deposition. Dr. Berry first saw claimant on February 8, 2014. He treated claimant postoperatively, managing his cardiac arrhythmia and counseling him on lifestyle modifications, including weight loss, smoking cessation, and diet. According to Dr. Berry, claimant suffered a myocardial infarction of the "demand-related ischemia" type, meaning that "he had severe preexisting coronary artery disease which was aggravated by the activity he was performing."

¶ 19 Dr. Berry testified that, based on his limited research regarding coronary heart disease and its relation to a firefighter's occupational exposure, there appeared to be "an association of cardiac events in firemen that is above and beyond that which would be expected of age-matched controls." Thus, he opined that occupational exposure as a firefighter "can be considered a risk factor" for coronary artery disease. Dr. Berry further testified that claimant suffered additional risk factors for coronary artery disease, including obesity, a family history of coronary artery

disease, and a history of smoking. Dr. Berry also stated there was some evidence that claimant was "mildly diabetic" as well. Regarding claimant's smoking, Dr. Berry was unable to recall how many packs of cigarettes per day, or for how long, claimant had smoked.

¶ 20 In Dr. Berry's opinion, an activity, such as snow removal, could trigger a cardiac arrhythmia in a person who suffered from blocked or partially blocked arteries like claimant. However, he stated that acute myocardial infarction does not necessarily have to be provoked by activity and that claimant could have suffered the same ischemic event at rest.

¶ 21 Dr. Dan Fintel, a board certified physician in internal medicine, cardiovascular diseases, critical care medicine, and nuclear cardiology, examined claimant in April 2014 at the employer's request. Dr. Fintel performed a physical examination of claimant and reviewed claimant's medical records. According to Dr. Fintel, claimant reported having no memory of the events leading up to his cardiac arrest, which Dr. Fintel explained was "very common." Dr. Fintel testified claimant suffered from preexisting undiagnosed severe triple vessel coronary disease, and the ischemic event experienced by claimant on February 5, 2014, could have been caused by claimant's exposure to cold air alone, regardless of whether he shoveled any snow. Dr. Fintel noted "that any activity on a day in which the ambient temperature was 15 degrees in a cardiac patient can be life threatening or life ending." In addition, based on his review of claimant's medical records, Dr. Fintel believed claimant had suffered a cardiac event, or a silent heart attack, prior to February 5, 2014, of which claimant may not have been aware of.

¶ 22 Dr. Fintel was asked his opinion "as to might or could the ingestion of heightened levels of nicotine delivered by an e-cigarette cause a heart attack in a person with [claimant's] cardiac profile." He responded that "there is emerging evidence that the nicotine in e-cigarettes, similar to the nicotine in conventional cigarettes, can cause cardiac problems in patients." Dr. Fintel

further testified that, in the course of his examination, claimant was unable to describe specific dates or days in which he was exposed to smoke, gases, or materials of combustion due to fighting fires. In Dr. Fintel's opinion, the medical treatment claimant received following the February 5, 2014, ischemic event was causally connected to his severe underlying preexisting triple vessel coronary artery disease.

¶ 23 On cross-examination, Dr. Fintel testified that he did not know the dosage of nicotine that claimant was using in his e-cigarette and that it was "speculation as to the impact, if any, of the e-cigarette on the event of February 5, 2014." Dr. Fintel further testified he was unaware of any significance between claimant's occupation, which required him to respond to an average of "300 calls per year," and his coronary artery disease because Dr. Fintel was "unaware of what extent of smoke exposure [claimant] had in [his] fire suppression activities." However, Dr. Fintel acknowledged the existence of a body of literature that has found an increased risk of coronary artery disease in firefighters. Dr. Fintel further testified that claimant had other risk factors for developing coronary artery disease, including a 20-year smoking history which he felt was "probably the major cause chronically of developing advanced atherosclerosis," and a family history of heart disease. In Dr. Fintel's opinion, "[w]orking as a fireman is not considered to be a regular risk factor for coronary artery disease. It depends on occupational exposure and data that I don't have available to me." He continued, "[i]t could be a risk factor based on what his occupational exposure was, but it is not definitely a risk factor."

¶ 24 Dr. Fintel also authored a report in which he opined that "[claimant's] vocational duties did not cause the underlying disease process *de novo*." During his deposition, Dr. Fintel was asked what he meant by the phrase "*de novo*." He responded, "I was trying to express my opinion that his underlying disease was a direct consequence of his multiple risk factors, the

smoking, the family history, his male sex, et cetera, and that work as a fireman was not the cause of his underlying coronary artery disease, that had he been doing another job he would still have experienced progressive and life-threatening coronary disease."

¶ 25 On September 17, 2014, the arbitrator issued his decision in the matter. He found that the employer had successfully rebutted the presumption set forth in section 6(f) of the Act "by showing that [claimant's] preexisting coronary artery disease alone was the cause of the cardiac event on February 5, 2014." The arbitrator "discount[ed] Dr. Berry's opinion that occupational exposure could have played a role in this case, given that there was absolutely no evidence submitted that would quantify or even generally describe the type or frequency of [claimant's] exposure in this regard." He noted, "the evidence overwhelming[ly] shows that [claimant] had multiple risk factors—including the fact that he was obese, had a family history of coronary artery disease, was a long-term and heavy smoker, and was possibly diabetic or prediabetic as well as hypertensive—and that the near fatal cardiac event he subsequently suffered could have happened at anytime and anywhere." The arbitrator further concluded that claimant "was a heart attack waiting to happen, and his employment activities neither aggravated nor accelerated his already severe and highly advanced coronary artery disease." The arbitrator found claimant failed to prove that he suffered accidental injuries arising out of his employment, or that his current condition of ill-being was causally related to the alleged accident.

¶ 26 On June 1, 2015, the Commission affirmed and adopted the decision of the arbitrator. (We note that it also erroneously remanded the case "for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).").

¶ 27 On December 22, 2015, the circuit court of Kane County confirmed the Commission's decision.

¶ 28 This appeal followed.

¶ 29 ANALYSIS

¶ 30 On appeal, claimant asserts the Commission erred in finding the employer had successfully rebutted the statutory presumption found in section 6(f) of the Act. In the alternative, claimant contends the Commission's finding his heart attack did not arise out of and was not causally related to a work accident was against the manifest weight of the evidence.

¶ 31 A. Section 6(f) of the Act

¶ 32 As noted, claimant first asserts the Commission erred in finding the employer had successfully rebutted the presumption found in section 6(f) of the Act. Specifically, claimant contends that the evidence showing he had other risk factors for developing coronary artery disease was insufficient to rebut the presumption that his coronary artery disease arose out of his employment as a firefighter. We will review the Commission's determination that the employer presented sufficient evidence to rebut the statutory presumption under the manifest weight of the evidence standard.

¶ 33 Section 6(f) of the Act provides, in pertinent part, as follows:

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic

employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. *** However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission." 820 ILCS 305/6(f) (West 2014).

¶ 34 1. *Presumptions and Rebuttable Presumptions*

¶ 35 Because section 6(f) of the Act provides for a rebuttable presumption, we first discuss the legal analysis relevant to the application of such a presumption.

¶ 36 In *Diederich v. Walters*, 65 Ill. 2d 95, 100-01, 357 N.E.2d 1128, 1130-31 (1976), our supreme court considered the effect of rebuttable presumptions and explained as follows:

"With regard to the procedural effect of presumptions, most jurisdictions in this country follow the rule that a rebuttable presumption may create a *prima facie* case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption. However, once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. (See 1 Jones, Evidence sec. 3:8 (6th ed. 1972).) The burden of proof thus does not shift but remains with the party who initially had the benefit of the presumption. Consistent with this view, Dean Wigmore states in his treatise on evidence that 'the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent

does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule ***.' (9 Wigmore, Evidence sec. 2491, at 289 (3d ed. 1940).)" (Emphasis omitted.)

¶ 37 The supreme court provided further guidance with regard to rebuttable presumptions in *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 448 N.E.2d 872 (1983). In that case, the court expanded upon its discussion in *Diederich*, noting "[t]he prevailing theory regarding presumptions that Illinois follows and *Diederich* speaks about is Thayer's bursting-bubble hypothesis: once evidence is introduced contrary to the presumption, the bubble bursts and the presumption vanishes." *Id.* at 462, 448 N.E.2d at 877. In other words, once evidence has been presented to rebut the presumption, the metaphorical bubble bursts and the trier of fact must then consider the evidence presented in the case as if the presumption had never existed. *Id.*

¶ 38 2. *The Amount of Evidence Necessary to Rebut the Section 6(f) Presumption*

¶ 39 "The amount of evidence that is required from an adversary to meet the presumption is not determined by any fixed rule." *Id.* at 463, 448 N.E.2d at 877. Generally, "[t]he party contesting the presumption must come forward with sufficient evidence to support a finding of the nonexistence of the presumed fact." *R.J. Management Co. v. SRLB Development Corp.*, 346 Ill. App. 3d 957, 965, 806 N.E.2d 1074, 1081 (2004). However, in some cases where compelling policy considerations are at issue, the "party attacking a presumption has a greater burden of production than merely producing evidence sufficient to support a reasonable trier of fact's finding as to the nonexistence of the presumed fact." *Id.* (citing Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence § 302.5, at 88 (8th ed. 2004)). In those cases, "the

challenging party must overcome a 'strong' presumption by clear and convincing evidence." *Id.* "The clear and convincing standard requires proof greater than a preponderance but not quite approaching the criminal standard of proof beyond a reasonable doubt." *Enbridge Energy, LLC. v. Keurth*, 2016 IL App (4th) 150519, ¶ 134. "Although this strong presumption commonly arises in fiduciary relationships, it has also been applied in other contexts." *Id.*

¶ 40 In some statutes which provide for a rebuttable presumption, our legislature has provided specific language regarding the amount of evidence a party contesting the presumption must present. For example, section 11-5.3(c) of the Probate Act of 1975 (755 ILCS 5/11-5.3(c) (West 2014)) provides, "[t]here shall be a rebuttable presumption that a parent of a minor is willing and able to carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence." In contrast, section 1(D)(i) of the Adoption Act (750 ILCS 50/1(D)(i) (West 2014)) provides that the conviction of any one of a number of listed criminal offenses "shall create a presumption that a parent is depraved which can be overcome only by clear and convincing evidence."

¶ 41 Unlike the above statutes, section 6(f) is silent as to the amount of evidence required to rebut the presumption therein. As such, we must determine, as a matter of statutory construction, whether the rebuttable presumption provided for in section 6(f) falls into the strong or ordinary category, requiring either clear and convincing evidence or merely "some evidence," respectively, to the contrary. Because the task before us is one of statutory interpretation, we employ a *de novo* standard of review. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 317 Ill. App. 3d 497, 503, 739 N.E.2d 1009, 1014 (2000).

¶ 42 "In interpreting the Act, our primary goal is to ascertain and give effect to the intent of the legislature." *Cassens Transport Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519, 524, 844

N.E.2d 414, 418 (2006). "The language used in the statute is normally the best indicator of what the legislature intended" and "[e]ach undefined word in the statute must be given its ordinary and popularly understood meaning." *Gruszeczka v. Illinois Worker's Compensation Comm'n*, 2103 IL 114212, ¶ 12, 992 N.E.2d 1234. "[W]here the statutory language is clear, it will be given effect without resort to other aids for construction." *Id.* However, where a statute is ambiguous, we may consider other sources, including legislative history, to determine the legislature's intent. *Id.* ¶ 17, 992 N.E.2d 1234.

¶ 43 Here, after a careful review of section 6(f), we are unable to discern from the language of the Act the amount of evidence necessary to overcome the rebuttable presumption contained therein. Because it could be either clear and convincing evidence or just some evidence to the contrary that is necessary to rebut the presumption, we are unable to apply the statute without looking beyond the Act's language. *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 397-98, 789 N.E.2d 1211, 1214 (2003). Accordingly, we consider the legislative history behind section 6(f) to determine the legislature's intent. *Id.*; see also *People v. Rose*, 268 Ill. App. 3d 174, 178, 643 N.E.2d 865, 868 (1994) ("where the language is ambiguous, it is appropriate to examine the legislative history").

¶ 44 Here, the floor debates on House Bill 928, which enacted section 6(f) of the Act in Public Act 95-316 (eff. Jan 1, 2008), are helpful. During the floor debate, the bill's sponsor, Representative Hoffman, was asked to explain the rationale behind the proposed legislation. He responded as follows:

> "Well, I think the current law, what would happen is a firefighter who has these diseases has to come in and the Workers' Compensation Act only covers you for work-related injuries. So you have to prove that the injury was a result of activities on the job.

> Many times that's very difficult with these types of diseases to prove. Yet we know over, and over, and over again that it's more likely than not that they were a result of the activities of the firefighter while on the job, because there's a higher incidence of these types of illnesses as a result of that type of employment. So what this does is if you have it you could bring your action, it doesn't mean you're going to get compensated, it doesn't mean you're going to win, it doesn't mean that you have proven beyond any doubt or conclusively that this happened on the job, *it only means that the employer can then come in and bring contrary evidence as to whether or not it happened on the job*." (Emphasis added.) 95th Ill. Gen. Assem., House Proceedings, Apr. 27, 2007, at 68-69 (statements of Representative Hoffman).

Representative Hoffman further explained how the rebuttable presumption would apply to a hypothetical firefighter who developed lung cancer toward the end of his career. He stated that an employer could introduce evidence of the firefighter's smoking history to rebut the presumption that the cancer arose out of his employment as a firefighter. *Id.* at 81. He continued, "[s]o don't think it's conclusive that simply because you have lung cancer, you're going to get compensation of the Worker's Compensation Act. What we're saying is, we'll get you to the hearing. Then the other side can bring in evidence that you smoked for thirty (30) years and therefore, it wasn't a result of the actions taken at work." *Id.* at 82.

¶ 45 Based on the above legislative history, we find that section 6(f) does not involve a strong rebuttable presumption, requiring clear and convincing evidence. Rather, we conclude that the legislature intended an ordinary rebuttable presumption to apply, simply requiring the employer to offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition.

¶ 46 3. *Whether the Employer Introduced Evidence Sufficient to Rebut the Presumption*

¶ 47 Here, it is undisputed that at the time of arbitration, claimant suffered from coronary artery disease and was entitled to the benefit of the presumption set forth in section 6(f) by virtue of his 15-plus years of work as a firefighter. The arbitrator found that the employer had rebutted the presumption "by showing that [claimant's] preexisting coronary artery disease alone was the cause of the cardiac event on February 5, 2014." However, this finding by the arbitrator fails to properly frame the presumed fact. The presumed fact here is that claimant's coronary artery disease—not just the cardiac event—arose out of his employment as a firefighter. Thus, the issue before us is whether the evidence introduced by the employer was sufficient to rebut the presumed fact as we have stated it.

¶ 48 Initially, we note that, in applying the section 6(f) presumption here, it is irrelevant whether claimant was performing a work function, *i.e.*, shoveling snow, at the time of his heart attack, because, as we have stated, it is claimant's underlying coronary artery disease—which manifested itself at the time of claimant's heart attack—to which the presumption attaches. Further, in order for the presumption to attach, it is immaterial whether a claimant has submitted specific evidence to show his actual level of occupational exposure—he simply must establish he has worked as a firefighter for at least five years. Consequently, the determinative issue here is whether the employer successfully rebutted the presumption that claimant's coronary artery disease arose out of and in the course of his employment.

¶ 49 In that regard, the record shows Dr. Fintel authored a report after examining claimant and his medical records. In considering whether claimant's occupation as a firefighter placed him at risk for premature coronary artery disease, Dr Fintel wrote, "[claimant's] vocational duties did not cause the underlying disease process *de novo*." When asked at his deposition what he meant

by the phrase "*de novo*," Dr. Fintel responded, "I was trying to express my opinion that his underlying disease was a direct consequence of his multiple risk factors, the smoking, the family history, his male sex, et cetera, *and that work as a fireman was not the cause of his underlying coronary artery disease, that had he been doing another job he would still have experienced progressive and life-threatening coronary disease*." (Emphasis added.) Dr. Fintel noted that claimant had multiple risk factors for developing coronary artery disease. In particular, claimant (1) had a 20-year history of smoking 1 to 1½ packs of cigarettes per day, (2) had a family history of heart disease, (3) was possibly "mildly diabetic," and (4) was obese. Dr. Fintel testified that claimant's history of smoking "at least a pack per day" for 20 years leading up to his heart attack was "probably the major cause chronically of developing advanced atherosclerosis."

¶ 50 Dr. Fintel's testimony stands in opposition to the presumed fact that claimant's coronary artery disease arose out of his employment. Given this evidence and that the employer needed only to rebut the section 6(f) presumption by presenting *some* contrary evidence, we find the presumption was rebutted. Accordingly, the Commission's finding on this issue was not against the manifest weight of the evidence.

¶ 51 We address here claimant's assertion that in order to rebut the presumption, the employer had to do more than simply point to other potential causes of his coronary artery disease without first *excluding* occupational exposure as a contributing cause. He cites to case law in support of the proposition that to prove causation, a claimant need only establish his occupational exposure was *a* factor in the resulting condition of ill-being. See *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶¶ 22-23, 60 N.E.2d 587. While it is correct that in order to obtain an award of benefits under the Act, a claimant need only prove an employment risk was *a* cause of his condition of ill-being (*Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193,

205, 797 N.E.2d 665, 673 (2003)), we find this basic proposition of law is not applicable in the context of a section 6(f) presumption. Nothing contained in the legislative debates on House Bill 928 indicates the legislature intended that an employer be required to eliminate any occupational exposure as a possible contributing cause of a claimant's condition in order to successfully rebut the presumption that the disease or condition arose out of his employment. Claimant cites no authority in support of this proposition and we decline to so hold. We note that if the employer is successful in rebutting the section 6(f) presumption, *at that point* the claimant may, if the evidence supports it, assert that his occupational exposure was *a* cause of his condition of ill-being, along the lines of *Sisbro*, thus entitling him to an award of benefits.

¶ 52 B. Whether Claimant Suffered a Work Accident

¶ 53 As explained, once a party has successfully rebutted a presumption such as the section 6(f) presumption here, the presumption vanishes and the parties proceed as if the presumption never existed. Accordingly, we now consider claimant's alternative argument that the Commission's subsequent finding that his heart attack did not arise out of a work accident was against the manifest weight of the evidence. It is important to note that while claimant asserted in his section 6(f) argument above that it was his underlying *coronary artery disease* which presumptively arose out of his employment, he argues in this second part of his appeal that the "*cardiac event*" arose out of his efforts to clear snow in the parking lot that day and that the Commission's finding to the contrary is against the manifest weight of the evidence. Specifically, claimant contends that "[t]he manifest weight of the evidence leads to the conclusion that [he] exited the firehouse into cold air for the purpose of clearing snow and that [he] did engage in the physical activity of clearing snow using a combination of a shovel and/or a snow blower." In other words, in his alternative argument on appeal, claimant does not assert

that the manifest weight of the evidence established his occupational exposure over the years was a cause of his underlying coronary artery disease—only that his work activities on the day in question caused the cardiac event. Thus, we will limit our discussion to this argument.

¶ 54 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 671. "Both elements must be present at the time of the claimant's injury in order to justify compensation." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 25, 990 N.E.2d 284. An injury occurs "in the course of employment" when it "occur[s] within the time and space boundaries of the employment." *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 671. An injury "arises out of" employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.*

¶ 55 Whether an injury arose out of and in the course of one's employment is generally a question of fact and the Commission's determination on this issue will not be disturbed unless it is against the manifest weight of the evidence. *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, ¶ 19, 10 N.E.3d 403. "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). "The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 592 (2005). "For the

Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." *Land & Lakes*, 359 Ill. App. 3d at 592, 834 N.E.2d at 592.

¶ 56 Here, the employer does not dispute that claimant's heart attack occurred in the course of his employment. Thus, our focus is limited to whether claimant's heart attack occurred "while [he was] shoveling snow in [the] fire department parking lot" as he alleged in his application for adjustment of claim.

¶ 57 To that end, we note that claimant has no recollection of the events immediately preceding his heart attack. As stated, claimant's last memory prior to suffering his heart attack and waking up in the hospital was "talking to one of the guys that was coming off shortly after I got in." In fact, claimant admitted that, instead of going outside to shovel snow, he could have gone outside in order to smoke a cigarette.

¶ 58 Additionally, the record shows that while three of claimant's fellow firefighters heard that claimant "was going outside to shovel" or "was outside snow blowing," no one actually heard a snowblower or saw claimant shoveling or blowing snow. Further, although three of the four witnesses recalled seeing a snowblower outside, they could not agree as to the location of the snowblower in proximity to claimant's body. In particular, one witness recalled the snowblower was five to six feet from claimant's body, while another remembered the snowblower being only two to three feet from claimant's body, and yet another did not recall seeing a snowblower at all. Finally, while the record shows that two of the witnesses recalled claimant's parking spot being clear of snow, one of them acknowledged that the spot would have been empty of snow if another vehicle had been parked there overnight. In short, the evidence

surrounding claimant's unwitnessed heart attack failed to establish the heart attack arose out of his employment.

¶ 59 Based on our review of the record, we cannot say the Commission's finding that claimant was not removing snow at the time of his heart attack was error. Thus, the Commission's determination that claimant's heart attack did not arise out of his employment was not against the manifest weight of the evidence. Further, even if it could be argued claimant had not confined his manifest weight argument to his heart attack, but had also included the development of his coronary artery disease, we would find the Commission's decision that he did not suffer accidental injuries which arose out of his employment was not against the manifest weight of the evidence. Claimant presented no evidence that *his* occupational exposure contributed to cause *his* coronary artery disease. Instead, Dr. Berry testified only that there existed medical research which *generally* supports a correlation between a firefighter's occupational exposure and the development of coronary artery disease. Dr. Berry did not opine that claimant's occupational exposure contributed to cause his disease. Thus, claimant failed to establish a causal connection existed between his occupational exposure and coronary artery disease.

¶ 60 In closing, we note that despite denying claimant benefits under the Act, the Commission remanded the matter pursuant to *Thomas*, 78 Ill. 2d 327, 399 N.E.2d 1322. This remand was in error.

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we vacate the circuit court's decision to the extent it affirmed the Commission's remand of the case and we vacate the Commission's remand. We otherwise affirm the circuit court's judgment confirming the Commission's decision.

¶ 63 Affirmed in part and vacated in part.

¶ 64 PRESIDING JUSTICE HOLDRIDGE, dissenting.

¶ 65 I dissent. The majority states that, in order to rebut the statutory presumption that the claimant's vascular disease and resulting heart attack were causally related to his employment as a firefighter, an employer must offer some evidence sufficient to support a finding that "something other than [the] claimant's occupation as a firefighter caused his condition." *Supra* ¶ 45. According to the majority, an employer can make this showing (and rebut the statutory presumption) even if it does not "eliminate any occupational exposure as a possible contributing cause" of the claimant's condition. *Supra* ¶ 51. From this premise, the majority concludes that the employer successfully rebutted the statutory presumption in this case by presenting Dr. Fintel's opinions that (1) the claimant's coronary artery disease was a direct consequence of multiple, non-work-related risk factors, including the claimant's smoking history, his obesity, his diabetes, his male gender, and his family history; (2) the claimant's work as a fireman was "not the cause of" his underlying coronary artery disease; and (3) "had [the claimant] been doing another job[,] he still would have experienced progressive and life-threatening coronary disease." (Emphasis and internal quotation marks omitted.) *Supra* ¶ 49.

¶ 66 I disagree. To rebut the presumption, the opposing party must present evidence that is "sufficient to support a finding of the nonexistence of the presumed fact." (Internal quotation marks omitted.) *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 462-63 (1983). Here, the presumed fact is that the claimant's cardiovascular condition and ensuing heart attack were causally connected to his employment as a firefighter. In order to establish such a causal connection under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as

long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. *Sisbro*, 207 Ill. 2d at 205; *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating or accelerating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981); *Swartz*, 359 Ill. App. 3d at 1086.[1] Accordingly, the statutory presumption of causation in this case required the fact finder to presume that the claimant's work as a firefighter was *a contributing cause* of his underlying cardiovascular condition, which caused his heart attack and his ensuing disability. To rebut this presumption, the employer was required to present some contrary evidence suggesting that the claimant's employment was not a contributing cause of his cardiovascular condition.[2] For example, the employer could rebut the

[1] Similarly, to recover compensation under the Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2014)), the claimant must prove that he suffers from an occupational disease that is causally connected to his employment. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 596 (2005). However, the occupational activity need not be the sole or even the principal causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Id.*; see also *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶ 22.

[2] I disagree with the majority's statement that, in order to rebut the presumption, the employer merely needs to present some evidence sufficient to support a finding that something other than the claimant's occupation caused his condition. *Supra* ¶ 45. The presumed fact under

presumption by presenting expert opinion testimony that (1) exposure to smoke or toxic fumes while fighting fires is not a risk factor for the claimant's cardiovascular condition, or (2) the claimant's particular level of exposure to smoke or toxic fumes on the job did not casually contribute to his cardiovascular condition.

¶ 67 Here, the employer did neither. Instead, it presented Dr. Fintel's opinion that the claimant's coronary artery disease was caused by multiple, non-work-related risk factors and not by his work as a firefighter. In my view, Dr. Fintel's opinion was insufficient to rebut the presumption of causation in this case. Dr. Fintel acknowledged that medical literature has noted an increased risk of coronary artery disease in firefighters, and he conceded that the claimant's work as a firefighter "could be a risk factor" for coronary artery disease depending on his level of exposure to smoke. On cross-examination, Dr. Fintel stated that he was unaware of any connection between the claimant's occupation and his coronary artery disease because he was "unaware of what extent of smoke exposure [the claimant] had in [his] fire suppression activities." Accordingly, Dr. Fintel did not (and could not) rule out the possibility that the claimant's occupational exposure to smoke and toxic fumes was a contributing cause of his coronary artery disease and resulting heart attack.

¶ 68 Given this, Dr. Fintel's opinion that the claimant's coronary artery disease was not causally connected to his work as a firefighter was without foundation and unworthy of credence. Expert opinions "must be supported by facts" (internal quotation marks omitted)

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section 6(f) is that the claimant's occupation was a contributing cause of his condition of ill-being. An employer cannot rebut this presumed fact merely by pointing to other potentially contributing causes. Rather, it must present evidence sufficient to support a finding that the claimant's employment was not a contributing cause.

(*Gross*, 2011 IL App (4th) 100615WC, ¶ 24) and are only as valid as the facts and reasons underlying them (*id.*; see also *Sunny Hill of Will County v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, ¶ 36). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the basis for the expert's opinion. *Gross*, 2011 IL App (4th) 100615WC, ¶ 24; see also *Sunny Hill of Will County*, 2014 IL App (3d) 130028WC, ¶ 36. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. *Gross*, 2011 IL App (4th) 100615WC, ¶ 24. Because Dr. Fintel acknowledged that the claimant's employment could be causally related to his coronary artery condition "depending on his level of exposure" to smoke on the job but admitted that he was unaware of the claimant's actual level of exposure to smoke as a firefighter, Dr. Fintel's opinion that the claimant's job was not causally connected to his coronary artery condition was speculative and without foundation. Given the information made available to him, Dr. Fintel could not reasonably conclude that the claimant's employment was not a contributing cause of his coronary artery disease. Moreover, even assuming *arguendo* that the claimant's coronary artery condition was initially triggered solely by personal risk factors such as smoking and obesity (which is not clear from the evidence), Dr. Fintel lacked sufficient information to conclude that the claimant's condition was not *aggravated* or *accelerated* by his occupational exposure to smoke and fumes. Because Dr. Fintel's opinion lacked sufficient foundation to support a finding of no causal connection, the employer failed to rebut the statutory presumption in this case. *Franciscan Sisters Health Care Corp.*, 95 Ill. 2d at 462-63.

¶ 69 One final point bears mentioning. In determining that an employer rebuts the section 6(f) presumption by presenting some evidence that "something other than the claimant's occupation as a firefighter caused his condition," the majority relies entirely upon certain comments made

by Representative Hoffman during the floor debates on House Bill 928, which enacted section 6(f) in Public Act 95-316 (eff. Jan. 1, 2008).[3] *Supra* ¶¶ 44-45. The majority states that it considered this legislative history because it was "unable to discern from the language of the Act the amount of evidence necessary" to rebut the presumption. In other words, because section 6(f) does not specify a particular quantum or type of evidence required to rebut the presumption, the majority concludes that the statute is ambiguous and in need of clarification by resort to legislative history.

¶ 70 I disagree. Where statutes are enacted or amended after judicial opinions are published, "it must be presumed that the legislature acted with knowledge of the prevailing case law." (Internal quotation marks omitted.) *Burrell v. Southern Truss*, 176 Ill. 2d 171, 176 (1997); see also *Bagcraft Corp. v. Industrial Comm'n*, 302 Ill. App. 3d 334, 339 (1998); *Manago v. County of Cook*, 2016 IL App (1st) 121365, ¶ 22. We must therefore assume that the legislature was aware of and approved the existing common-law standards for overcoming rebuttable presumptions when it enacted section 6(f). See *Burrell*, 176 Ill. 2d at 176. That standard was articulated in *Franciscan Sisters Health Care Corp.* Because section 6(f) does not explicitly announce a different standard, we must presume that the legislature incorporated the common-law standard. *Burrell*, 176 Ill. 2d at 176; see also *Bagcraft Corp.*, 302 Ill. App. 3d at 338 ("[t]he judiciary will not interpret a statute in a manner that will abrogate the common law unless such intent is clearly gleaned from the language of the statute); *Malfeo v. Larson*, 208 Ill. App. 3d 418, 424 (1990) (a statute "cannot be construed as changing the common law beyond what is expressed by the words of the statute or is necessarily implied from what is expressed"). Accordingly, there is no ambiguity in section 6(f), and therefore no need to consider that

[3] As the majority notes, Representative Hoffman was the bill's sponsor.

section's legislative history. As the majority acknowledges, unambiguous statutes must be construed according to their plain meaning, without resort to legislative history or other aids for construction.[4]

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[4] In my view, the use of legislative history in construing a statute's meaning is if often problematic even if the statute is ambiguous. As Justice Scalia noted, "[w]e are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). "[L]egislators do not make laws by making speeches on the floor of the legislative chamber." *Town of the City of Bloomington v. Bloomington Township*, 233 Ill. App. 3d 724, 736 (1992). "They make laws by majority vote on a specifically worded bill that has been read three times before each house and distributed to each legislator." *Id.*; see also Ill. Const. 1970, art. IV, §§ 8(c), (d). "Neither the disclosed nor undisclosed intent of a legislator *** becomes law; only the bill as it reads when passed becomes law." (Emphasis omitted.) *Town of City of Bloomington*, 233 Ill. App. 3d at 736. Thus, while a court may properly consult dictionaries and other appropriate sources in interpreting the meaning of ambiguous terms contained in a statute, the intent of any individual legislators prior to the enactment of the statute is arguably irrelevant. In any event, statements made by individual legislators during floor debates or in committee reports do not necessarily reflect the intent of all of the legislators who ultimately voted to enact the law in question. Some legislators might not have been aware of such statements when they voted. See, *e.g.*, *Krohe v. City of Bloomington*, 329 Ill. App. 3d 1133, 1139 (2002) (Steigmann, J., dissenting). Unless the legislator's statements are included in the language of the statute itself, the statements are not voted upon by the legislators or signed into law by the governor. Only the language of the statute, as passed, could properly convey the

¶ 71 For the reasons set forth above, I would find that the employer failed to rebut the statutory presumption of causation in this case. I would therefore reverse the Commission's decision and remand the matter to the Commission.

"legislature's intent" in passing the statute, assuming that such an intent exists and is legally relevant.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Johnston,
Petitioner,

vs. NO. 14 WC 06647

15IWCC0393

East Dundee & Countryside Fire District,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof . The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 17, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

15IWCC0393

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 22 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-05/19/15
jdl/wj
68

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Kevin Johnston,
Employee/Petitioner

v.

East Dundee & Countryside Fire Protection District,
Employer/Respondent

Case # 14 WC 6647

Consolidated cases: none

15IWCC0393

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Geneva**, on **7/14/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

15IWCC0393

FINDINGS

On the date of accident, **2/5/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of his employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$95,138.68**; the average weekly wage was **$1,829.59**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

The parties agreed that Respondent shall be entitled to a credit for any amounts paid by its group health carrier on account of the injury, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. (Arb.Ex.#1).

ORDER

The Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries arising out of his employment on February 5, 2014, and failed to prove that his current condition of ill-being is causally related to said alleged accident. Accordingly, his claim for compensation is hereby denied.

No benefits are awarded.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

9/11/14
Date

ICArbDec19(b)

SEP 17 2014

STATEMENT OF FACTS:

Petitioner has been employed by the Respondent as a firefighter for 22 years and currently holds the rank of lieutenant. Prior to the events of February 5, 2014, Petitioner appeared to be in general good health, was not aware that he may have suffered from heart disease or high blood pressure and did not consider himself to be obese. Prior to February 5, 2014, Petitioner had not been treated for heart disease or high blood pressure and had no lost time from his duties as a firefighter as a result of heart disease or high blood pressure. Petitioner admitted to being a smoker and had been smoking one to one and a half packs of cigarettes per day since the 1990's. He tried unsuccessfully to stop smoking and had recently started using an electronic cigarette to help in the effort. Since the events of February 5, 2014 he has stopped smoking. In February of 2014 Petitioner weighed around 265 pounds. Petitioner is six feet one inch tall. At the time of arbitration Petitioner weighed 237 pounds.

Petitioner and his fellow firefighters work shifts of 24 hours on and 48 hours off with each 24 hour shift starting and ending at 6:00 AM. Petitioner testified that during colder months in the snow, he would plug the heater of his diesel truck into a socket in to the garage in order to keep the truck's engine block warm, although he could not recalling doing so on the date of the alleged accident.

On February 5, 2014, Petitioner arrived at the fire station shortly before 6:00 AM. He did not recall the weather that morning, and that his last recollection was talking to one of the guys coming off the prior shift. He indicated that the next thing he remembers is waking up in the hospital.

The records from Sherman Hospital reflect the following histories: "The patient apparently a fireman and was shoveling the snow this morning and had a VF arrest. The patient was seen immediately then by the paramedics at the firehouse, who found him in VF arrest. He was immediately shocked and responded appropriately." (PX6, p.50); "This is a 43 year old white male patient who is a firefighter who suffered sudden cardiac arrest while he was at his job. Apparently, he was clearing snow." (PX6, p.46); "This 42 year old patient, who is a fireman was using a snow blower outside of the firehouse and suffered a cardiac arrest." (PX6, p.43). Petitioner underwent quadruple bypass surgery on February 6, 2014. (PX6, pp.58-63).

Respondent submitted into evidence the deposition transcripts of four (4) co-workers who were also on-duty on February 5, 2014 -- firefighters Tyler Burd, Ashley Rebou, Jeremy Schwab and Kanen Terry. All four witnesses agreed that they found Petitioner in the parking lot outside the apparatus room of the fire house, lying in the snow. They also consistently testified that they used resuscitation efforts, got him on a flat board, transferred him into the fire station, and continued working on him until they obtained a heart rhythm. They then loaded Petitioner into an ambulance and took him to Sherman Hospital where he slowly revived.

Firefighter Tyler Burd testified that he saw a snow blower approximately 5 to 6 feet away from the Petitioner's body but that there was no path in the snow between the snow blower and Petitioner's body. (RX2, p.16). As for the duties involved in clearing the snow from the parking lot, Mr. Burd testified that clearing the snow was done by the whole crew. (RX2, pp.21–29).

Firefighter/paramedic Ashley Rebou testified that she believed the snow blower was in front of the garage, maybe two to three feet away from Petitioner, but that she saw no path between his body and the snow blower and that it did not appear that he had done any snow blowing or the presence of any snow shovels. (RX3, p.12).

Firefighter Jeremy Schwab testified that he thought it was unusual that Petitioner had walked in around 5:59, one minute before the shift started and that Mr. Johnston had flopped on to the recliner "as if something – something was off.".(RX4, p.6-7). Mr. Schwab testified that he saw a snow blower approximately 5–10 feet away from the body but that he saw no snow blowing or snow clearing activity. (RX4, pp.14–22). Mr. Schwab testified that it was always a crew-effort to clean the snow and that it would be unusual for Petitioner to have done the snow clearing without the rest of the crew. (RX4, pp. 28-29). Mr. Schwab also testified that he knew Petitioner was a cigarette smoker, and that he saw him smoke perhaps half a pack a day. (RX4, p.29).

Firefighter/paramedic Kanen Terry testified that he saw the Petitioner's body three feet in front of and to the driver's side of where the black truck is shown in RX6, between the black truck and the garage in the photograph. He indicated that Petitioner's head was located probably a foot from the corner of the curb. (RX5, pp.10-11). Mr. Terry testified that there was no snow shovel and no snow blower nearby. (RX5, p.11). Mr. Terry also testified that he regularly smoked with Petitioner and that the latter smoke on average a pack of cigarettes per day. (RX5, pp.15-16). Mr. Terry noted that in January Petitioner pulled out an e-cigarette and was taking puffs off of it as opposed to a real cigarette. (RX5, pp.16-17) Mr. Terry indicated that Petitioner stated that he was trying to quit and that he was trying to adjust the dose of nicotine in the e-cigarette he was using, saying at one point that there was too much nicotine and was toning it back. (RX5, p.17).

Since February 5, 2014, Petitioner testified that he has not worked. Petitioner testified that prior to February 5, 2014, he had never suffered any cardiac problems that he was aware of and that he considered himself healthy.

Dr. Christopher Berry, Petitioner's cardiologist, testified that Mr. Johnston at rest, sitting and breathing, could have had the same ischemic event as he did on February 5, 2014. (PX13, p.44).

At the request of Respondent, Dr. Dan James Fintel, a cardiac surgeon and professor of cardiology at Northwestern University School of Medicine and Hospital, examined Petitioner pursuant to §12 of the Act. Dr. Fintel noted that Petitioner provided a past history of working a firefighter and having responded to 200-300 fire calls per year, and using a treadmill about once a week for 30 minutes at 3 mph. (RX1, p.11). He noted that Petitioner reported no prior experiences of chest pain, shortness of breath, rapid heartbeats or passing out. (RX1, p.12). Petitioner admitted to 20 years of smoking at least one pack per day and that he had recently begun using an e-cigarette in the hope of quitting smoking. (RX1, pp.12-13). He also noted that Petitioner was not on any cardiac medications prior to February 5, 2014. (RX1, p.13). Dr. Fintel indicated that the medical records revealed that Petitioner had suffered a cardiac arrest from myocardial infarction on February 5, 2014. (RX1, p.13-14). Tests showed severe blockages of coronary arteries and coronary artery disease that existed well prior to February 5, 2014. (RX1, pp.17-18). Dr. Fintel also noted that other records suggested evidence of a prior infarction or heart attack that may have occurred several weeks before the incident in question. (RX1, p.20).

Dr. Fintel went on to opine that "...any activity on a day in which the ambient temperature was 15 degrees in a cardiac patient (such as Petitioner) can be life threatening or life ending." (RX1, p.24). He noted that going from the heated firehouse to the outside and suddenly breathing cold air "... in a susceptible individual like Mr. Johnston who had undiagnosed severe triple vessel coronary disease, a change in the blood flow of the coronary arteries such that a further reduction in blood flow to the heart muscle would occur just by exposure to the cold without even having to posit picking up a shovel, if indeed he did any shoveling at all..." (RX1, p.24). Dr. Fintel went on to state that "... any activity in cold weather can be a life stressor and an arrhythmogenic stimulus for an individual with severe underlying coronary artery disease." (RX1, p.25). Dr. Fintel also felt that prior to the alleged accident Petitioner "... had sustained a silent heart attack to the tip of his heart which caused some degree of scarring or fibrosis and abnormal wall motion ..." that Petitioner may not have been aware of. (RX1, p.27). In addition, Dr. Fintel noted that nicotine in both e-cigarettes and regular cigarettes can cause

cardiac problems in patients. (RX1, p.30). Dr. Fintel also felt that Petitioner's medical treatment was "... all a direct consequence of the severe underlying preexisting triple vessel coronary artery disease." (RX1, p.32).

On cross examination, Dr. Fintel admitted that he did not know the dosage of nicotine that Petitioner was using in his e-cigarette and admitted it was pure "speculation as to the impact, if any, of the e-cigarette on the event of February 5, 2014." (RX1, p.39). Dr. Fintel also noted that "risk factors" for coronary artery disease such as family history -- in regards to which Petitioner had a father who had suffered a heart attack in his 50's -- as well as smoking, diabetes, hypertension, high cholesterol and sedentary life style are thought to increase the likelihood that coronary disease will progress and lead to a heart attack. (RX1, pp.42-43). Dr. Fintel also noted that Petitioner's heavy smoking for 20 years was "probably the major cause chronically of developing advance atherosclerosis." (RX1, p.43). Dr. Fintel also noted that "[w]orking as a fireman is not consider to be a regular risk factor for coronary artery disease. It depends on occupational exposure and data that I don't have available to me." (RX1, p.44). When pressed further, Dr. Fintel note that "[i]t could be a risk fact based on what his occupational exposure was, but it was not definitely a risk factor." (RX1, p.45).

Dr. Fintel was questioned about the elements of the statutory presumption. Dr. Fintel admitted that Petitioner suffered from heart or vascular disease, that the ischemic attack and the cardiac arrest resulted from that heart or vascular disease and that, in turn, caused Petitioner's disability. (RX1, p.52). Dr. Fintel also agreed that if one were to assume Petitioner was engaged in snow removal, that such activity could have been the trigger for the heart attack. (RX1, pp.53-54). Dr. Fintel also agreed with the general statement that the occupation of a fireman is a risk factor for premature coronary artery disease above and beyond the other risk factors; however, Dr. Fintel noted that he was unaware of what specific activities Petitioner engaged in that would have increased his risk of atherosclerosis. (RX1, p.54).

Petitioner's treating cardiologist, Dr. Christopher Berry, testified that he treated Petitioner post operatively to manage cardiac arrhythmias and to counsel him on lifestyle modifications. (PX13, pp.9-10). Dr. Berry confirmed that Petitioner suffered from coronary artery disease, meaning plaque buildup in the arteries that supply blood to the heart muscle. (PX13, p.10). Petitioner had suffered a myocardial infarction meaning a sudden occlusion of one of the heart arteries supplying blood to the heart muscle which leads to immediate cessation of blood flow to that territory of the heart and over the following minute cause necrosis of the heart muscle. (PX13, pp.10-11). Dr. Berry opined that Petitioner suffered "demand related ischemia" in that he suffered from severe preexisting coronary diseased that was aggravated by the activity he was performing. (PX13, p.11). Dr. Berry also noted that Petitioner had multiple risk factors including obesity, family history of coronary artery disease, smoking and possible undiagnosed prediabetes or diabetes. (PX13, p.12). In addition, Dr. Berry noted that in patients with either blocked or partially blocked arteries and/or evidence of a prior heart, "... activity above and beyond what they are accustomed to or even what they may be accustomed to can cause the cells to become ischemic ... [a]nd can trigger cardiac arrhythmias." (PX13, p.17). Dr. Berry could not specify the amount of exertion that would be necessary to trigger such an event, other than to say that it would not be significant whether he was shoveling snow for 5 minutes or 50 minutes. (PX13, pp.17-18).

Dr. Berry also testified that based on his knowledge of the literature on the subject, "... there is an association of cardiac events in firemen that is above and beyond that which would be expected of age-matched controls." (PX13, pp.20-21). Further, Dr. Berry expressed his own opinion that "occupational exposure as a firefighter can be considered a risk factor for coronary artery disease." (PX13, p.21). As of the date of his deposition (May 1, 2014), Dr. Berry was of the opinion that Petitioner was unable to work as a firefighter and that it was premature to express a prognosis as to when or if Petitioner would ever be able to return to work as a firefighter. (PX13, pp.25-26). Dr. Berry further explained that as of May 1, 2014 Petitioner was cleared to commence a three month course of cardiac rehabilitation and that Petitioner would be re-evaluated thereafter. (PX13, pp.26-27).

On cross examination, Dr. Berry agreed that Petitioner suffered from preexisting critical three-vessel coronary artery disease, with 100% occlusion of the left anterior descending artery, 90% and 99% stenosis of the distal and posterolateral branch of the right coronary artery, respectively, 60% stenosis of the proximal circumflex and 50% stenosis of the mid circumflex artery and 60% and 70% in a separate diagonal artery. (PX13, pp.29-30). Dr. Berry also testified that while he felt it unlikely, it was possible that Petitioner might or could have suffered this cardiac event on the date in question just by being exposed to 15 degree Fahrenheit temperatures. (PX13, p.31). Dr. Berry explained that exposure to cold "... is a physical stressor that may promote an ischemic event" and that he "... would consider extreme temperature as a physiologic stressor which may aggravate underlying medical disease." (PX13, p.32). Dr. Berry also acknowledged that it would be speculative for him to testify as to any specific date of exposure on the part of Petitioner to smoke, fumes or other chemicals or substances. (PX13, pp.33-34).

WITH RESPECT TO ISSUES (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, AND (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

§6(f) of the Act provides in pertinent part:

"Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment... However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim ..."

Based on the above, it would appear that for a firefighter such as Petitioner, with over 20 years of service, a statutory presumption exists that the cardiac event he experienced on February 5, 2014 arose out of and in the course of his employment, and that a causal relationship likewise exists between said condition and the hazards of his employment. Respondent points to the above statutory language and essentially argues that in order for the presumption to apply Petitioner must first prove that the condition or impairment resulted either "directly or indirectly" from the employment, as if those two words didn't already encompass the only two possible types of conditions, and that Petitioner somehow has to show one or the other for the presumption to apply. The Arbitrator disagrees with this interpretation. Instead, the Arbitrator views the statute's reference to "direct or indirect" as simply setting forth the underlying principle and basic parameters of §6(f) – namely, that the presumption applies regardless of whether or not the claimant can initially prove that the condition was the direct result of one of the enumerated jobs. Indeed, to hold otherwise would render such a presumption entirely meaningless.

Instead, the crux of the issue is whether or not Respondent rebutted the presumption in question. Towards this end, on the question of accident, Respondent presented the deposition testimony of four fellow firefighters and/or paramedics that were on the job at the time of the incident, and who without question saved Petitioner's life – namely, Tyler Burd, Ashley Rebou, Jeremy Schwab and Kanen Terry. None of these individuals actually saw Petitioner outside prior to finding him lying facedown in the snow, so none of them could testify as to what Mr. Johnston was doing at the time he suffered the cardiac event. Petitioner himself had no recollection of what he was doing or even why he had gone outside. In fact, the only evidence we have with respect to Petitioner's

possible intentions on that date in question was the testimony of Tyler Burd who indicated that while he was preparing his rig Lieutenant Parthun, the crew chief from the previous shift, "... peeked his head in the ambulance and said that Lieutenant Johnston was going outside to shovel around his car ..." (RX2, p.7). No objection was made to Mr. Burd's statement along these lines, and Lieutenant Parthun was never called to testify.

As far as whether Petitioner actually engaged in any snow removal activity prior to the incident, all four witnesses agree that it was part of their duties to clear the parking lot of snow, and that Petitioner often joined them, although most seem to indicate that this was typically done as a group. Indeed, Jeremy Schwab testified that it would have been unusual for Petitioner to be out snow blowing the parking lot without the rest of the crew. (RX4, p.28). Furthermore, none of the witnesses seem to be able to agree as to the exact location or even the presence of a snow blower or shovel in proximity to the body. However, the general consensus seems to be that there was no sign a path had been cleared in the area. Indeed, Mr. Burd testified that he never actually heard a snow blower going. (RX2, p.16). Mr. Burd did testify that it appeared some snow may have been cleared around Petitioner's vehicle, but he conceded that Petitioner may have simply parked in a spot previously occupied by a crew member from the previous shift. (RX2, pp.18-19). All in all, there is no solid evidence that Petitioner was actually removing snow at the time of the event.

The firefighters also testified to the fact that Petitioner was quite a heavy smoker. Petitioner himself readily admitted that he smoked a pack and a half or less per day, that he had smoked at the start of his shift in the past, and that he had probably smoked on the morning of the incident. And while Petitioner testified that he had been trying to quit smoking by using e-cigarettes, Kanen Terry – who noted that he smoked with Petitioner "regularly" – testified that during the month leading up to the incident Petitioner smoked e-cigarettes and regular cigarettes "50/50 of the times that [they] were outside smoking together..." (RX5, 18). Mr. Burd likewise testified that Petitioner "... went through at least two packs a day" and that he would smoke "out by the garage." (RX2, pp.13-14). The Arbitrator notes that it appears from the testimony that Petitioner's body was found not too far from the garage, near the curb that abuts the first parking space and the narrow parkway between the curb and the side of the garage. (See photo at RX6).

Based on the above, the Arbitrator is not convinced that Petitioner was actually shoveling or removing snow at the time of the event, or even that his intention was to do so. Instead, the Arbitrator is more inclined to believe that as a 1 to 2 pack-a-day smoker he was heading outside for smoke. Even so, one could say that the act of stepping outside to smoke was an act of personal comfort, one which Respondent was well aware of and apparently acquiesced to, and which therefore brought the conduct within the course and scope of his employment. However, to be compensable, an injury must also arise out of the employment.

For a finding that an injury "arose out of" employment, the injury must have had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Swartz v. Industrial Commission, 359 Ill.App.3d 1083, 1086, 837 N.E.2d 937, 940, 297 Ill.Dec. 486 (3rd Dist. 2005); citing Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 203, 797 N.E.2d 665, 671, 278 Ill.Dec. 70 (2003). That being said, the accidental injury need not be the sole causative factor, nor even the primary causative factor, so long as it was *a* causative factor in the resulting condition of ill-being. Sisbro, 797 N.E.2d at 673.

A claimant with a preexisting condition that makes him more vulnerable to injury may obtain compensation under the Act so long as employment was a causative factor. Swartz, 837 N.E.2d at 940. The supreme court has rejected the argument that "where a causal connection between work and injury has been established, it can be negated simply because the injury might also have occurred as a result of some 'normal daily activity.'" Id., at

940-941; citing *Sisbro*, 797 N.E.2d at 676. Instead, whether an injured employee's health has deteriorated so that any normal daily activity is an overexertion or whether the work-related activity engaged in presents risks no greater than those to which the general public is exposed are factors to be considered when determining whether sufficient causal connection between employment and an injury has been established. *Id.*, at 941; citing *Sisbro*, 797 N.E.2d at 676.

The Supreme Court's conclusion in *Sisbro*, supra, is quite instructive with respect to the present case. To wit, the court noted that "[w]hen an employee with a preexisting condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability. The Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. Generally, these will be factual questions to be resolved by the Commission." *Id.*, at 678.

As far as the medical evidence is concerned, both Petitioner's treating cardiac physician, Dr. Berry, and Respondent's §12 examining physician, Dr. Fintel, agreed that Petitioner had severe, preexisting coronary artery disease. In fact, Dr. Fintel believed that Petitioner most likely suffered a "silent heart attack" during the weeks leading up to the event on February 5, 2014. Both physicians agree that shoveling snow could trigger such an ischemic attack, with Dr. Fintel questioning whether Petitioner was actually shoveling at the time. In light of the Arbitrator's factual findings along these lines (see above), the Arbitrator discounts Dr. Berry's opinion to the effect that said activity was the triggering event. Furthermore, the Arbitrator discounts Dr. Berry's opinion that occupational exposure could have played a role in this case, given that there was absolutely no evidence submitted that would quantify or even generally describe the type or frequency of Petitioner's exposure in this regard. Instead, the evidence overwhelming shows that Petitioner had multiple risk factors – including the fact that he was obese, had a family history of coronary artery disease, was a long-term and heavy smoker, and was possibly diabetic or prediabetic as well as hypertensive – and that the near fatal cardiac event he subsequently suffered could have happened at anytime and anywhere. Luckily for him, it happened outside a firehouse where highly-trained paramedics were able to act quickly and save his life.

Based on the above, and the record taken as a whole, the Arbitrator finds that Respondent successfully rebutted the presumption outlined in §6(f) by showing that Petitioner's preexisting coronary artery disease alone was the cause of the cardiac event on February 5, 2014. Furthermore, the Arbitrator finds that the act of stepping outside, whether it be for a smoke or with the intention of clearing snow, did not present a risk of injury that was greater than that to which a member of the general public is regularly exposed. More to the point, Petitioner was a heart attack waiting to happen, and his employment activities neither aggravated nor accelerated his already severe and highly advanced coronary artery disease. Along these lines, the Arbitrator finds the opinion of Dr. Fintel to be more persuasive than that offered by Dr. Berry as to the role Petitioner's employment may have played in the attack. As a consequence, the Arbitrator finds that it cannot be said Petitioner suffered accidental injuries arising out of his employment on the date in question, nor that his current condition of ill-being is causally related to the alleged accident. Accordingly, Petitioner's claim for compensation is hereby denied.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to medical expenses. Accordingly, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to prospective medical care and treatment. Accordingly, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to temporary total disability benefits. Accordingly, Petitioner's claim for same is hereby denied.

2017 IL App (3d) 160024WC

NO. 3-16-0024WC

Opinion filed April 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CURTIS SIMPSON,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Peoria County.
	)	
v.	)	No. 15-MR-78
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION, *et al.*	)	James Mack,
(City of Peoria, Appellee).	)	Judge, presiding.

JUSTICE MOORE, delivered the judgment of the court, with opinion.
Justices Hoffman, Hudson, and Harris concurred in the judgment and opinion.
Presiding Justice Holdridge dissented, with opinion.

OPINION

¶ 1 The claimant, Curtis Simpson, appeals the judgment of the circuit court of Peoria County, which confirmed the decision of the Workers' Compensation Commission (Commission) to deny him benefits under section 8 of the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/8 (West 2014)), which he sought against his employer, the City of Peoria (City). In addition, the following motions have been taken with the case on appeal: (1) The City's motion to strike the *amicus curiae* brief filed by the Associated Firefighters of Illinois (AFFI) on behalf of the claimant; (2) The motion of the Illinois Municipal League (IML) for leave to intervene as *amicus*

curiae and to file a brief on behalf of the City. For the following reasons, we grant the City's motion to strike as to those portions of the AFFI's brief that contain or reference matters that are *de hors* the record, grant IML's motion to intervene as *amicus,* deeming its brief to be filed *instanter*, and affirm the judgment of the circuit court which confirmed the decision of the Commission.

¶ 2 FACTS

¶ 3 The claimant was employed by the City as a firefighter. On May 21, 2008, the claimant filed an application for adjustment of claim under the Act (820 ILCS 305/1 *et seq.* (West 2008)), alleging work-related permanent injury to his heart by virtue of a heart attack. An arbitration hearing was held on March 19, 2014, in which the claimant amended his application to designate the injury as "heart attack and cardiovascular disease." The following evidence was adduced at the arbitration hearing.

¶ 4 The claimant testified that he began employment with the City as a beginning firefighter/hoseman in 1976. He served as a front line or line of duty firefighter for approximately 22 years, and testified in detail regarding his extensive history of exposure with regard to fire, smoke, and other toxins, his demolition of buildings, high-stress situations, and noise. He also testified that when he became a fireman, protective equipment was not available, but it progressively became more available as time went on.

¶ 5 The claimant testified that he became an administrative officer for the City's fire department in 1997 and worked in this capacity until the end of his career. In his first administrative positions, such as Assistant Chief, he was not as closely related to the fire and basic life support calls in terms of his day-to-day activities in that he was only required to respond to multi-alarm fires. However, he testified that there was a lot of stress involved when

he became Batallion Chief and became responsible for the safety of 60 firefighters throughout an entire 24 hour period. In that position, he had to respond to all working fires.

¶ 6 The claimant testified that on January 12, 2008, at the age of 63, he was home sweeping and cleaning his garage. After he finished, he went into the house to take a shower and get ready for dinner. After his shower, he felt some moderate pain and lay down on the bed to rest. His girlfriend at the time, who is now his wife, came and asked him what was wrong. Although the pain was not debilitating, she insisted he go to the hospital. He was treated at the emergency room of Proctor Hospital by a cardiologist, Darrel Gumm, who diagnosed cardio enzyme elevation and then heart attack. Following that, he underwent an angiogram and the placement of two stents. He was placed on several medications: Atenolol, Lisinopril, Sodium Vasolate, and Plavix, which is a blood thinner. He soon learned that taking a blood thinner such as Plavix disqualified him from working in any capacity at the City fire department.

¶ 7 The claimant testified that he did not have a family history of cardiovascular disease, had never been a smoker, and his alcohol use was minimal. As a result of his heart attack, he applied for a duty disability pension and that was granted. Since that time, he has had cardiovascular treatment in the form of cardiac rehabilitation services and had a third stent placement by Dr. Gumm in 2009. Due to his cardiovascular condition, he no longer engages in stressful activities or a regimented exercise program for fear of having another heart attack.

¶ 8 On cross-examination, the claimant testified that in addition to the traumatic experiences he went through as a firefighter, there were many positive outcomes and good things that happened while he was working, such as saving lives. During the course of his career as a firefighter, he never sought mental health treatment or psychological counseling. The stress of

the job never got to the point that he needed medical intervention or felt it was affecting his ability to do his job or perform the everyday activities of his life.

¶ 9 Once he moved into an administrative capacity in 1997 for the City, the requirement that he physically enter a burning building was significantly diminished. In addition, his hours changed from 24 hours on, 48 hours off, to a standard 8:00 a.m. to 5:00 p.m., 40 hours-per-week schedule. However, every other month he would be on call as the Division Chief to respond to all working fires.

¶ 10 At the time of his heart attack, the claimant was on medication for hypertension (high blood pressure) and hyperlipidemia (high cholesterol). He had been tested for sleep apnea but the test was negative, although certain medical records report a history of sleep apnea. His mother also had a history of hypertension, although the medical records indicate that the claimant, at some point in time, reported a history of heart disease in his mother. The claimant characterized himself as overweight at the time of the heart attack, having been in more of a sedentary job. While cleaning his garage on the day of his heart attack, he moved half a bag of bird seed out of the way and rolled a cart with more bird seed as well. He now is retired, lives in Arizona, has regular stress tests under the care of a cardiologist, but is not under any physical restrictions from any doctor.

¶ 11 The evidence deposition of Dr. Virginia Weaver was admitted into evidence on behalf of the claimant. Dr. Weaver testified regarding a vast array of credentials, the most relevant being that she is a doctor of public health at the Bloomberg School of Public Health at Johns Hopkins University. She is board certified in internal medicine and occupational medicine. She is a member of the American College of Occupational and Environmental Medicine and serves on the medical advisory board of the International Association of Firefighters (IAFF).

¶ 12 Dr. Weaver testified that she prepared a report concerning the claimant at the claimant's attorney's request. In preparation for her report, dated September 9, 2013, Dr. Weaver reviewed the claimant's medical records from his emergency room admission and subsequent cardiac treatment, the report and deposition of the City's expert, Dr. Fintel, and the report of Dr. McDowell, a resident of the IAFF, who assisted Dr. Weaver in the evaluation of the claimant's condition and its cause. Dr. Weaver testified that she also conducted a phone interview with the claimant.

¶ 13 Dr. Weaver testified that she spoke with the claimant in order to get an understanding of his working career and specific issues within his job that could have resulted in exposure to any of the number of firefighting hazards that can result in cardiovascular disease. She testified that the claimant's work history is consistent with most firefighters in the United States in that during the first two to three years of his employment as a firefighter he generally did not use any type of breathing apparatus during fire suppression and overhaul activities. Following that, he began using self-controlled breathing apparatus (SCBA) equipment during active fire suppression but not during the overhaul phase. In the last couple of decades, the data shows that overhaul activities are as high-risk as fire suppression activities and it is recommended now that firefighters keep their SCBA equipment on the entire time they are doing suppression and overhaul.

¶ 14 Dr. Weaver testified that as a result of the multiple times the claimant undertook fire suppression activities without SCBA equipment, the claimant had extensive exposure to chemical asphyxiates, such as carbon monoxide and cyanide. In addition, Dr. Weaver testified that the claimant's stress and noise exposure during his 22 years of active firefighting was extensive and that this type of occupational stress is a risk factor for heart disease. Dr. Weaver

testified that the claimant's history of hypertension "can certainly be occupational as a firefighter and non-occupational." She recognized that the claimant's obesity, age, sex, and history of hyperlipidemia were also risk factors but that chronic occupational exposure from firefighting in terms of chemicals, stress, noise, and disrupted sleep were risk factors as well.

¶ 15 Dr. Weaver explained recent developments regarding occupational hazards related to firefighting and cardiovascular disease. It has been very clear for a long period of time that acute exposure to certain chemical asphyxiates during fire suppression activities followed by a cardiac event within 24 to 48 hours signifies a work-related injury. However, there is now literature that shows that chronic carbon monoxide exposure increases the risk of hypertension and elevated blood levels of inflammatory markers which are risk factors for subsequent cardiac disease. Other potential mechanisms for cardiovascular disease from chronic smoke exposure include increased formation of free radicals, subsequent endothelial dysfunction, increased coagulability of the blood, and increased progression of atherosclerosis. In addition, shift work involving sleep deprivation has now been correlated with hypertension, diabetes, obesity, and heart disease. Chronic noise and stress are also associated with an increased risk for chronic hypertension. Dr. Weaver concluded that the claimant had 31 years of exposure to these chronic risk factors and that it is therefore her opinion, within a reasonable degree of medical certainty, that his occupation may have been a cause of his cardiovascular disease and myocardial infarction.

¶ 16 On cross-examination, Dr. Weaver testified that she is not board certified in cardiovascular disease, critical care medicine, or nuclear cardiology. The IAFF has had a long-standing contractual relationship with the Bloomberg School of Public Health, where she is Director of the Occupational and Environmental Medicine Residency. Funds are transferred to the school to provide salary support for faculty to oversee residents rotating at IAFF to assist

with questions of causation with regard to injuries in firefighters. The main focus of her practice in this position is to provide causation expertise for firefighters with about five to 10 percent of her practice devoted to treating patients. She does not treat patients with cardiovascular disease.

¶ 17 With regard to specific exposures, Dr. Weaver testified that benzene, carbon monoxide, hydrogen cyanide, asbestos, P.A.H.'s, formaldehyde, carbon disulfide, diesel exhaust, and soot are routinely reported at fires where monitoring has been done. However, specific information about which of these chemicals a firefighter has been exposed to over the course of his or her career and in what amounts is almost never available, making exposure assessment extremely difficult for research purposes. This is true in the case of the claimant as well.

¶ 18 The claimant also introduced records from his line of duty disability pension examination into evidence. According to an independent medical disability report prepared by Dr. Robert Ayers at the Occupational Health Foundation on April 30, 2008, the claimant had been evaluated 30 years prior to the exam with coronary angiography for chest pain. He was diagnosed as having coronary spasm and his angiogram was normal at that time. It was his impression that it was marital stress related. He was not given any medications and had no recurrence. The report noted that the claimant had been treated for high blood pressure and elevated cholesterol for several years also.

¶ 19 Regarding the incident at issue in this case, the report indicated the claimant presented to the Proctor Emergency Room for chest pain on January 12, 2008. His blood enzymes changed and he was diagnosed as having a heart attack. He was seen by Dr. Gumm who performed a coronary angiography and he had two stents placed and "has done okay since then." He had no recurrent chest pain as of that date. Regarding occupational history, it was noted that at the time of the injury, the claimant was the Assistant Fire Chief for the City. He had been employed there

for 31 years. He performed administrative work with occasional physical work. He was a front line firefighter for 22 years. He was advised by the Chief that because he is taking Plavix, he is not able to do firefighting work. With regard to whether the claimant's disability was caused by an on-the-job incident, the report noted that the claimant was cleaning his garage at the time preceding the incident. However, the report noted that, based upon legislation passed in Illinois, taking effect January 1, 2008, firefighters are included in the designation that would allow them to claim work relatedness to any heart problems. The report concluded that the statute would allow this to be rebutted in a legal setting.

¶ 20 Finally, the claimant introduced a pension board examination report prepared by Dr. M. Fayez Malik of Heartcare Midwest on May 1, 2008. Dr. Malik's impressions of the claimant included: coronary artery disease post-stenting with no evidence of angina or failure at that time but with moderate disease in the other vessels which was being actively followed by Dr. Gumm at that time with risk factor modifications; hypertension with blood pressure slightly elevated at the time of the report; and hyperlipidemia with an improving lipid profile. Dr. Malik recommended that the claimant follow-up with Dr. Gumm with a pre-office visit stress test to reassess the stented vessels and other territories, continue to take medications as instructed, limit salt intake, and check blood pressure at home.

¶ 21 Exhibits were admitted into evidence on behalf of the City. First, the job descriptions regarding the administrative positions the claimant held during the final nine years of his career were admitted into evidence. The claimant's most recent position of Assistant Fire Chief is summarized as an assistant to the fire chief in the administration and direction of the fire department - overseeing, coordinating, and reviewing the activities and staff of three divisions within the department. A review of the list of essential job functions for this position reveals a

host of administrative responsibilities. However, essential job functions include serving as incident commander at large emergency scenes. In addition, working conditions are listed as occasional exposure near fumes or airborne particles and extremely hazardous, life threatening environments at emergency scenes.

¶ 22 With regard to the claimant's prior administrative position of Fire Division Executive, essential job functions were also heavy in administrative work. However, job functions also included responding to and managing emergency scenes through the implementation of an incident command system as assigned. With regard to working conditions, the job description states that while performing the essential functions of this position, the employee is frequently exposed to wet and humid conditions, fumes or airborne particles, extreme cold, and extreme heat. In addition, the employee is occasionally exposed to toxic or caustic chemicals, work in high precarious places, and work with explosives, with irregular hours and shift times. The working conditions for this position are typically moderately quiet unless on an emergency scene, then the conditions are typically loud.

¶ 23 With regard to Battalion Chief, the claimant was charged with assuring the protection of lives and property through supervision of all employees during normal operations. Job functions included a host of administrative duties, but also included command and control of multi-unit response to fire, rescue, and emergency scenes; investigation and reporting of all vehicular accidents involving fire apparatus or personnel while on duty; and direction and possible assistance with the extrication of persons from car accidents and other entrapments. The position description specifies that while performing the essential functions of this position, the employee is frequently exposed to flames, smoke, extreme hot or cold conditions, work in high precarious places, hazardous materials, risk of electrical shock, and violent and uncontrollable individuals.

The description also states that working time may require irregular hours and shift times and frequently loud working conditions.

¶ 24 The claimant's work history records with the City reflect that he was hired as a firefighter on August 30, 1976. The record includes some gaps in time as far as the claimant's service but shows that he worked four years as a hoseman, took a six-month leave of absence for military training, and worked until at least 1993 as a front line firefighter, with some time periods serving as fire engineer as well. The first record of his service in an administrative capacity shows a date of 2004, and it appears he served as Fire Division Executive for two years, followed by Assistant Fire Chief for three years. There is not a record of the claimant serving as Battalion Chief included in the exhibit, although the claimant clearly testified to serving in that position.

¶ 25 The City introduced an independent medical evaluation (IME) report on the claimant, conducted by Dr. William S. Scott at St. Francis Medical Center on July 15, 2008, at the request of the Firemen's Pension Fund of Peoria. Of relevance to this appeal, Dr. Scott opined that based on his personal risk factors, non-work location, and activities at the time of the cardiac event, the claimant's condition was not caused by an on-the-job incident. Dr. Scott stated that the claimant has coronary artery disease associated with personal risk factors and a coronary event at home while doing strenuous activities. Dr. Scott determined that the claimant seems to have the same general risk factors as the regular population of people with coronary artery disease and that it is known that "other men with similar personal risk factors in different occupations or even in no occupations can experience similar events." Dr. Scott concluded that "it would appear to be not medically valid to assume his cardiac event occurred solely due to his occupation as a firefighter while ignoring valid risk factors of age, sex, hyperlipidemia, [and] long history of hypertension."

¶ 26 The report and evidence deposition of Dr. Dan Fintel of the Cardiology Division of The Feinberg School of Medicine at Northwestern University was admitted into evidence on behalf of the City. Dr. Fintel conducted a record review regarding the claimant. Dr. Fintel's report states as follows:

> "I do not believe the patient-reported history of coronary vasospasm in the 1980s contributes to [the claimant's] risk for the cardiac event on 1/12/08. Relevant medical records to substantiate this report are not available for review. The Proctor Hospital angiogram dated 1/14/08 definitively identifies multi-vessel atherosclerotic coronary artery disease, with an obstructive lesion in the right coronary artery. Coronary angiography is the gold standard study to establish the diagnosis of coronary artery disease. Extensive coronary disease, like that identified in [the claimant], is due to the interplay of non-modifiable genetic predisposition and lifestyle factors such as diet, exercise, and habits. While the acute rupture of a coronary cholesterol plaque can be related to hormone surges during severe physical and emotional stressors, this is *not* the type of process indicated in the angiogram or the clinical history at [the claimant's] presentation. The [claimant's] risk factors for the development of coronary disease included age, male sex, hypertension, hyperlipidemia, and obesity.
>
> [The claimant's] cardiac symptoms occurred while the patient was at home, off duty, and performing physical labor on his own accord. These symptoms are best described by Dr. Dhanekula, whose history dated 1/13/08 indicates that the chest discomfort came on in the shower *after* [the claimant] was working in his garage with heavy items. As such, I do *not* believe the cardiac event was caused or precipitated by his work as a firefighter. The evidence in the medical record, namely [the claimant's]

documented risk factors, presenting clinical history, and angiographic findings, strongly suggest that the event of 1/12/08 was due to the progression of coronary atherosclerosis (narrowing of the arteries), which in turn was the result of underlying risk factors." (Emphasis in original.)

¶ 27 During his deposition, Dr. Fintel testified extensively regarding his credentials in the area of cardiovascular disease and treatment, including board certifications in cardiovascular diseases, critical care medicine, and nuclear cardiology. About 80 percent of his time on the staff at Northwestern entails attending to patients in the coronary care unit, the observation unit where he admits patients with suspected cardiac conditions, and the consultation service where he performs cardiac consultations. He also attends a busy outpatient cardiac practice in the clinic building. Academically, he oversees residents, lectures at Northwestern and all over the world, and publishes between one and three articles or book chapters per year in various texts. In the medical/legal consultation arena, Dr. Fintel testified that he does about two-thirds of his work on behalf of defendants and one-third on behalf of plaintiffs.

¶ 28 Dr. Fintel testified consistently with his record review report. In addition, in the deposition, Dr. Fintel was asked whether he had an opinion based upon a reasonable degree of medical and surgical certainty as to whether the claimant's cardiac event could have been caused by his employment as a firefighter. In response, Dr. Fintel stated:

"My opinion is that in the presence of these significant risk factors for coronary artery disease, the hypertension, hyperlipidemia, mild family history, male sex, that [the claimant] was the essential kind of powder keg waiting to explode, that is, that he had risk factors for coronary disease that were the cause of his atherosclerosis, and that the events that occurred while working in his garage on January 12, 2008[,] were a

culmination of that process, and the mild heart attack that resulted was a direct correlate or consequence of his risk factors leading to his underlying coronary disease."

¶ 29 On cross-examination, Dr. Fintel testified that atherosclerotic process is not fully understood, but the risk factors he outlined earlier increase the probability that it will develop. He agreed that given the evidence of coronary heart disease found in the claimant at the time of his heart attack, it would be fair to say that coronary artery disease had been present for a substantial period of time prior to 2008. He testified that he reviewed no records and had no knowledge of the particular duties the claimant performed as a firefighter.

¶ 30 On May 2, 2014, the arbitrator issued a decision awarding the claimant PPD benefits pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2008)), representing 25% loss of use of the whole person. The City sought review before the Commission, which issued its decision on January 20, 2015. Finding that the application of section 6(f) of the Act (820 ILCS 305/6(f) (West 2008)) presents a case of first impression, the Commission turned to the Illinois Supreme Court's decision in *Fransican Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460-63 (1983) for guidance as to the analysis to be employed to determine whether a legislative presumption has been rebutted. Employing "Thayer's bursting bubble hypothesis," which posits that once sufficient evidence is produced " 'to support a finding of the nonexistence of the presumed fact,' " the presumption ceases to operate and the issue is determined as if no presumption ever existed, the Commission first considered the amount of evidence needed to rebut the presumption created by section 6(f) of the Act. *Id.* at 462-63 (citing *McCormick,* Evidence sec. 345, at 821 (2d ed. 1972); (quoting Graham, *Presumptions in Civil Cases in Illinois: Do They Exist?* 1977 S.Ill.U.L.J. 1, 24)). Noting that the presumption applicable in this

case is a legislative one, the Commission determined that it requires "stronger evidence" to overcome.

¶ 31 Turning to the case at bar, the Commission found that the City had successfully rebutted the presumption that the claimant's cardiovascular disease was causally related to his employment as a firefighter "by providing strong evidence through its experts' opinions along with [the claimant's] own health history, work history and [the claimant's] own testimony to show there were other causes of [the claimant's] cardiovascular problems and his condition is not related to his employment as a firefighter." Finding the presumption to be successfully rebutted, the Commission weighed the evidence to determine whether the claimant met his burden to prove by a preponderance of the evidence that his "heart attack" was related to his employment with the City. The Commission found that the claimant failed to meet his burden because at the time of his heart attack, he was at home, had just physically exerted himself, and was not performing any activity connected to his duties as a firefighter or Assistant Fire Chief. In addition, the Commission found that during the last 1/3 of his career, the claimant was working in an administrative capacity performing tasks of a more sedentary nature and had several cardiac risk factors including being a male of advanced age, overweight, and on medications for high blood pressure and high cholesterol. The Commission also noted that the claimant had a poor diet and family history of hypertension. Due to the extent of his atherosclerotic disease, the Commission found credible Dr. Fintel's opinion that the claimant was essentially "a powder keg waiting to explode," and found Dr. Fintel's opinion, as well as those of Drs. Scott and Ayers, to be more credible than that of Dr. Weaver. As such, the Commission found that the claimant failed to meet his burden of proof and that his claim is not compensable.

¶ 32 The claimant sought review of the Commission's decision before the circuit court of Peoria County. On December 17, 2015, the circuit court entered an order confirming the decision of the Commission. On January 7, 2016, the claimant filed a notice of appeal with this court. On May 23, 2016, AFFI filed a motion for leave to file a brief as *amicus curiae* on behalf of the claimant. The City filed no response to the motion, and on June 8, 2016, this court entered an order allowing the *amicus curiae* brief. On June 17, 2016, the City filed a motion to strike the *amicus curiae* brief and AFFI requested leave to respond to the motion to strike. On July 27, 2016, this court entered an order allowing AFFI to respond to the motion to strike and taking the motion with the case.

¶ 33 On October 17, 2016, after this case had been fully briefed and placed on the call of the docket for December 8, 2016, IML filed a motion to intervene as *amicus curiae* and to file a brief in support of the City. IML acknowledged that the date for filing an *amicus* brief was long past due but argued that the parties to this matter will not be unfairly prejudiced by the granting of the motion and that it was not informed by the City that the AFFI submitted an *amicus* brief until September 1, 2016. IML claimed in its motion that its interest in this case is substantial because the claimant's claim "threatens hundreds of the League's municipal members and their citizenry," and this court's decision "will substantially increase the burden on municipalities if they will be required to pay workers' compensation claims for injuries to the administrative staff of fire departments that do not arise out of and in the course of normal employment." On October 21, 2016, this court entered an order taking IML's motion with the case and requiring IML to file its proposed *amicus curiae* brief within seven days. On October 31, 2016, this court received IML's proposed *amicus* brief.

¶ 34 ANALYSIS

¶ 35 We begin by considering the City's motion to strike the *amicus curiae* brief filed by AFFI. Illinois Supreme Court Rule 345(a) (eff. Sept. 20, 2010) provides as follows:

> "A brief *amicus curiae* may be filed only by leave of court or of a judge thereof, or at the request of the court. A motion for leave must be accompanied by the proposed brief and shall state the interest of the applicant and explain how an *amicus* brief will assist the court."

¶ 36 On May 23, 2016, AFFI filed a motion pursuant to Rule 345(a), along with a copy of the proposed brief and affidavit of AFFI President Pat Devaney, in which he averred that the AFFI assisted in drafting, presenting, and arguing House Bill 928, which culminated in the enactment of section 6(f) of the Act. 820 ILCS 305/6(f) (West 2008). According to paragraph one of the City's motion to strike, it appears that the City received a copy of the motion and proposed brief as per the certificate of service attached to AFFI's motion. The City did not file an objection to AFFI's motion despite having notice of the brief's contents prior to this court's order of June 8, 2016, granting the motion. Instead, the City filed a motion to strike the brief on June 17, 2016, which this court ordered to be taken with the case. Having considered the City's motion, AFFI's response thereto, and the City's reply, we grant the motion to strike as to any material contained or referenced in AFFI's brief that are *de hors* the record. See *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 60 (1987) (striking briefs of *amicus curiae* that relied upon materials that were not part of the record on appeal).

¶ 37 We next consider the motion of the IML to intervene as *amicus curiae* and to file a brief on behalf of the City. Illinois Supreme Court Rule 345(b) (eff. Sept. 20, 2010), which governs the timing for filing of a brief of an *amicus curiae*, provides that "[u]nless the court or a judge thereof specifies otherwise, it shall be filed on or before the due date of the initial brief of the

party whose position it supports." Having received IML's proposed *amicus* brief, and in the interest of giving full consideration to all interested parties in this case of first impression, this court grants IML's motion to file its *amicus* brief out of time.

¶ 38 Turning to the merits of the claimant's appeal, we begin our analysis by making a determination of the applicable standard of review. The standard of review, which determines the level of deference to be afforded the Commission's decision, depends on whether the issue presented on appeal is one of fact or one of law. See *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶17. Our review of the Commission's factual findings is limited to determining whether such findings are against the manifest weight of the evidence. *Id.* A finding of fact is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370 (2009). "Commission rulings on questions of law are reviewed *de novo*." *Johnson* at ¶17. "We also apply a *de novo* standard of review when the facts essential to our analysis are undisputed and susceptible to but a single inference, and our review only involves an application of the law to those undisputed facts." *Id.*

¶ 39 Here, in accordance with the above-stated principles, the propriety of the Commission's decision presents us with two separate inquiries involving two separate standards of review. The first issue on appeal involves the interpretation of section 6(f) of the Act (820 ILCS 6(f) (West 2008)), and a determination as to whether the Commission properly applied the rebuttable presumption set forth therein. This is an issue of law for which our standard of review is *de novo*. See *id.* The second issue requires us to determine the propriety of the Commission's ultimate determination that the claimant's condition of ill-being was not causally related to his

employment as a firefighter. This issue mandates that we confirm the Commission's decision unless it is against the manifest weight of the evidence. See *id.*

¶ 40 Having determined the appropriate standards of review to be employed in this case, we turn to section 6(f) of the Act, which provides, in relevant part, as follows:

> "Any condition or impairment of health of an employee employed as a firefighter *** which results directly or indirectly from any *** heart or vascular disease or condition, [or] hypertension ** resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of an in the course of the employer's firefighting, ** and further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. *** However, this presumption should not apply to any employee who has been employed as a firefighter ** for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission.[1] 820 ILCS 305/6(f) (West 2008).

¶ 41 Turning to the first issue on appeal, which requires us to make a legal determination regarding the application of section 6(f), we begin by addressing the issue raised by IML in its *amicus* brief, that the claimant is not a firefighter for purposes of section 6(f) because he served in an administrative capacity as Assistant Fire Chief at the time of his heart attack and was not

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[1] We note that this language was added to section 6(f) of the Act (820 ILCS 310/6(f) (West 2008)) by Public Act 95-316 (Pub. Act 95-316 (eff. Jan. 1, 2008). Accordingly, the language set forth later in this section, which states that "the changes made to this subsection by Public Act 98-291 shall be narrowly construed," does not apply to the statutory language at issue in this appeal.

actively engaged in firefighting. This issue was not raised by the parties below. At no time has the City disputed that the claimant is a firefighter.

¶ 42 The Commission found that the petitioner was a firefighter at the time of his heart attack, a finding that we cannot say is against the manifest weight of the evidence because an opposite conclusion is not clearly apparent. See *Beelman Trucking*, 233 Ill. 2d 364, 370 (2009). The claimant served as a front line firefighter for 22 years followed by service in managerial capacities for the 11 years prior to his heart attack, during the latter of which he did, at times, respond to the scenes of fires to coordinate firefighting efforts. For these reasons, we find that the claimant's occupation does fall within the auspices of section 6(f).

¶ 43 While we recognize the IML's concerns that applying the presumption to the claimant in this case "will substantially increase the burden on municipalities if they will be required to pay workers' compensation claims for injuries to the administrative staff of fire departments," this court is simply enforcing the statute as written based on the record before us, and it is outside of our province to rewrite the presumption as it pertains to firefighters who have worked their way through the ranks of a fire department to managerial positions.

¶ 44 The evidence is also undisputed that the claimant suffered a heart attack, and has an underlying atherosclerotic disease which contributed to this injury, both of which are directly related to a heart or vascular disease or condition. Accordingly, pursuant to section 6(f), the claimant's condition is rebuttably presumed to arise out of and in the course of the claimant's firefighting, and to be causally connected to the hazards or exposures of firefighting. 820 ILCS 305/6(f) (West 2008). As such, the issue becomes whether the Commission properly applied the presumption. Concurrent with our taking the present case under advisement, this court was asked to determine the application of this presumption in *Johnston v. Workers' Compensation*

Comm'n, 2017 IL App (2d) 160010WC. In the *Johnston* opinion, we set forth in detail how the presumption is to be applied, and our analysis and holding in *Johnston* is directly applicable to the case at bar.

¶ 45 This Court in *Johnston* adopted Thayer's bursting bubble hypothesis, which was referenced in the decision of the Commission in the case at bar. *Id.* at ¶36-¶37 (quoting *Diederich v. Walters,* 65 Ill. 2d 95, 100-101 (1976)). This theory regarding the effect of a rebuttable presumption posits that "once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed." *Id.* at ¶36 (quoting *Diederich*, 65 Ill. 2d at 100-101) (citing 1 Jones, Evidence sec. 3:8 (6th ed. 1972)). In determining the amount of evidence required to terminate the operation of the presumption, this court set forth a detailed analysis of the differing standards that are applied depending on the origin of the presumption. See *id.* at ¶39-¶40. In a case such as this, where there is a statutory presumption, and the statute is silent as to the amount of evidence required, we found that principles of statutory interpretation, and specifically, a review of its legislative history, was required to determine the legislature's intent. *Id.* at ¶43.

¶ 46 After a detailed analysis of the legislative history of section 6(f) of the Act, this Court determined that "the legislature intended an ordinary rebuttable presumption to apply, simply requiring the employer to produce some evidence that something other than [the] claimant's occupation as a firefighter caused his condition." *Id.* at ¶45. As such, in order to rebut the 6(f) presumption, it is not necessary that the employer eliminate any occupational exposure as a possible contributing cause of the claimant's condition. *Id.* at ¶51. Rather, once the employer introduces some evidence of another potential cause of the claimant's condition, the presumption

ceases to exist and the Commission is free to determine the factual question of whether the occupational exposure was a cause of the claimant's condition based on the evidence before it but without the benefit of the presumption to the claimant. *Id.*

¶ 47 Here, as mentioned above, the Commission was aware of and specifically cited Thayer's bursting bubble hypothesis in its decision. In determining the amount of evidence required to terminate the effect of the presumption, the Commission determined that "strong" evidence was required, a higher standard than "some evidence", which this court found is required in *Johnston*. *Id.* at 45. The Commission found that the employer introduced some evidence to rebut the presumption through the testimony of Dr. Fintel. Dr. Fintel testified that the claimant had three major risk factors for heart disease: high cholesterol, hypertension, and obesity. He then testified that these "risk factors" caused the heart disease that resulted in a heart attack. We agree with the Commission that this constitutes sufficient evidence of another cause of the claimant's heart disease, and that the presumption thereby ceased to operate per our analysis in *Johnston*.[2] *Id.* at ¶51. As such, the Commission was free to determine the factual question of whether the occupational exposure was a cause of the claimant's condition based on the evidence before it but without the benefit to the claimant of the presumption. *Id.* Accordingly, we find that the

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[2] We note that hypertension, which is one of the major risk factors Dr. Fintel testified caused the claimant's heart disease and resulting heart attack, is itself rebuttably presumed to be causally connected to the duties of a firefighter. 820 ILCS 305/6(f) (West 2008). However, evidence of the risk factors of high cholesterol and obesity remain as potential other causes, serving to "burst" the Thayer bubble and terminate the operation of the presumption. See *Johnston* at ¶51.

Commission properly applied the presumption set forth in section 6(f) of the Act. 820 ILCS 5/6(f) (West 2008).

¶ 48 Having found that the Commission properly applied the presumption set forth in section 6(f) of the Act, we will proceed to determine whether the Commission's determination that the claimant's work as a firefighter did not cause his heart attack and underlying heart disease was against the manifest weight of the evidence. See *Johnson*, 2011 IL App (2d) 100418WC, ¶17. As previously stated, the Commission's determination on a factual matter such as this is only against the manifest weight of the evidence if an opposite conclusion is clearly apparent. See *Beelman Trucking*, 233 Ill. 2d at 370

¶ 49 Applying the appropriate standard of review to the Commission's determination that the claimant's employment as a firefighter for the City was not a cause of the claimant's heart attack and underlying heart disease, we cannot say that an opposite conclusion is clearly apparent. The Commission was very specific in its decision as to its reasoning and its findings regarding the evidence. It found Dr. Fintel's opinion to be more credible than that of Dr. Weaver because it found Dr. Fintel, as a cardiologist, is better credentialed and possessed a greater foundational understanding of the claimant's condition. Dr. Fintel testified that the claimant's risk factors, including his gender, obesity, age, poor diet, and high cholesterol were the causes of the claimant's condition. In reviewing the decision of the Commission, we give deference to its determinations resolving conflicts in the evidence or regarding credibility of witnesses and the weight that their testimony is to be given. *Shafer v. Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶45 (citing *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 206 (2003); *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980)). For these reasons, we decline to disturb the Commission's determination.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, we grant the City's motion to strike AFFI's *amicus* brief as to any matters contained or referenced in AFFI's brief that are *de hors* the record. We grant IML's motion to file an *amicus* brief out of time. Further, we affirm the judgment of the circuit court, which confirmed the Commission's decision.

¶ 52 Affirmed.

¶ 53 PRESIDING JUSTICE HOLDRIDGE, dissenting.

¶ 54 I join the majority's judgment as to the amicus briefs and associated motions. However, I dissent from the remainder of the majority's judgment for the reasons stated in my dissent in *Kevin Johnston v. Illinois Workers' Compensation Comm'n et al.*, 2017 IL App (2d) 160010WC, ¶¶ 65-72 (Holdridge, J., dissenting). Relying on *Johnston*, the majority holds that the City rebutted the presumption of causation prescribed in section 6(f) of the Act (820 ILCS 305/6(f) (West 2014)) by presenting Dr. Fintel's testimony that: (1) the claimant had three major risk factors for heart disease (high cholesterol, hypertension, and obesity); and (2) these risk factors caused the claimant's heart disease, which resulted in his heart attack. Supra ¶ 47. I disagree.

¶ 55 As I noted in my dissent in *Johnson*, in order to establish causation under the Act, a claimant need only prove that some act or phase of his employment was *a* causative factor in his ensuing injuries. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003); *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Thus, the section 6(f) presumption of causation in this case required the factfinder to presume that the claimant's employment as a firefighter was *a contributing cause* of his underlying heart disease, which caused his heart attack. In order to rebut this presumption, the City had to introduce evidence sufficient to support a contrary finding (*i.e.*, a finding that the claimant's employment was not a contributing

cause of his heart disease).[3] See *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 461-63 (1983). The City could do this by presenting expert testimony that: (1) exposure to smoke or toxic fumes while fighting fires is not a risk factor for the claimant's heart disease; or (2) the claimant's particular level of exposure to smoke or toxic fumes on the job did not casually contribute to his heart disease (*i.e.*, it did not contribute the development of such disease, aggravate or accelerate the disease, or aggravate or accelerate the claimant's ensuing heart attack).

¶ 53 ¶ 56 Here, the City did neither. Instead, it presented Dr. Fintel's opinion that the claimant's heart disease was caused by non-occupational risk factors. In rendering this opinion, Dr. Fintel did not address the claimant's repeated exposure to smoke or toxic fumes during his 31 years of employment as a firefighter. Nor did he explain why such exposure was not or could not have been a contributing cause of the claimant's heart condition or ensuing heart attack. In fact, Dr. Fintel testified that he had no knowledge of the particular duties the claimant performed as a firefighter and no information regarding the claimant's exposures to occupational risk factors while he was a firefighter. Thus, Dr. Fintel neither contradicted Dr. Weaver's detailed account of the claimant's occupational exposure to various toxic fumes nor rebutted Dr. Weaver's opinion that the claimant's employment may have been a cause of his cardiovascular disease and heart attack.

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[3] I disagree with the majority's resort to legislative history in determining the quantum of evidence needed to rebut the presumption of causation prescribed by section 6(f). In my view, section 6(f) is unambiguous as to that issue; accordingly, it is unnecessary and inappropriate to consider legislative history in construing the statute. See *Johnston*, 2017 IL App (2d) 160010WC, ¶¶ 71-73 and n.3 (Holdridge, J., dissenting).

Instead, Dr. Fintel merely pointed to other contributing causes which he opined were sufficient to cause the claimant's cardiovascular disease and resulting heart attack. In sum, Dr. Fintel presented no facts or reasons supporting his conclusion that the claimant's employment was not a contributing cause of his resulting illness. Nor did Dr. Fintel present any facts or reasons supporting a conclusion that the claimant's employment did not aggravate or accelerate the claimant's cardiovascular disease or ensuing heart attack. Accordingly, Dr. Fintel's opinion lacked foundation (see *Sunny Hill of Will County v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, ¶ 36; *Gross v. Illinois Workers' Compensation Comm'n*, 2011 Ill. App. (4th) 100615WC, ¶ 24) and could not support a finding of no employment-related causation sufficient to rebut the section 6(f) presumption (see *Franciscan Sisters Health Care Corp*, 95 Ill. 2d at 462-63; *Johnston*, 2-16-0010WC, ¶ 70 (Holdridge, J., dissenting)).[4]

¶ 57 For the reasons set forth above, I would find that the City failed to rebut the statutory presumption of causation in this case. I would therefore reverse the Commission's decision and remand the matter to the Commission.

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[4] The City also presented the medical opinion of Dr. William Scott, which suffers from the same deficiencies as Dr. Fintel's opinion. Dr. Scott opined that the claimant's coronary artery disease was associated with personal risk factors and he noted that "other men with similar personal risk factors in different occupations or even in no occupations can experience similar events." However, Dr. Scott did not consider the claimant's significant occupational exposure to smoke or toxic fumes or opine that such exposure could not have been a contributing, aggravating, or accelerating cause of the claimant's coronary artery disease or heart attack. Instead, he merely opined that it would not be medically valid to assume that the claimant's cardiac event "occurred *solely* due to his occupation as a firefighter" while ignoring the claimant's personal risk factors. (Emphasis added.) Supra ¶ 25. Accordingly, Dr. Scott's opinion does not rebut the statutory presumption that the claimant's employment with the City was *a* contributing cause of his cardiovascular disease or heart attack.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Curtis Simpson,
Petitioner,

vs.

NO: 08 WC 22849

15IWCC0037

City of Peoria,
Respondent,

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Dollison finding Petitioner sustained an accidental injury arising out of and in the course of his employment on January 12, 2008. The Arbitrator found Petitioner is permanently disabled to the extent of 25% man as a whole under Section 8(d)2 of the Illinois Workers' Compensation Act. The main issue on Review is whether Petitioner's claim is compensable. The Commission, after reviewing the entire record, reverses the Arbitrator's decision and finds that Petitioner failed to meet his burden of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was a 63 old year firefighter on January 12, 2008. He testified he began working for Respondent in 1976 as a hoseman. He then progressed to being a firefighter/fire engineer/basic life support (BLS) person, which is currently known as a first responder. During the first 2/3 of his career he worked as a front line/line of duty firefighter. He performed this job for 22 years in all. During this time he was subjected to smoke, toxins, alarms, shift work, disruptive sleep, a high degree of anxiety/adrenalin rushes and all sorts of medical calls. He worked a 24 on and 48 hour off shift. He spent the last 1/3 of his career as an administrative officer. He performed this job for 11 years. He worked as a captain, a Battalion Chief, a Division

Chief and finally as an Assistant Chief. The more he advanced in the ranks the further removed he became from the front line. As he rose in the ranks he was more responsible for the safety of other firefighters and the operation of the department as a whole. He last worked as a firefighter in 2008 performing administrative/managerial functions that were more sedentary in nature. At the time of the alleged accident he was working as an Assistant Fire Chief and with the exception of being "on-call" as a division chief every other month he worked an 8 a.m. -5 p.m./40 hour a week shift. He witnessed both good and bad things during his career. He never sought psychological treatment.

2. On January 12, 2008, Petitioner was at home. Petitioner testified that earlier in the day he had cleaned his garage. He said he had been sweeping and cleaning up materials. In particular, he moved an approximately 50 pound bag of bird seed. Petitioner said he moved ½ a bag of bird seed and then rolled a cart with more bird seed out of the way. Petitioner subsequently told Dr. Weaver, the independent medical examiner hired by Petitioner, that he slid the bag of bird seed. The Proctor Hospital records from that day show Petitioner was working in his garage at home cleaning and carrying some wood and other objects. A second history showed he was lifting fertilizer and heavy bags of birdseed. Petitioner testified that after cleaning his garage, he took a shower in his house. During the shower he felt some pain. After the shower he was sitting and talking but the pain did not go away so he laid down on his bed. His girlfriend came in and asked him what was the matter. He told her about the pain and she took him to the hospital. Dr. Gumm, a cardiologist, told him he had a heart attack. Petitioner underwent surgery at that time with a second surgery a year later. A stent was put in each time. Post surgery, he went through rehabilitation. He was not allowed to return to work as a firefighter because he was taking Plavix, a blood thinner. He retired in 2008 at the age of 63. Mandatory retirement is 66. It is his personal choice to currently not work. He regularly sees a cardiologist in Arizona. He is not having any current problems. He golfed, using a cart, until he experienced a pinched nerve in his back. He still rides a motorcycle.

3. Petitioner testified that at the time of the heart attack he was on medication for hypertension for high blood pressure and hyperlipidemia/high cholesterol. He was also taking Morvasc, Atenolol and Lipitor. He reported to his doctor that his mother had hypertension. He testified that at the time of the heart attack he was overweight. He further testified that he is a nonsmoker and consumes alcohol on a rare basis. Petitioner said while he was tested for sleep apnea, he was never treated for the same.

4. On April 30, 2008, Dr. Ayers performed a Pension Board Examination. Dr. Ayers noted Petitioner's medical records showed he had an 80% stenosis in the right coronary artery, 40-60% stenosis in the left artery and 40-50% stenosis in the left circumflex artery. He noted that Petitioner was cleaning his garage on January 12, 2008 at the time of the heart attack. On reviewing the assistant fire chief essential job functions, Dr. Ayers noted that this position required administrative skills and it did not appear that physically performing fire suppression was required for this position. Dr. Ayers opined that Petitioner seemed to have had a good response from his stenting and with ongoing medical care he should be able to manage his risk

factors. However, if he were classified as a fireman doing fire suppressive activities, then this would not be the case. Dr. Ayers noted that Petitioner had been given the impression by his fire chief that he could not return to work since he had sustained a heart attack, was stented and taking Plavix.

5. On July 15, 2008 Dr. Scott evaluated the Petitioner. Dr. Scott opined that Petitioner had coronary artery disease associated with personal risk factors and a coronary event at home while doing strenuous activities. It would not appear medically valid to assume his cardiac event occurred solely due to his occupation as a firefighter while ignoring valid risk factors of age, sex, hyperlipidemia and a long history of hypertension. Dr. Scott opined that Petitioner was able to safely perform his duties if his real job and functional demands were based on his current job description of Assistant Fire Chief. Based on his medical records there would be no technical reason why he could not return to work. Lastly, based on Petitioner's personal risk factors, the non-work location and activities at the time of the event, Dr. Scott did not see any on-the-job incident that caused the coronary event.

6. On November 29, 2012, Dr. Fintel was deposed. He has a medical degree from Harvard. He performed a 3 year internship and residency at Mt. Sinai Hospital in internal medicine. He had completed a 3 year fellowship in cardiovascular diseases at John Hopkins. He joined the faculty at the Northwestern University School of Medicine in 1985. Over the past 28 years, he has moved up the academic ranks to a professor of medicine. He specializes in cardiovascular disease. He is board certified in cardiovascular diseases, nuclear cardiology, internal medicine and critical care medicine. In a typical work week, which is 60-70 hours, 80% of his time is clinical in nature.

Dr. Fintel noted from his report that Petitioner was a longstanding member of the fire department with 22 years as a fire fighter and 10 years as an assistant fire chief. He has a longstanding history of a number of important and interrelated cardiac risk factors, including high blood pressure/hypertension, hyperlipidemia, and obesity. His obesity led to obstructive sleep apnea, which itself can lead to a progression of coronary disease. He has left buddle branch block in which there has been some damage to the conducting system of the heart so that the pattern of depolarization of the heart muscle is abnormal on the EKG. He has a history of heart disease in his family, primarily his mother. Petitioner's cardiac symptoms occurred while he was at home, off duty, and performing physical labor on his own accord. Petitioner reported his chest discomfort came on in the shower after he was working in his garage with heavy items. Dr. Fintel did not believe the cardiac event was caused or precipitated by Petitioner's work as a fire fighter. The medical records strongly suggest that the event of January 12, 2008 was due to a progression of coronary atherosclerosis (narrowing of the arteries) which in turn was the result of underlying risk factors. Dr. Fintel noted that Petitioner had significant risk factors for coronary artery disease which are hypertension, hyperlipidemia, mild family history and his gender. He was "essentially a powder keg waiting to explode". The events that occurred while working in his garage on January 12, 2008 were a culmination of that process and the mild heart attack that resulted was a direct correlation or consequence of his risk factors leading to his underlying

coronary disease. Based on his symptom-limited exercise performance, he would allow Petitioner to exercise on a regular basis to the point of exhaustion and to do ordinary work, including administrative work. He would leave it up to the fire department to determine whether Petitioner could function as a fireman on the line. Dr. Fintel understood that for the past few years Petitioner was no longer actively engaged in fighter fighting and he was presumably in an administrative capacity.

7. Dr. Weaver was deposed on September 13, 2013. She testified she is a doctor of public health at Johns Hopkins University in the Bloomberg School of Public Health. She received her medical degree from New York University. After medical school she completed a residency in internal medicine at Case Western Reserve University and at John Hopkins University in occupational and environmental medicine. She then completed a research fellowship at Johns Hopkins University. After that she joined the faculty there. She is board certified in internal and occupational medicine. She also holds an appointed position in the School of Medicine. She directs the occupational and environmental medicine training program for physicians at Johns Hopkins and she is on the faculty in the Welch Center for Prevention, Epidemiology and Clinical Research. She is a member of several societies and is on many advisory panels. The most pertinent is the medical advisory board of the International Association of Fire Fighters (I.A.F.F.) The I.A.F.F. has a long standing relationship with the Bloomberg School of Public Health. There is a contractual agreement that firefighters' funds are transferred to the school in exchange for residents rotating at the I.A.F.F. to assist with questions of causation.

Dr. Weaver prepared a report in regard to Petitioner. She reviewed a DVD from Proctor Hospital in regard to Petitioner's admission, the medical records from Drs. Malik and Gumm, his cardiologists, a report from Dr. Fintel along with his deposition and a report from Dr. McDowell, who is a resident at I.A.F.F. She also had a telephone interview with Petitioner on September 6, 2013 in order to get an understanding of his work career and specific issues in the job that could have resulted in exposure for him to fire fighting hazards that can result in cardiovascular disease.

Petitioner reported working 22 years as a full-time fire fighter capped off in the last 9 years as a working chief who was on call every other month. His firehouse was one of the busiest in the City of Peoria and he worked a wide range of fires. He worked a 24 hours on/48 hour off schedule. Because the station was busy, he did not get much sleep when he was on duty. Also, the city had a fire alarm system that would be activated in all the fire stations when only one station was being called to respond, which meant that all the firefighters would wake up every time there was a fire anywhere in the city. If they had to respond they would go from a dead sleep to being ready to put out the fire in four minutes, which was very stressful. Petitioner was subjected to smoke, chemicals, noise of the sirens, structural sounds of the fire and the alarm system. He listed many reasons why occupational stress is a real concern for fire fighters. He was an active fire fighter dealing with adults and children dying. As a result of being a chief, he was responsible for protecting his work force and he had ongoing daily concerns about the safety of those under him.

Petitioner pointed out an inaccuracy in the medical records from the day of his heart attack. He said he had been sweeping his garage and was not lifting but had just slid one 50 pound bag of birdseed. Petitioner further related the heart attack followed what he described as not very intense physical activity. He had a myocardial infarction (MI) diagnosed by elevated cardiac enzymes but there were no changes on his EKG. He was treated by a stent being put into right coronary artery. Petitioner said he could not remember the most recent fire exposure he had before the event. He noted as chief he pretty much went to all the fires, whether he was on call or not because he was dedicated to his job and concerned about the safety of those under him.

In reviewing his medical records and in talking to Petitioner it was clear he had a history of hypertension, hyperlipidemia, obesity, chronic occupational exposure from fire fighting in terms of chemicals, stress, noise and disrupted sleep, age and diet. He was never a smoker, not a diabetic and had no family history other than his mother having hypertension. She opined that for firefighters who have a cardiac event within 24 to 48 hours after a fire exposure, it is very clear that it is work related. The doctor addressed a large body of literature that focuses on the range of hazards in chemical asphyxiants such as carbon monoxide leading to cardiac risks. She noted that Petitioner's work schedule was highly irregular and he could be awake for 24 hours. She noted that shift work, sleep disturbances and noise exposure have been correlated with hypertension, diabetes, obesity and heart disease. Noise exposer is associated with hypertension, which is a risk factor for heart disease. Studies have shown that those who have heart attacks/MIs are twice as likely to report chronic stress. Firefighters are exposed to many traumatic life events so they are at risk for post traumatic stress disorder (PTSD) and patients who have PTSD often have increased blood pressure which can lead to hypertension or heart disease. Dr. Weaver thought Petitioner also had chronic stress exposures worrying about the fighter fighters under him and having been personally exposed to some very distressing events. She conceded that Petitioner's MI was not the result of an acute cardiac event directly related to fire suppression activity. However, because of Petitioner's 31 years of exposure to chronic risk factors, Dr. Weaver believed that his occupation might have been a cause of his MI.

On cross-examination, Dr. Weaver acknowledged that she is not board certified in cardiovascular disease, nuclear cardiology or critical care medicine. She only spends 5-10% of her time treating patients and she does not treat any patients for cardiovascular disease. She is a causation expert. She said she focused on the medical aspects for fighter fighters so she really does not know the details of the administrative response to fire fighting. She agreed that Petitioner's MI was not the result of an acute cardiac event directly related to a fire suppression activity. The most likely scenario is that Petitioner had chronic exposure which contributed to his cardiovascular disease. Dr. Weaver did not discuss the specifics of Petitioner's sleep disruption in the last 9 years. She was not provided with any specifics information as to what decibel levels he was exposed to during his career. There was no discussion of specific traumatic life events that occurred frequently in Petitioner's career. She acknowledged that Petitioner was not diagnosed with PTSD.

The legislature has recently enacted a new provision of the Illinois Workers' Compensation Act. Section 6(f) of the Act (820 ILCS 305/6(f) (West 2007)) creates among other things a rebuttable presumption that, after five years of service, a firefighter's heart disease or condition arises out of and in the course of his employment and that the same is causally related to his employment. The Commission finds that the application of this new provision of the Act presents a case of first impression. In applying the provision to the case at bar, the Commission turns to the Illinois Supreme Court and Appellate Court for guidance.

It has been recognized by the Courts that "[t]here is a good deal of confusion on [the] general proposition of what evidence, if any, overcomes a presumption, particularly a legislative one." *In re Marriage of Landfield,* 209 Ill. App. 3d 678, 691 (1991). The Illinois Supreme Court has explained:

> "The prevailing theory regarding presumptions that Illinois follows *** is Thayer's bursting-bubble hypothesis: once evidence is introduced contrary to the presumption, the bubble bursts and the presumption vanishes. (McCormick, Evidence sec. 345, at 821 (2d ed. 1972); see *Coal Creek Drainage & Levee District v. Sanitary District* (1929), 336 Ill. 11.) It is consistent with the Thayer approach that the party producing evidence to rebut the presumption must come forward with evidence that is 'sufficient to support a finding of the nonexistence of the presumed fact.' (Graham, Presumptions in Civil Cases in Illinois: Do They Exist? 1977 S. Ill. U. L.J. 1, 24.)." *Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 462-63 (1983).

The Court continued:

> " '[O]nce evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. (See 1 Jones, Evidence sec. 3:8 (6th ed. 1972).) . The burden of proof thus does not shift but remains with the party who initially had the benefit of the presumption.' " *Franciscan Sisters,* 95 Ill.2d at 460-61, quoting *Diederich v. Walters*, 65 Ill. 2d 95, 100-03 (1976) .

Lastly,

> "The amount of evidence that is required from an adversary to meet the presumption is not determined by any fixed rule. A party may simply have to respond with some evidence or may have to respond with substantial evidence. If a strong presumption arises, the weight of the evidence brought in to rebut it must be great. 5 A.L.R.3d 19, 39 n.14 (1966)." *Franciscan*

Sisters, 95 Ill.2d at 463; see also *In re Marriage of Landfield*, 209 Ill. App. 3d at 691-92.

With this framework in mind, the Commission now turns to the rebuttable presumption set forth in Section 6(f) of the Act. It bears emphasizing that this presumption is a legislative one. As such, it requires stronger evidence to overcome. Having reviewed all the evidence in the case at bar, the Commission finds that Respondent has successfully rebutted the presumption by providing strong evidence through its experts' opinions along with Petitioner's own health history, work history and Petitioner's own testimony to show there were other causes of Petitioner's cardiovascular problems and his condition is not related to his employment as a firefighter.

The presumption having successfully been rebutted, the Commission now weighs the evidence to determine whether Petitioner has met his burden of proving by a preponderance of the evidence that his heart attack was related to his employment with Respondent. The evidence in the case at bar shows as follows: at the time of the January 12, 2008 incident, Petitioner was at home. Petitioner had just finished physically exerting himself while cleaning his own personal garage. More specifically he testified he had swept, cleaned up material and moved a 50 pound bag of bird seed, either on a cart, through sliding it or through lifting it along with bags of fertilizer and wood. After he completed cleaning the garage, Petitioner was taking a shower at home when he initially felt chest pain that caused him to lie down. He was transported to the hospital where the cardiologist diagnosed a heart attack. At no time, did Petitioner indicate that he was "on-call", was wearing any fire fighter equipment, was listening to a fire fighter scanner or performing any other activity that connected him to his duties as an Assistant Fire Chief or a fire fighter in general. His activity of cleaning out his own garage was personal in nature.

During the last 1/3 of his career, Petitioner was working as an administrator/manager and was performing tasks that were more sedentary in nature and, with the exception of being "on-call" as a division chief every other month, he worked an 8 a.m.-5 p.m. schedule/40 hours a week. In terms of Petitioner's own physical shape it was shown that he had several cardiac risk factors in that he was male, overweight, on medications for both high blood pressure and cholesterol, of an advanced age, had a poor diet and family history of hypertension. The medical records indicate he had 80% stenosis in the mid right coronary, a 40-60% stenosis in the left artery and 40-50% stenosis in the left circumflex artery. In short he was "essentially a powder keg waiting to explode", as Dr. Fintel stated. The Commission finds that Dr. Fintel is better credentialed and possesses a greater foundational understanding of Petitioner's condition than Dr. Weaver. Additionally, his causation opinion is supported by the opinions of Drs. Scott and Ayers. As such, the Commission assigns greater weight to the causation opinions of Drs. Fintel, Scott and Ayers over those of Dr. Weaver. Accordingly, the Commission finds that Petitioner failed to meet his burden of proof. The Commission, therefore, finds that the case is not compensable.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim for compensation is hereby denied.

15IWCC0037

The party commencing the proceedings for review in Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 20 2015

MB/jm

O: 11/20/14
43

Mario Basurto

Stephen Mathis

David L. Gore

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Curtis Simpson
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # 08 WC 22849

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Peoria, Illinois**, on **March 19, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **January 12, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$115,751.20**; the average weekly wage was **$2,225.99**.

On the date of accident, Petitioner was **63** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$n/a** for TTD, **$n/a** for TPD, **$n/a** for maintenance, and **$n/a** for other benefits, for a total credit of **$n/a**.

Respondent is entitled to a credit of **$n/a** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for 125 weeks, because the injuries sustained caused the loss of 25% the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/1/14
Date

MAY - 2 2014

FINDINGS OF FACT

Petitioner began his employment as a fire fighter with the City of Peoria in 1976. He spent 22 years as a frontline fire fighter, and a total of 32 years with the department, serving as Captain, Battalion Chief, and finally Assistant Chief.

On January 12, 2008, Petitioner suffered a heart attack while off duty. He was hospitalized following the attack, and it was discovered that he was suffering from coronary artery disease necessitating an angioplasty and the placement of two cardiac stents.

Petitioner never returned to work for Respondent. He applied for and received a "line of duty" disability pension which took effect on January 23, 2008. He was paid his full salary while off work from the date of the heart attacked until he received his pension.

Petitioner testified that during his 22 years as a front line fire fighter he was assigned to Station 3 which was consistently among the busiest in the City. He responded to commercial, residential, auto and grass fires. Early in his career, in keeping with the practice at the time, Petitioner rarely wore a respirator while fighting fires, nor during the "overhaul" phase after the fire was extinguished. In 1980 the Fire Chief ordered the use of respirators during firefighting. While Petitioner complied, he and others continued to work "overhaul" without a respirator, exposing him to smoke and toxic chemicals. Respirators became the norm for all phases of fire suppression in the last years of his career.

In addition to fire calls, Petitioner responded to Basic Life Support (BLS) calls during his time at Station 3. He estimated that he responded to 10-15 calls per shift during this time. The calls began as 80/20 fire to BLS but became 50/50 in later years.

Petitioner testified that in responding to BLS calls, he was exposed to many traumatic scenes involving death and serious injuries. He testified he had been among the first to arrive at horrific traffic accidents including one with four dead teens, and also suicides where people had taken their lives by putting a shot gun in their mouth. He noted instances involving dead children and babies as well. Petitioner recalled arriving at the scene of a chemical explosion where the victims were sitting in front of the explosion site with skin hanging off their bones due to burns. Both later died.

Petitioner testified that when on shift he suffered from anxiety related to the stress of responding to calls not knowing what he would encounter, worrying about his and his fellow fire fighter's safety, and the uncertainty of when the next alarm would sound. He described responding to calls as exciting and producing an "adrenalin rush".

Petitioner testified that he was a Captain on the department in 1986 when a fellow fire fighter was killed when a wall collapsed on him at a fire. He testified his fellow fire fighter's death caused him to worry more about the safety of himself and those under his command.

Petitioner noted that he worked a "24 on 48 hours off" shift prior to becoming a Chief. During this time, department alarm system alerted all fire stations about any call in the City. As a result, fire fighters were awakened whether the call was theirs or not. This was the "Gamewell" system that caused bells to ring in numeric patterns to identify the location of the call and the responsible station. The "Gamewell" system was

later replaced by a tone system which also sounded in all stations for all calls. Petitioner testified that when responding to a call, he was required to be on his engine and ready to go within 4 minutes. His sleep was often interrupted and he was not always able to go back to sleep.

Petitioner testified that in his years as an engineer, he would drive a fire engine to calls while being exposed to extremely loud noise from the siren which was located on the fender next to the driver's door.

Petitioner testified he had no family history of coronary artery disease and stated he had never smoked, only occasionally drank alcohol, and was not diabetic.

On January 23, 2008 Petitioner applied for and was granted a line of duty disability pension. A year later he underwent a subsequent cardiac surgery when another artery was stented due to blockage. He stated that he was disqualified from the fire department due to taking Plavix, a blood thinner for heart disease. Petitioner limits his activities due to his concern over his cardiac condition.

At the time of his heart attack, Petitioner was 63 years of age. He testified that he would have continued to work until January of 2010 if he had not become disabled.

MEDICAL EVIDENCE

EVIDENCE DEPOSITION OF DR. VIRGINIA M. WEAVER (Petitioner's Exhibit 1)

Dr. Virginia M. Weaver, board certified in both internal and occupational medicine, testified that she was employed at John Hopkins University in Baltimore, Maryland, as a professor in both the medical school and the Bloomberg School of Public Health. As such, she served on a number of boards related to occupational medicine and environmental health including the medical advisory board of the International Association of Fire Fighters.

Dr. Weaver conducted a telephone interview with Petitioner concerning his fire fighting career and reviewed his medical records. Petitioner had been exposed to smoke at times which she stated contained chemical asphyxiates such as carbon monoxide and hydrogen cyanide. This occurred during suppression and in particular during "overhaul" after the fire was extinguished. Dr. Weaver stated that chronic exposure to toxic chemical vapors, increased the risk of hypertension, formation of free radicals, subsequent endothelial dysfunction, increased coagulability of the blood, and increased progression of atherosclerosis all of which increased the risk of cardiovascular disease in fire fighters.

Dr. Weaver noted that Petitioner had been subjected to both sleep disturbance and deprivation due to alarms while on duty. She stated there is a positive correlation between shift work, sleep disturbance/deprivation and cardiovascular disease.

Dr. Weaver noted that Petitioner was exposed to extremely loud siren noises in close proximity to his seat while driving a fire engine. Noise exposure, such as that from sirens and alarm systems, is also associated with increased risk for hypertension which, in turn is a risk factor for heart disease.

Dr. Weaver noted Petitioner's exposure to chronic psychological stress or many traumatic life events during his career. Dr. Weaver noted that the "Command- Control" Model of occupational stress, involving work with the potential to save or cost lives over which the worker has little control, is a cornerstone of occupational stress literature. Fire fighting is a classic example of a "Command-Control" occupation. She noted Petitioner's concern for the safety of those under his command as well as the traumatic events to which he was exposed were examples of chronic occupational stress. According to Dr. Weaver, chronic occupational stress increases

hormone levels in the body such as adrenaline that are released as part of the stress response which then increases blood pressure and heart rate. She noted that individuals who had suffered heart attacks were more than twice as likely to report chronic stress.

Dr. Weaver testified that Petitioner's 30+ years of chronic exposure to stress, toxic chemicals, sleep disturbance and deprivation, noise, and shift work could have been a cause of Petitioner's cardiovascular disease and myocardial infarction.

On cross examination, Dr. Weaver testified that she is a causation expert focused in occupational medicine. As such, she does not treat patients with cardiovascular disease. Dr. Weaver stated that her position on the International Association of Fire Fighters' medical advisory board is an unpaid position and that she was not being paid to testify.

On further cross examination, Dr. Weaver admitted that she did not have dose response information on levels of gas toxins or noise to which Petitioner would have been exposed during his career. Dr. Weaver agreed she could not express an opinion on the levels of damage caused to Petitioner's heart in the myocardial infarction.

EVIDENCE DEPOSITION OF DR. DAN J. FINTEL (Respondent's Exhibit 7)

Dr. Dan J. Fintel reviewed Petitioner's medical records at the request of Respondent. Dr. Fintel testified by evidence deposition taken on November 29, 2012. Dr. Fintel testified that he identified some personal risk factors which might have caused Petitioner's cardiovascular disease and heart attack. These were high blood pressure, hyperlipidemia, obesity, male sex, and mild family history. Based upon these risk factors Dr. Fintel's opinion was that Petitioner developed cardiovascular disease and suffered a heart attack due solely to non-occupational factors. He stated that Petitioner had significant underlying coronary artery disease, which when combined with exertion caused him to sustain a heart attack.

On cross examination, Dr. Fintel stated that Respondent had supplied him with Petitioner's medical records and asked him to consider Petitioner's job as a fire fighter, his activities at the time, and his personal health history in arriving at his opinion on causation. He admitted that he was not aware of Petitioner's specific job duties. Dr. Fintel admitted that the development of coronary artery disease is not fully understood. He stated that the factors he noted increased the probability it would develop but that there were other risk factors that Petitioner did not have.

PROCTOR HOSPITAL RECORDS OF TREATMENT, JANUARY 2008 (Exhibit 2 to Dr. Fintel's deposition)

Petitioner was admitted to Proctor Hospital on January 12, 2008. The ER record indicates his cardiac risk factors were hypertension and hyperlipidemia and that Petitioner was a nonsmoker with no family history of heart disease.

Coronary angiography showed that his right coronary artery had an 80% stenosis which was treated with a stent through cardiac catheterization on January 14, 2008.

TREATMENT RECORDS OF HEARTCARE MIDWEST (Exhibit 4 to Dr. Fintel's deposition)

Petitioner was seen at Heartcare Midwest by both Dr. Daniel Gumm and Dr. Fayez Malik. Their records indicate Petitioner underwent cardiac catheterization by Dr. Gumm, and was seen in the office for follow up care. He was prescribed Plavix, a blood thinner, as part of his treatment. It was noted that he was being

followed by Dr. Gumm for moderate disease in other, non-stented, heart vessels. Petitioner underwent a Cardiolite stress test in September 2008 to assess his stented vessels as well as others. The stress test was interpreted as normal.

EXAMINATION REPORT OF PENSION BOARD, DR. ROBERT AYERS (Petitioner's Exhibit 2)

Dr. Ayers reviewed Petitioner's medical records and performed a physical examination. He expressed the opinion that Petitioner suffered from an 80% stenosis of the mid right coronary artery, a 40% narrowing proximally of his left artery diagonal, a 60% narrowing at the origin of the first diagonal, and left circumflex narrowed to 50% proximally, and 40% distally which lead to his heart attack. Dr. Ayers found Petitioner disabled from firefighting due to his stent and Plavix prescription.

EXAMINATION REPORT FOR THE PENSION BOARD OF DR. FAYEZ MALIK (Petitioner's Exhibit 3)

Dr. Malik was one of Petitioner's treating doctors following his heart attack. He diagnosed Petitioner with coronary artery disease status post stenting and noted that he "does have known moderate risk in the other vessels".

EXAMINATION REPORT FOR THE PENSION BOARD OF DR. WILLIAM SCOTT (Respondent's Exhibit 5)

Dr. Scott reviewed medical records and examined Petitioner for the pension board. He stated his belief that Petitioner could perform administrative duties for the Fire Department. Dr. Scott expressed the opinion that Petitioner's heart attack due to coronary artery disease associated with "personal risk factors." He believed it was "not medically valid to assume his cardiac event occurred solely due to his occupation as a fire fighter while ignoring valid risk factors."

In support of the Arbitrator's decision on issues (C), did an accident occur that arose out of and in the course of Petitioner's employment by the Respondent? (F) Is Petitioner's present condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Petitioner claims that his condition of ill-being falls under Section 6(f) of the Act, which created a rebuttable presumption that certain conditions of ill-being in fire fighters are work related.

Section 6 (f) provides as follows:

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of an in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. This presumption shall also apply to any hernia or hearing loss suffered by an employee who has been employed as a firefighter, EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission. The Finding and Decision of the Illinois Worker's Compensation Commission under only the

rebuttable presumption provision of this subsection shall not be admissible or be deemed res judicata in any disability claim under the Illinois Pension Code arising out of the same medical condition: however, this sentence makes no change to the law set forth in *Krohe v. City of Bloomington*, 204 Ill.2d.392."

The Arbitrator finds that the presumption in §6(f) is applicable to this case in that Petitioner served as a fire fighter for more than 30 years and his cardiovascular disease and heart attack fall within the conditions noted therein.

Respondent introduced the testimony of Dr. Dan Fintel in an effort to overcome the presumption of causal connection. Dr. Fintel identified some non-occupational risk factors which might have contributed to Petitioner's cardiovascular. He did not, however, rule out other causes and did not address whether any risk factors associated with fire fighting might or could have been a cause of his condition.

It is well established that under Illinois law, Petitioner need not prove his work activities were the sole or even primary cause of his condition but only a cause. (*Sisbro v. Industrial Commission*, 207 Ill.2d.193 at 205 (2003)).The Arbitrator also notes the case of *Schaefer v. Village of Gurnee*, (11 WC 497) in which the Commission affirmed the Arbitrator's finding that the presumption under §6 (f), even in the absence of additional causation testimony, was not rebutted by Dr. Fintel's opinion since he had not discussed stress as a risk factor for cardiac disease.

The Arbitrator finds Dr. Fintel's testimony insufficient to rebut the Section 6(f) presumption of causal connection.

Even if the presumption had been rebutted, Petitioner introduced Dr. Virginia Weaver's testimony in further support of his claim. Dr. Weaver noted that exposure to smoke containing chemicals asphyxiants, shift work, noise exposure, and psychological stress were all risk factors for the development of cardiovascular disease. Petitioner's testimony was that he has been exposed to each of these risks for the majority of his 30+ years as a fire fighter.

The Arbitrator finds that Dr. Weaver's opinion that chronic exposure to work related risk factors might have been a cause of Petitioner's cardiovascular disease and heart attack is credible, and further supports Petitioner's claim.

Based upon all of the above, the Arbitrator finds that Petitioner has sustained his burden to show, by a preponderance of the evidence, that his cardiovascular disease and heart attack arose out of his employment for Respondent.

In support of the Arbitrator's decision on issues (K), what temporary benefits are in dispute, the Arbitrator finds as follows:

Petitioner testified he received his full salary while off until he began receiving his pension. No temporary benefits are therefore owed by Respondent.

In support of the Arbitrator's decision issue (L), what is the nature and extent of the injury, the Arbitrator finds as follows:

Based on the above, the Arbitrator finds that, Petitioner was permanently disabled from service in the fire department as of January 23, 2008. (Respondent's Exhibit 8) As such, he was awarded a duty disability pension and forced to leave active service prior to his planned retirement date. He testified that he would have continues to work as an Assistant Fire Chief until at least January 2010 has he not suffered a heart attack. In addition, he is concerned about his capacity for strenuous activity and avoids activities, thus restricting his lifestyle. The Arbitrator notes that Petitioner underwent an additional cardiac surgery for the placement of an additional stent in 2009.

Petitioner is unable to pursue his usual and customary line of employment and is restricted in other physical activities due to his injury. He is therefore entitled to permanent partial disability pursuant to Section 8(d)2 of the Act representing 25% loss of use of the whole person.