2018 IL App (2d) 170447WC-U
No. 2-17-0447WC-U
Order filed November 14, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CLIFFORD A. EKKERT,	)	Appeal from the Circuit Court
	)	of Du Page County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16-MR-1631
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and VILLAGE OF	)	
OAK BROOK,	)	Honorable
	)	Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: By setting forth evidence of a possible cause for claimant's prostate cancer other than his employment as a firefighter, respondent rebutted the presumption contained in section 1(d) of the Workers' Occupational Diseases Act (820 ILCS 310/1(d) (West 2010)); claimant did not adequately set forth and develop an argument as to why the ultimate decision of the Commission was contrary to the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Clifford A. Ekkert, appeals an order of the circuit court of Du Page County confirming a decision of the Illinois Workers' Compensation Commission (Commission) denying him benefits under the Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 *et seq.* (West 2010)). Claimant contends that the Commission erred in finding that respondent presented sufficient evidence to rebut the presumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)). For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Defendant was diagnosed with prostate cancer in 2011. He asserts that various environmental exposures he was subjected to as part of his employment with respondent was a causal factor in the development of his cancer. The following evidence was presented at the arbitration hearing.

¶ 6 Claimant testified that he was employed by the Village of Oak Brook fire department beginning in 1991. He was initially employed as a fireman and paramedic. Seven or eight years later, he was promoted to lieutenant and subsequently—in 2008 or 2009—to battalion chief. Claimant described his various duties. As a firefighter and paramedic, he was part of the "first-line-in company." They would "enter all structure fires, [and] respond to dumpster fires, brush fires, [and] car fires." Claimant would also respond to ambulance calls and perform general maintenance around the fire station. He was exposed to fire and smoke approximately 10 to 12 times per year. When he was promoted to battalion chief, the number of exposures increased, as he was required to be present at additional fires. When he was first hired, he underwent a medical and physical examination, which he passed. He underwent annual physicals.

¶ 7 Early in his career, firefighters did not always use SCBA (self contained breathing apparatus) equipment. However, they later used it "pretty much on all structure fires, car fires,

etc." After the fire was extinguished, they removed this equipment during the "overhaul" phase. "Overhaul" is the phase after the main fire is extinguished and the firefighters are inspecting for "hot spots." Often, during overhaul, the smoke "hadn't cleared yet." Overhaul was "probably the longest period of a fire." Sometimes, the air in his SCBA equipment would be expended, and, because he was "taxed" he would continue without getting another bottle of air. He estimated that he proceeded without SCBA equipment on 30 to 50 occasions. Also, there were times that he was exposed to smoke when he was outside a structure and "didn't have air packs on." Such exposures occurred 5 or 6 times per year. Early in his career, he was exposed to smoke during live-burn training exercises.

¶ 8 In addition to SCBA gear, claimant was issued a set of "bunker gear," which is also called "turnout gear." This included "pants, boots, jacket, gloves, hood, and helmet." This gear would get "contaminated with smoke and ash and carbon or whatever else you got into." For the first 10 years of his career, there was no washing machine in the fire station (claimant was apparently referring to a specialized washing machine, called an "extractor"). After a fire, claimant would blow his nose, and black ash would come out. He would also have soot around his eyes.

¶ 9 Claimant testified that he was also exposed to diesel exhaust fumes in the course of his employment. Vehicles would have to be started during maintenance. During the first 10 or 11 years of his career, the station did not have a system to remove exhaust fumes from the building. Moreover, his first station did not have a sealed door between the living area and the garage.

¶ 10 In 2010, claimant underwent a fitness-for-duty physical examination by Dr. Fragen. Testing revealed an elevated prostate-specific antigen (PSA). Claimant sought treatment from Dr. Thai Nguyen. Claimant first saw Nguyen on August 12, 2010. Nguyen recommended a

biopsy. It was performed in September 2010 and came back negative. In March 2011, claimant had another elevated PSA result. A second biopsy was performed in May 2011, and the results indicated that claimant had cancer. Claimant elected to undergo surgery to remove his prostate. The surgery was performed on January 24, 2012. He was off-work for seven weeks following the surgery. Claimant described the effects of the surgery on him.

¶ 11 Claimant testified that he was evaluated by Dr. Ernest Chiodo at the request of his attorney on November 6, 2014. He retired from firefighting in June 2014. He has never been diagnosed with any other form of cancer. He classified himself as a "casual smoker," explaining that he smoked "less than a pack a month." Moreover, there were periods when he did not smoke at all.

¶ 12 On cross-examination, claimant testified that paramedic calls were much more frequent than fire calls. Sometimes he would not be called to a fire for "weeks or even a month." As a safety officer, he would sometimes allow firefighters to do overhaul work without SCBA equipment if he determined the area was safe.

¶ 13 Claimant acknowledged that, as is documented in Nguyen's records, he drinks alcohol. However, he denied that he did so daily, as the records indicate, as sometimes his shifts lasted 24 or 48 hours. He further acknowledged that there is a history of prostate cancer in his family. Claimant's father, who was not a firefighter, developed prostate cancer "at a late age." Claimant had no symptoms at the time of his first elevated PSA test. Nguyen believed claimant's cancer had been detected early.

¶ 14 Claimant stated that he saw Chiodo on one occasion. He was aware that Chiodo would not be providing him with medical care. Chiodo's office was not a typical doctor's office; it did not have an examination room.

¶ 15 Claimant was released to return to work in March 2012. Claimant then worked full time, and he was able to perform his duties. He took a regular retirement (as opposed to a disability retirement) in June 2014.

¶ 16 On redirect-examination, claimant stated, his department acquired air-testing equipment toward the end of his career. The equipment was used to test air quality and determine if it was safe to remove the SCBA equipment. Even after a safe read out, there was "particulate matter" in the air. Claimant testified that his father was diagnosed with prostate cancer when he was 77 or 78 years old. His father was a machinist.

¶ 17 The testimony of Dr. Chiodo was presented via evidence deposition. Chiodo is a physician who is board certified in internal medicine, occupational medicine, and "the epidemiological and biostatistical specialty within medicine, that is, public health and general preventive medicine." Chiodo has served as the medical director for pension boards, which included police and fire pension boards. He has previously been called on to assess whether a firefighter's cancer was duty related.

¶ 18 Chiodo met with claimant on November 6, 2014, and conducted a physical examination. He prepared a written report based on that meeting. Chiodo noted that claimant "had a long history of working in fire suppression." His PSA levels were found to be elevated after about 19 years of such work. Thus, "he had a long period of exposure to the types of materials that can cause prostate cancer that arise in fire suppression." Chiodo further noted that claimant developed prostate cancer when he was 55 years old. The median age of this diagnosis is 72, and 75 percent of the time it occurs after the age of 65. Thus, claimant "developed the prostate cancer at an age much younger than one would expect." Chiodo observed that claimant's father had prostate cancer, but he did not develop it until he was 76 or 77 years old. Moreover,

claimant's father was a machinist, which is also an occupation that carries with it an increased risk of prostate cancer. Chiodo did not believe claimant's light use of cigarettes was a significant factor.

¶ 19 After meeting with claimant, Chiodo reviewed a number of research articles to help formulate his opinion. The articles are identified in this report. Chiodo opined that "there is a direct causal connection between [claimant's] work as a firefighter and his development of prostate cancer." Chiodo testified that his opinion was based on claimant's long history of work as a firefighter and his development of cancer at an early age.

¶ 20 Chiodo testified that firefighters are exposed to certain carcinogenic chemicals that are generated from combustion. Chiodo noted a 2010 study that indicated that smoke production is greatest in residential and automobile fires. Chemicals, such as benzene, phenols, acid gasses and formaldehyde, are produced. Fires produce microscopic particulates that can be inhaled deep into one's lungs. Some particles contain arsenic and lead. SCBA gear reduces but does not eliminate exposure to smoke and chemicals. A respirator designated as N95 removes 95% of particles but still allows 5% of them to pass through. He characterized this gear as "helpful" but not "completely protective." An article from the International Agency for Research on Cancer classifies arsenic and benzene as group 1 carcinogens. Chiodo testified that he was familiar with a number of articles from the American Journal of Industrial Medicine. This included an article titled, "Cancer Incidence Among Male Massachusetts Firefighters," which supported his opinion on causation. An article titled "Cohort Mortality Study of Philadelphia Firefighters" provided further support.

¶ 21 In his written report, Chiodo cited, "Cancer Risk Among Firefighters, a Review and Meta-Analysis of 32 Studies." This meta-analysis aggregated the results of 32 studies and is "a

massive large study" which gives "a more powerful result." By "powerful," Chiodo meant more "statistically valid or reliable." This study shows a statistically significant increased risk of prostate cancer among firefighters.

¶ 22 Chiodo reviewed a report authored by Dr. Lev Elterman (respondent's medical examiner, a urologist). Elterman came to a contrary conclusion from Chiodo. Chiodo disagreed with Elterman. He noted that Elterman was not an industrial hygienist, occupational medicine doctor, toxicologist, or epidemiologist. He also noted that Elterman did not explain why claimant got cancer at such a young age. Elterman cited the "Cancer Risk Among Firefighters" study, but he "ended up mixing up the numbers." According to Elterman, the study showed an increased risk of prostate cancer among firefighters, but the increase was not statistically significant. Chiodo continued, the study "says the summary risk estimate was 1.28" and the "confidence interval" was 1.15 to 1.43, which meant 1.28 was statistically significant since it fell within the interval. He added that Elterman "was completely wrong on that." The numbers cited by Elterman came from a portion of the meta-analysis representing a mortality study. Chiodo explained that a mortality statistic is not the same thing as a statistic for the development of prostate cancer.

¶ 23 On cross-examination, Chiodo acknowledged that he was not board certified in oncology and he is not a specialist in that field. He added that "oncology is part of the knowledge, training and testing of a general internist." He is also not board certified in urology. Though he is licensed in the state of Illinois, he does not have an active practice here. He does, however, have an office, and he keeps an examination table in the closet, which is where he examined claimant. His only work in Illinois is "in the context of medical/legal work." Chiodo is licensed to practice law in Illinois and Michigan. He has about 100 regular patients in the Detroit area, and he could not recall whether he was treating any of them for conditions of the prostate. Chiodo stated he

acted as an independent medical examiner "very frequently," but he could not quantify the extent of this part of his practice. He also performs record reviews in medical-legal cases at the request of attorneys. He stated that he does these "very frequently," and probably more than he does independent medical examinations. He charges $3,500 for both of these services.

¶ 24 Chiodo testified that he only saw claimant on one occasion. By the time Chiodo examined claimant, he already had his prostate removed. Chiodo could not recall whether he discussed claimant's work history with him; however, he believed he had an adequate understanding of claimant's job to render an opinion. Chiodo disagreed when asked whether the frequency with which a firefighter is exposed to various toxic chemicals is a relevant consideration. He added, "[T]he literature doesn't break it down in that manner." He later stated that generally, "the more exposure you have, the more risk due to a toxin." However, "there's a one-hit theory," which holds that "you could develop cancer due to a one-time exposure."

¶ 25 Chiodo acknowledged that he cited a study in his report titled "Mortality and Cancer Incidence in a Pooled Cohort of U.S. Firefighters in San Francisco, Chicago, and Philadelphia." The study recognizes the possibility that enhanced medical screening among firefighters "contributed to the observed excess" cancer rate. However, Chiodo stated that this was not what the study concluded and that it was merely recognizing a potential confounding variable. Chiodo was presented with an article titled "Mortality of a Municipal-Worker Cohort: Firefighters," about which he had testified on direct examination. He agreed that this study only references prostate cancer at one point and concludes that, regarding prostate cancer, "deaths among firefighters were actually lower than they would have anticipated in the general public."

¶ 26 Chiodo testified that he had formulated no opinion on claimant's prognosis or whether the surgery he underwent was successful. He also formulated no opinion regarding whether

claimant's condition prevented him from working as a firefighter. He explained that he had only been asked to opine regarding causation. Chiodo was not familiar with respondent's expert, Dr. Lev Elterman. Chiodo further agreed that prostate cancer can develop without a specific carcinogenic exposure.

¶ 27 On redirect-examination, Chiodo reiterated that if one is involved in fire suppression, one has an increased risk of prostate cancer, regardless of the number of such events one is involved in during a given time frame. Light smoking would not have a similar magnitude of risk. He opined that claimant's prostate cancer "was caused, if not totally, at least in substantial part due to his fire suppression activities." Chiodo testified that if claimant had 6 to 12 exposures to smoke and fumes per year, this would not change his opinion. Moreover, that one study found a lower mortality rate would not change his opinion. He explained that "people who get sick or can't handle the exposure drop out, so you just have healthy people continue on" in a given profession. Chiodo called this the healthy-worker phenomenon, which, he added, was a "well-known epidemiological phenomenon."

¶ 28 Dr. Lev Elterman also testified via evidence deposition. He is a board-certified urologist. As part of his practice, he performs prostatectomies. He sees 50 to 60 patients per week, and half of them "have some condition of the prostate." Recognized risk factors for prostate cancer are "heredity, ethnic origin, age, and diet." Patients with no known risk factors start being screened at the age of 50, which indicates an "increasing risk of us finding cancer." Elterman testified that "[t]here is no known risk factors for the firefighters with respect to the risk of prostate cancer." He added, "there are a large body of literature looking at that," but "my understanding is that there is no clear evidence that firefighter exposure would lead to increased risks of prostate cancer formation."

¶ 29 Elterman performed a record review of claimant's condition. In the course of his practice, he discusses with patients how they came to develop cancer. Hence, he reviews literature on causation. That claimant's father did not develop cancer until he was in his 70s did not mean that this fact was irrelevant. He stated that "genetic predisposition may become evident at different ages." As claimant had a family history of prostate cancer, screening would typically start at the age of 40.

¶ 30 Elterman opined that the "occurrence of the prostate cancer in [claimant] was not causally related to his profession of being a firefighter." He stated that his opinion was based on "the review of his medical records, particularly his family history of prostate cancer, and review of current literature." Elterman reviewed Chiodo's report and stated that it did not change his opinion on causation. Elterman also reviewed some of the literature cited by Chiodo. He testified that this "reinforced [his] original opinion." He noted that the study titled "Mortality and Cancer Incidence in a Pooled Cohort of US Firefighters From San Francisco, Chicago, and Philadelphia," which "reviewed mortality and cancer incidence in firefighters," found the risk of prostate cancer "was near expectation." To the extent firefighters are screened for prostate cancer more regularly, it would likely be diagnosed earlier than in the general population. Elterman noted that a study cited by Chiodo showed an increased risk of bladder cancer; however, he explained that bladder cancer is known to be affected by environmental factors much greater than prostate cancer."

¶ 31 On cross-examination, Elterman acknowledged that his practice concerns urology and that he has taken no courses in toxicology, occupational medicine, industrial hygiene, or epidemiology. Most of his past legal-medical work has involved medical negligence, and, 70 to 80 percent of the time he was retained by the defense. In the course of his training as a urologist,

Elterman received training regarding determining the cause of a disease he is treating. His training involved the epidemiology of urological diseases. In addition, the subject is covered in courses and conferences he attends. He clarified that "heredity, ethnic origin, age, and diet" are the most serious risk factors for prostate cancer and the ones he focuses on in counseling his patients. He testified that he was "not aware of any specific substantial environmental risk factor" that would be relevant to this case.

¶ 32 Elterman cited the "Mortality and Cancer Incidence in a Pooled Cohort of US Firefighters From San Francisco, Chicago, and Philadelphia" study when asked to identify a study that showed specifically that environmental exposures are not a risk factor for the development of prostate cancer. However, he conceded that the study "seems to suggest and state that there was a significant age-at-risk difference in the standardized incidence ratios for prostate cancer and bladder cancers in firefighters." However, Elterman noted the authors of the study had "substantial reservations," including the effect of enhanced screening of younger firefighters relative to the general population. He agreed that urological cancers, like most cancers, are multifactorial in origin. Elterman agreed that environmental exposures could be one such factor. He was not "ruling out with absolute certainty environmental exposures as a possible cause of [claimant's] prostate cancer." Elterman opined that the more one is exposed to a carcinogen, the more likely one is to get cancer.

¶ 33 Elterman acknowledged that he cited a mortality rate in support of his opinion of 1.14 whereas the report from which he took this number also established an incidence rate of 1.29, which was within the confidence interval. He agreed that this meant that the study shows "that there is a probable cancer risk for developing prostate cancer for firefighters that's greater than

the general public." Elterman further testified that "probable," as used in these studies, is a term of art meaning "a higher rate or factor than possible."

¶ 34 On redirect-examination, Elterman testified that there are both strengths and weaknesses to meta-analyses. Further, a carcinogenic substance does not necessarily "have a known association with all types of cancer." In claimant's case, Elterman opined, "genetics played the greatest role." Moreover, the increased incidence of prostate cancer diagnosed in firefighters aged 45 to 59 could be due to enhanced screening among firefighters resulting in more cases being discovered earlier. This would further be consistent with the observation that, while firefighters with less than 10 years of employment have an elevated incidence of prostate cancer, those with more than 10 years do not exhibit an increased rate. On recross-examination, Elterman stated that while he believed that genetics played the greatest role in plaintiff's cancer, other factors could possibly play a role.

¶ 35 The arbitrator found that claimant had "established that he developed a compensable occupational disease while working as a firefighter for Respondent that manifested on September 23, 2011." She noted that a rebuttable presumption is set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)). That presumption is, in pertinent part, as follows:

> "Any condition or impairment of health of an employee employed as a firefighter *** 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 *** and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment." *Id.*

The presumption applies only if the employee has been so employed for at least five years. *Id.*

¶ 36 The arbitrator noted that claimant had been employed as a firefighter for 20 years. During a routine examination in 2010, it was discovered that claimant had an elevated PSA level. He was eventually diagnosed with prostate cancer and had his prostate removed in January 2012. Claimant's cancer has not recurred. The arbitrator noted claimant's testimony regarding his exposure to smoke and fumes as well as the fact that he sometimes worked without SCBA equipment, which "caused direct exposure to smoke, fumes, toxins[,] or carcinogens." She further noted claimant's testimony concerning exposures he was subject to at the fire station.

¶ 37 The arbitrator observed that both Chiodo and Elterman referred to the study entitled "Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies." She found "the reliability of Dr. Elterman's opinion that [claimant's] prostate cancer was not related to his work as a firefighter in any way was significantly eroded on cross examination." Elterman "initially maintained that there were four main risk factors for the development of prostate cancer, including heredity, ethnic origin, age[,] and diet." He concluded that claimant's cancer was not causally related to his employment with respondent. However, he also "conceded that the Cancer Risk Among Firefighters article noted that '[t]he early onset of these cancers [including prostate cancer] suggests an association with firefighting.' " (Bracketed material added by arbitrator.) Moreover, he agreed that he could not rule out environmental exposures as a possible cause of claimant's cancer. The arbitrator then found that Chiodo was more persuasive than Elterman and that the rebuttable presumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)) had not been rebutted. The arbitrator then entered an award in accordance with the provisions of the Act.

¶ 38 The Commission reversed the arbitrator's decision. It acknowledged the presumption contained in section 1(d), but found that "[r]espondent has successfully rebutted the presumption by providing strong evidence through its board certified [*sic*] urologist expert's opinions along with [claimant's] own health history, work history[,] and [claimant's] own testimony to show that there were other causes of [claimant's] prostate cancer and his condition is not related to his employment as a firefighter." It then weighed the evidence "to determine whether [claimant] has met his burden of proving by a preponderance of the evidence that his prostate cancer arises out of a risk peculiar to or increased by [r]espondent." It concluded that claimant had not carried this burden. Accordingly, it reversed the decision of the arbitrator.

¶ 39 One commissioner dissented. He found that the evidence submitted by respondent was insufficient to rebut the presumption. While acknowledging that Elterman stated that it was his opinion that claimant's cancer was not related to his employment, Elterman also "did not opine any potential causes for [claimant's] condition" other than claimant's father having prostate cancer in his 70s. Further, Elterman "conceded that the study he relied upon to deny a causal connection suggested an association between firefighting and the early onset of cancer, including prostate cancer. Elterman also "acknowledged he couldn't rule out environmental exposures as a possible cause of [claimant's] prostate cancer." Finally, he agreed that the literature indicated that "there was a probable increased risk for firefighters to develop prostate cancer as compared to the general public."

¶ 40 The dissenting commissioner found Chiodo credible, noting his credentials, the relatively early age at which claimant's cancer developed, the late age claimant's father developed cancer, the fact that claimant's father's job exposed him to an increased risk of cancer (suggesting it may not have been a genetic issue), and that the study the two experts had been citing actually

supported Chiodo's position. The dissenting commissioner acknowledged that "there is disagreement within the medical community regarding whether firefighting activities and exposure to carcinogens, toxins[,] and other particulate matters can increase the risk of developing prostate cancer." Consequently, he found such evidence and Elterman's opinion insufficient to rebut the presumption contained in section 1(d) of the Act.

¶ 41 The trial court confirmed the decision of the Commission's majority. This appeal followed.

¶ 42 III. ANALYSIS

¶ 43 This appeal presents a single dispositive issue: whether respondent presented sufficient evidence to rebut the presumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)). Claimant does not argue that, assuming the presumption was rebutted, the Commission's decision was otherwise contrary to the manifest weight of the evidence.[1] We will focus our analysis accordingly. Our standard of review in cases such as this is bifurcated. *Simpson v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160024WC, ¶ 39. First, any questions concerning the scope and application of the presumption are subject to *de novo* review. *Id*. This is because a presumption, in itself, " 'is not evidence, and cannot be treated as evidence.' " *Diederich v. Walters*, 65 Ill. 2d 95, 102 (1976) (quoting *Lohr v. Barkmann Cartage*

[1] Though claimant mentions in the point heading of the argument section that he is alleging that the Commission's decision "that [he] failed to prove a compensable injury under [the] Act is against the manifest weight of the evidence," his entire argument focuses on deficiencies in the evidence presented by respondent. Nowhere does he discuss the evidence he presented or attempt to explain how he had carried his ordinary burden of proof if the presumption had been rebutted.

Co., 335 Ill. 335, 340 (1929)). A presumption such as this one is not evidence; rather, it arises by operation of law. *Diederich*, 65 Ill. 2d at 102. Thus, it would be inappropriate to apply an evidentiary standard of review at the initial phase of this inquiry. Second, if we determine that the presumption has been properly rebutted, we review the Commission's ultimate decisions concerning accident and causation using the manifest weight standard, assessing whether an opposite conclusion to the Commission's is clearly apparent. *Id.* ¶¶ 38, 39.

¶ 44 The presumption contained in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)) is substantially the same as the presumption contained in section 6(f) of the Illinois Workers' Compensation Act (Workers' Compensation Act) (820 ILCS 305/6(f) (West 2010)). Section 1(d) of the Act states, in relevant part:

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), emergency medical technician-intermediate (EMT-I), advanced emergency medical technician (A-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, EMT-I, A-EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment." 820 ILCS 310/1(d) (West 2010).

Section 6(f) of the Workers' Compensation Act provides:

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), emergency medical technician-intermediate

> (EMT-I), advanced emergency medical technician (A-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." 820 ILCS 305/6(f) (West 2010).

As these provisions are meaningfully identical, we will look to cases interpreting section 6(f) of the Workers' Compensation Act for guidance in understanding the presumption at issue here. See *Relf v. Shatayeva*, 2013 IL 114925, ¶ 39 ("When construing statutes, it is appropriate to consider similar and related enactments, though not strictly *in pari materia*. We must presume that several statutes relating to the same subject are governed by one spirit and a single policy, and that the legislature intended the several statutes to be consistent and harmonious.").

¶ 45 We recently discussed the proposition contained in section 6(f) of the Workers' Compensation Act in *Johnston v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160010WC. Citing *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 462 (1983), the *Johnston* court held that this presumption was a bursting-bubble presumption. *Johnston*, 2017 IL App (2d) 160010WC, ¶ 37. That is, the presumption places a burden on an employer to come forward with some evidence to negate it. *Id.* Once the employer does so, the presumption vanishes, and the trier of fact must then address the evidence as if the presumption never existed. *Id*. The ultimate burden of persuasion remains with the claimant. *Id*. ¶ 36 (quoting *Diederich*, 65 Ill. 2d at 100-01). Furthermore, this is not a "strong" presumption. *Id.* ¶ 45. It does not

require a respondent to come forward with some heightened quantum of evidence, such as clear and convincing. *Id.* Rather, it simply requires "the employer to offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition." (Emphasis in original.) It is not necessary for an employer to present evidence eliminating occupational exposure as a cause of a claimant's condition of ill being. *Id.* ¶ 51. It is sufficient to rebut the presumption if "the employer introduces some evidence of another potential cause of the claimant's condition." *Simpson*, 2017 IL App (3d) 160024WC, ¶ 46. Once rebutted, the Commission is free to resolve any factual dispute as it would in an ordinary workers' compensation case, without reference to the presumption. *Id.*

¶ 46 In this case, the testimony of Elterman is clearly sufficient to rebut the presumption. Elterman testified that he is a board-certified urologist who performs prostatectomies. He treats 25 to 30 prostate patients each week. In his practice, he discusses with his patients why they developed cancer, and, in order to do so, he reviews literature on causation. Elterman had received training regarding determining the cause of a disease he is treating, and his training included the epidemiology of urological diseases. Such subjects are covered in conferences he attends as well. He opined that claimant's "prostate cancer *** was not causally related to his profession of being a firefighter." He stated risk factors for prostate cancer are "heredity, ethnic origin, age, and diet." He believed there was "no clear evidence that firefighter exposure would lead to increased risks of prostate cancer formation." He acknowledged that certain studies showed an enhanced risk, he pointed out that firefighters are typically screened more than the general population (annual physicals) and that this could lead to a higher rate of early detection of prostate cancer. He opined that genetics "played the greatest role" in claimant developing

prostate cancer." However, he did not rule "out with absolute certainty environmental exposures as a possible cause of [claimant's] prostate cancer."

¶ 47 This fulfills respondent's burden of production and rebuts the resumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)). Quite simply, Elterman provides an alternate cause of claimant's cancer—genetics. Moreover, he opined that there was no link between claimant's firefighting and his cancer. It is true that Elterman stated that he did not rule out environmental exposures with absolute certainty; however, he did not have to in order for respondent to meet its burden of production here. As noted above, it was not necessary for respondent to set forth evidence eliminating occupational exposure as a cause of a claimant's cancer. *Johnston*, 2017 IL App (2d) 160010WC, ¶ 51. It is sufficient that respondent presented "some evidence of another potential cause of the claimant's condition." *Simpson*, 2017 IL App (3d) 160024WC, ¶ 46.

¶ 48 In arguing for a different result, claimant primarily makes a series of fact-based attacks on Elterman's opinions. Claimant first correctly points out that an expert opinion is only as valid as the facts and reasons underlying it. See *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶ 24. However, it is also true that the basis for an expert's opinion is typically a matter of weight for the trier of fact to determine. See *Snelson v. Kamm*, 204 Ill. 2d 1, 26-27 (2003) ("While Kamm contends that Sarnelle's opinions were not adequately supported, the basis for a witness' opinion generally does not affect his standing as an expert; such matters go only to the weight of the evidence, not its sufficiency. [Citation.] Indeed, the weight to be assigned to an expert opinion is for the jury to determine in light of the expert's credentials and the factual basis of his opinion. [Citation.]"). Thus, at this stage of the analysis, it is largely immaterial whether claimant points out various alleged factual flaws with Elterman's

opinion. Any flaws in the basis of his opinion were for the Commission to assess in determining what weight the opinion is entitled to. See *National Bank of Monticello v. Doss*, 141 Ill. App. 3d 1065, 1072 (1986) ("The basis for his opinion does not affect his standing as an expert. Such matters go only to the weight of the evidence, not the sufficiency."). Such attacks would have been better suited to an argument that, despite respondent successfully rebutting the presumption, the Commission's ultimate decision was contrary to the manifest weight of the evidence.

¶ 49 For example, claimant attacks Elterman's credentials, pointing out that he is not board-certified in epidemiology, toxicology, environmental medicine, public health, or industrial hygiene. While true, Elterman is board certified in urology and has received training in the epidemiology of diseases he treats. An expert's credentials affect the weight to which an opinion is entitled. *Treadwell v. Downey*, 209 Ill. App. 3d 999, 1003 (1991).

¶ 50 Claimant also takes issue with Elterman's reliance on various studies in support of his opinion. He points out that Elterman agreed that the study titled "Cancer Risk Among Firefighters, a Review and Meta-Analysis of 32 Studies" concluded that there was a probable increased risk of prostate cancer for firefighters. However, Elterman explained this statistic by noting that enhanced screenings for firefighters could explain the difference between their cohort and the public generally. The existence of such a conflict in the record creates an issue for the trier of fact; it does not mean that respondent has not submitted evidence in support of its position. Claimant complains that Elterman relied on a mortality statistic, rather than an incidence statistic, in formulating his opinion. Generally, a defect in the basis of an expert's opinion goes to the weight to which the opinion is entitled. See *In re L.M.*, 205 Ill. App. 3d 497, 512 (1990).

¶ 51 Claimant further charges that outside of heredity—*i.e.*, that the fact that claimant's father had prostate cancer in his 70s—Elterman did not identify any other potential cause of claimant's prostate cancer. However, respondent's burden was merely to set forth *some* evidence in order to negate the presumption. *Johnston*, 2017 IL App (2d) 160010WC, ¶ 45. Elterman's testimony certainly constitutes *some* evidence. Indeed, heredity as a possible cause of a heart attack was one factor we found sufficient in *Johnston*, 2017 IL app (2d) 160010WC, ¶ 45, for the respondent in that case to rebut the presumption arising under section 6(f) of the Illinois Workers' Compensation Act (820 ILCS 305/6(f) (West 2010)). In sum, we hold that the evidence set forth by respondent was sufficient to rebut the presumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)). Regardless of whether the Commission should have ultimately rejected Elterman's opinion as a question of fact, it did constitute evidence of a cause for claimant's cancer outside of his employment with respondent.

¶ 52 IV. CONCLUSION

¶ 53 Claimant has failed to convince us that the Commission erred in finding respondent rebutted the presumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)). Claimant does not argue that the Commission's decision was otherwise contrary to the manifest weight of the evidence. We therefore affirm the judgment of the circuit court of Du Page County confirming the decision of the Commission.

¶ 54 Affirmed.