DANIEL LARRABEE
(Appellant)

v.

CITY OF SOUTH PORTLAND
(Appellee)

and

TOWN OF SCARBOROUGH
(Appellee)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer for South Portland and Scarborough)

Argued: December 12, 2018
Decided: November 25, 2020

PANEL MEMBERS: Administrative Law Judges Elwin, Jerome, and Knopf
BY: Administrative Law Judge Knopf

[¶1] Daniel Larrabee appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) denying Petitions for Award related to a 2007 cardiac injury brought against the Town of Scarborough and the City of South Portland and denying Petitions for Award brought against those same employers related to the aggravation of underlying coronary artery disease in 2012. The ALJ granted the 2012 Petition for Award filed against South Portland, however, and awarded a closed-end period of incapacity benefits, based on the additional

claim that Mr. Larrabee suffered an acute myocardial infarction (MI) on that day.[1] We vacate the decision insofar as it denied the petitions against the employers related to the claimed 2012 gradual aggravation of Mr. Larrabee's underlying coronary artery disease, and we remand for additional findings in light of this opinion. At issue, mainly, is whether the ALJ correctly applied the presumption in 39-A M.R.S.A. § 328 (Pamph. 2020) in determining that Mr. Larrabee's alleged aggravation injury did not arise out of and in the course of employment as a firefighter and whether or to what extent Mr. Larrabee sustained an earning incapacity as a result of his gradual cardiac injury.

I. BACKGROUND

[¶2] Daniel Larrabee began his firefighting career as a volunteer for the Town of Scarborough in 1976. In 1988, he began working as a per diem firefighter for the town. Also in 1988, Mr. Larrabee was hired by the City of South Portland as a full-time firefighter and emergency medical technician. In addition, he worked part-time doing home inspections.

[¶3] On October 16, 2007, while working for the Town of Scarborough, Mr. Larrabee was sweeping the floor and began to feel pain in his left side. The pain gradually increased throughout the day. There were no fire calls that day. After his

[1] The ALJ denied Mr. Larrabee's claim against Scarborough alleging the same acute injury. That denial has not been appealed.

shift ended, he went to the hospital and was diagnosed with an acute MI. Testing revealed that Mr. Larrabee had severe coronary artery disease. He underwent a triple bypass surgery on October 22, 2007.

[¶4] Scarborough and South Portland each filed a First Report of Injury, which the board received at the end of October 2007. In November 2007, a board claims resolution specialist sent a letter to Mr. Larrabee informing him that the municipalities' insurer, Maine Municipal Association (MMA), had filed a Notice of Controversy and asking him to contact the board if he intended to pursue the claim. The letter contained information about the applicable, two-year limitations period.

[¶5] Following cardiac rehabilitation, on January 2, 2008, Mr. Larrabee returned to work for both fire departments, eventually resuming regular duties. On the advice of his cardiologist, he discontinued the home inspection work.

[¶6] In March 2008, Mr. Larrabee contacted Tammy Moody, an adjuster with Maine Municipal Association, both employers' insurer, to inform her that he was pursuing his claim for workers' compensation benefits. Ms. Moody contacted legal counsel to arrange for a review of Mr. Larrabee's medical records by a health professional. This resulted in a report in July 2008 by Karl Sze, M.D., a cardiologist. Dr. Sze concluded that Mr. Larrabee's MI was unrelated to his work activity and more likely was part of the natural progression of his underlying coronary artery

disease, noting that Mr. Larrabee suffers from well-recognized risk factors including high blood pressure, high cholesterol, and diabetes.

[¶7] Mr. Larrabee suffered a second heart attack on January 20, 2012. At that time he was working full-time for South Portland and per diem for Scarborough. He had been shoveling snow around fire hydrants for South Portland when he began to feel pain in his left side. Later that day he was taken to the hospital and diagnosed with an MI.

[¶8] After the second heart attack, Mr. Larrabee's cardiologist recommended that he not return to unrestricted duty as a firefighter. He resumed light duty work for South Portland, but he did not return to work for Scarborough. Mr. Larrabee ultimately stopped working for South Portland in August 2013 under an agreement that afforded him his pension. He has not returned to work since.

[¶9] After Mr. Larrabee met with an attorney in June 2012, he filed the current petitions regarding both the 2007 and 2012 heart attacks.

[¶10] Dr. Sze performed another records review and gave a report and deposition supporting his opinion that Mr. Larrabee's coronary artery disease was not caused by firefighting but rather the natural progression of his underlying coronary artery disease, which he attributed to nonwork-related risk factors such as Mr. Larrabee's long history of diabetes, hypertension, and hyperlipidemia, and his family history. Dr. Sze did opine, however, that Mr. Larrabee's 2012 heart attack

was related to his exertion at work that day for South Portland and was not related to work performed for Scarborough because he had not worked for Scarborough that day.

[¶11] Mr. Larrabee's records also were reviewed by Dr. Michael Fifer and Dr. Stefano Kales. Dr. Fifer was inconclusive regarding causation of Mr. Larrabee's underlying disease, but he agreed with Dr. Sze that the 2012 acute MI was related to his work activity with South Portland that day. Dr. Kales concluded that Mr. Larrabee's career as a firefighter was a significant factor in the development and acceleration of his underlying cardiovascular disease. Although he agreed that Mr. Larrabee's diabetes put him at risk for coronary arthrosclerosis, he noted that shift work as a firefighter worsened his diabetic control and accelerated the progression of the disease. He further opined that Mr. Larrabee's work activity on the respective injury dates triggered the two MIs.

[¶12] The ALJ determined that Mr. Larrabee's claims on the 2007 injury, filed in 2012, were barred by the two-year statute of limitations. He rejected Mr. Larrabee's argument that he was under a mistake of fact as to the cause and nature of his 2007 heart attack due to Dr. Sze's report.

[¶13] Regarding the 2012 date of injury, the ALJ considered claims for both a gradual injury and an acute cardiac event. The ALJ applied the firefighter presumption in section 328(2), which entitled Mr. Larrabee to a rebuttable

presumption that he "received the injury or contracted the disease arising out of and in the course of employment." Accordingly, the ALJ shifted the burden of proof to Scarborough and South Portland to negate the presumed fact that the claimed injuries arose out of and in the course of Mr. Larrabee's employment as a firefighter.

[¶14] As to the gradual injury, the ALJ concluded that the municipalities had met their burden to rebut the presumption, finding Dr. Sze's opinion more persuasive on the issue of causation than Dr. Kales's contrary medical opinion.

[¶15] However, the ALJ found that South Portland did not negate the presumption with respect to the acute MI suffered in 2012, relying on the consistent opinions of the doctors that Mr. Larrabee's work duties for South Portland on January 20, 2012, causally contributed to his heart attack. The ALJ further determined that the effects of the acute MI had resolved as of March 20, 2012, and that any remaining incapacity is due to his nonwork-related cardiovascular disease. The ALJ further adopted Dr. Sze's opinion that the Town of Scarborough was not responsible for the 2012 acute MI because Mr. Larrabee was not working for the town that day.

[¶16] Mr. Larrabee and the City of South Portland filed motions for further findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020), which the ALJ denied. Mr. Larrabee appeals.

II. DISCUSSION

[¶17] The Appellate Division's role on appeal "is limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). An ALJ's ruling "that any party has or has not sustained the party's burden of proof . . . is considered a conclusion of law and is reviewable[.]" 39-A M.R.S.A. § 318 (Pamph. 2020); *see also Savage v. Georgia Pacific Corp.*, Me. W.C.B. No. 13-5, ¶ 7 & n.1 (App. Div. 2013).

A. Statute of Limitations

[¶18] Mr. Larrabee argues that the ALJ erred in concluding that the two-year statute of limitations in 39-A M.R.S.A. § 306(1) bars his claims for the 2007 injury, and specifically in rejecting his argument the statute was tolled for mistake of fact pursuant to section 306(5).[2] Mr. Larrabee contends that after reviewing Dr. Sze's

[2] Title 39-A M.R.S.A. § 306 provides in relevant part:

> **Time for filing petitions**
>
> **1. Statute of limitations.** Except as provided in this section, a petition brought under this Act is barred unless filed within 2 years after the date of injury or the date the employee's employer files a required first report of injury if required in section 303, whichever is later.
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> . . .

opinion, sent to him by MMA in July 2008, he believed that his injury was not work-related, and that belief continued until June 2012 when he spoke with his attorney.

[¶19] "The 'mistake of fact' provision in the statute of limitations establishes an exception to the two-year limit when an injury, or its cause, is not recognized due to a mistake of fact." *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 17, 968 A. 2d 528. A failure to connect medical problems to a work-related cause may constitute a mistake of fact sufficient to extend the limitations period. *Id.* ¶18. Here, however, the ALJ found that Mr. Larrabee was aware of the cause and nature of his injury regardless of how he perceived Dr. Sze's opinion. This finding was based on evidence that the board had mailed Mr. Larrabee notice of his rights—including notice of the limitations period—and on Mr. Larrabee's testimony, including that he told an MMA insurance adjuster he would be making a workers' compensation claim. Although on these facts another ALJ could reach a different conclusion, this evidence is sufficient to support the ALJ's finding that Mr. Larrabee was aware of the cause and nature of his injury more than two years before he filed his petitions on the 2007 claim.

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5. Mistake of fact. If an employee fails to file a petition within the limitation period provided in subsection 1 because of mistake of fact as to the cause or nature of the injury, the employee may file a petition within a reasonable time, subject to the 6-year limitation provided in subsection 2.

B. Section 328(2) Presumption

[¶20] Title 39-A M.R.S.A. § 328 affords, among other things, a rebuttable presumption that a qualified firefighter "received the [cardiovascular] injury or contracted the disease arising out of and in the course of employment."[3] The provision reflects a legislative policy of recognizing the unusually high risk of cardiovascular disease faced by firefighters, and the difficulties in proving causation. *See, e.g.*, P.L. 1975, ch. 169 (107th Legis), L.D. No. 286, Statement of Fact. There is no dispute that the presumption in section 328 applies in this case.

[3] Title 39-A M.R.S.A. § 328 provides:

> **Cardiovascular injury or disease and pulmonary disease suffered by a firefighter or resulting in a firefighter's death**
>
> Cardiovascular injury or disease and pulmonary disease suffered by a firefighter or resulting in a firefighter's death are governed by this section.
>
> **1. Firefighter defined**. For the purposes of this section, "firefighter" means an active member of a municipal fire department or of a volunteer firefighters association if that person is a member of a municipal fire department or volunteer firefighters association and if that person aids in the extinguishment of fires, regardless of whether or not that person has administrative duties or other duties as a member of the municipal fire department or volunteer firefighters association.
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> **2. Presumption.** There is a rebuttable presumption that a firefighter received the injury or contracted the disease arising out of and in the course of employment, that sufficient notice of the injury or disease has been given and that the injury or disease was not occasioned by the willful intention of the firefighter to cause self-injury or injury to another if the firefighter has been an active member of a municipal fire department or a volunteer firefighters association, as defined in Title 30-A, section 3151, for at least 2 years prior to a cardiovascular injury or the onset of a cardiovascular disease or pulmonary disease and if:
>
> **A.** The disease has developed or the injury has occurred within 6 months of having participated in fire fighting, or training or drill that actually involves fire fighting; or
>
> **B.** The firefighter had developed the disease or had suffered the injury that resulted in death within 6 months of having participated in fire fighting, or training or drill that actually involved fire fighting.

[¶21] Mr. Larrabee contends, with respect to his gradual injury claim, that the ALJ misapplied the section 328 presumption because, instead of requiring the employers to negate the presumed fact, the ALJ conducted a traditional analysis by weighing competing medical opinions and making a decision based on which he found more persuasive. We agree with this contention.

[¶22] When a rebuttable presumption applies, the employer bears the burden to prove the non-existence of the presumed fact on a more probable than not basis. *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982); *Morrison v. City of Sanford*, Me. W.C.B. No. 19-22, ¶ 23 (App. Div. 2019); *Lavallee v. Town of Bridgton*, Me. W.C.B. No. 15-13, ¶ 9 (App. Div. 2015). The employers' burden here was to show that Mr. Larrabee's cardiovascular condition did not arise out of and in the course of his employment as a firefighter. *Hall*, 441 A.2d at 1022; *Morrison*, Me. W.C.B. No. 19-22, ¶ 21; *Lavallee*, Me. W.C.B. No. 15-13, ¶ 9.

[¶23] The employers relied on the medical opinions of Drs. Fifer and Sze. Dr. Fifer's opinion was explicitly inconclusive regarding causation of the disease. Dr. Sze consistently expressed his medical opinion that Mr. Larrabee's cardiovascular disease was probably accounted for by risk factors other than firefighting. Specifically, Dr. Sze identified Mr. Larrabee's diabetes, high blood pressure, hyperlipidemia, and family history as primary risk factors.

[¶24] Dr. Sze's reports and testimony demonstrate that he does not agree with the legislative conclusion that cardiovascular problems incurred by firefighters are related to their work. When asked at deposition if he had ever given an opinion that firefighting caused cardiovascular disease, Dr. Sze replied that he "[doesn't] believe that's likely to be the case." About the statutory presumption itself, Dr. Sze said:

> If the law says that's true, that's fine. In my way of thinking, I go by the traditional cardiac risk factors that . . . most cardiologists follow. And these are elevated lipids, elevated blood pressure, smoking, diabetes, strongly positive family history. . . . I don't typically consider other—other items as risk factors.

Dr. Sze also indicated, "I don't think we actually know what the ultimate cause of coronary artery disease is" and stated that he could not exclude Mr. Larrabee's work as a firefighter as a cause of the 2007 injury.

[¶25] The ALJ accepted Dr. Sze's opinion as more persuasive than Dr. Kales's. However, Dr. Sze's opinion did not negate the presumed fact that firefighting work is causative; he merely adopted an alternative. While Dr. Sze's opinion may have provided a persuasive account of factors contributing to Mr. Larrabee's cardiovascular disease, it did not establish an account of facts or circumstances that contradict the presumed fact that the injury arose out of and in the course of his employment as a firefighter.[4]

[4] Dr. Sze did state during his deposition and in his reports that he did not believe that Mr. Larrabee's cardiovascular disease was causally related to his firefighting work. However, Dr. Sze did not provide his reasoning; rather, he consistently made clear that his opinion was based only on traditional factors such as diabetes, without directly addressing why Mr. Larrabee's work as a firefighter, comprising a career of over

[¶26] Because Dr. Sze's reports and testimony do not negate the legislative finding that cardiovascular problems incurred by firefighters are presumptively compensable, they are insufficient to rebut the statutory presumption. The ALJ erred in concluding that the employers met their burden to rebut the presumption. Therefore, the presumed facts that Mr. Larrabee's gradual and acute cardiovascular injuries in 2012 arose out of and in the course of his work as a firefighter must be adopted.

C. Incapacity

[¶27] While the presumption operates to establish that the 2012 gradual and acute injuries arose out of and in the course of Mr. Larrabee's employment as a firefighter, the presumption does not address the level of incapacity, if any, attributable to that injury. There is no dispute that due to his cardiac condition, Mr. Larrabee was unable to return to firefighting following the 2012 injury. Under *Cross v. LLP Transport, LLC*, Me. W.C.B. Dec. No. 15-23, ¶ 16 (App. Div. 2015) (citing *St. Amand v. Edwards Mfg. Co., Inc.*, 386 A.2d 730, 731 (Me. 1978)), therefore, Mr. Larrabee likely has some level of incapacity as a matter of law.

[¶28] Based on Dr. Sze's reports and testimony, the ALJ appears to have concluded that Mr. Larrabee's coronary artery disease constitutes a preexisting,

35 years was, on a more likely than not basis, *not* the cause of his cardiovascular condition. Providing an alternative view of causation alone is insufficient to rebut the legislatively adopted fact that, under some circumstances, cardiovascular disease in firefighters is related to their work.

nonwork-related condition. Operation of the presumption, however, establishes that the disease is work-related. Nonetheless, by the time of the 2012 injury, Mr. Larrabee had clearly suffered from coronary artery disease since at least 2007. As such, Mr. Larrabee's entitlement to incapacity benefits based on the 2012 injury is subject to 39-A M.R.S.A. § 201(4) (Pamph. 2020), which provides:

> If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

[¶29] "When a case appears to come within [39-A M.R.S.A.] § 201(4) (2001), the [ALJ] must first determine whether the employee has suffered a work-related injury. If the employee is found to have an injury, then [section] 201(4) is applied if the employee has a condition that preceded the injury." *Celentano v. Dep't of Corr*., 2005 ME 125, ¶ 9, 887 A.2d 512. As provided above, operation of section 328 satisfies the first step of the analysis by establishing an injury. The employee then has the burden to establish the second element of a section 201(4) case, which is not presumed: whether the employment contributed to the employee's disability in a significant manner.

[¶30] The ALJ stated:

> I find and conclude that the employers have sustained their burden to show that it is not likely that Mr. Larrabee's employment as a firefighter significantly aggravated or accelerated his underlying coronary artery disease. Therefore, I find and conclude that Mr.

> Larrabee's employment for those two employers did not contribute to a gradual cardiac work injury.

[¶31] Because we have determined that the ALJ erred when determining that the 2012 gradual injury did not arise out of and in the course of his employment as a firefighter, we remand for clarification of whether the employment contributed to the employee's *disability* (rather than his medical condition) in a significant manner, and, if so, whether and to what extent Mr. Larrabee suffers incapacity as a result of his 2012 work-related cardiovascular condition.

III. CONCLUSION

[¶32] We vacate the decision insofar as the ALJ determined that the City of South Portland and the Town of Scarborough rebutted the presumed fact that Mr. Larrabee's 2012 gradual cardiovascular condition arose out of and in the course of employment, and we remand for a determination regarding (1) whether the employment contributed to the employee's disability in a significant manner; and (2) if so, whether and to what extent Mr. Larrabee suffers incapacity as a result of his 2012 work-related cardiovascular condition. In all other respects we affirm the decision.

The entry is:

> The ALJ's decision is affirmed in part and vacated in part and is remanded for further proceedings consistent with this decision.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Pamph. 2020).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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