IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D15-5844

City of Jacksonville and City of Jacksonville Risk Management,

Appellant,

v.

Robert Ratliff,

Appellee.

OJCC Case No.: 15-005677WRH
Date of Accident: 11/17/2014
Judge: William Holley

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ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellants, City of Jacksonville and City of Jacksonville Risk Management (collectively, the "Employer"), challenge the Judge of Compensation Claims' ("JCC") order awarding Appellee, Robert Ratliff (the "Claimant"), compensability of his claim for heart disease, authorization of an appointment with a board-certified cardiologist, and attorney's fees. The Employer's statement of the case and facts fails to state the facts in the light most favorable for affirming the JCC's order. Accordingly, the Claimant provides his own statement of the case and facts.

I. Evidentiary basis for the JCC's findings

The Claimant served as a firefighter for twenty-six years. (R. 415.) On November 17, 2014, he suffered a heart attack at work. (R. 5.) On that date, he met with an engineer and contractors to discuss whether their building's fire alarm system satisfied the fire prevention code. (R. 658-59.) It was a "normal" meeting to the extent it was normal for him to resolve disputes about whether or not a building satisfied the code. (R. 659.) He described the meeting as "argumentative," but not "heated to the point of … altercation." (R. 659.)

The Claimant began to feel discomfort and unwell during the meeting. (R. 660.) After the meeting adjourned, a colleague checked his blood pressure and it was high. (R. 661.) The Claimant then drove to a fire station and, after running an EKG, his colleagues transported him to the hospital. (R. 662-63.) The emergency room

department immediately started a cardiac catherization procedure and put in two stents, and he later returned to the hospital for placement of a third stent. (R. 663.) He was diagnosed with an acute myocardial infarction, commonly known as a heart attack. (R. 461, 405.)

In March 2015, the Claimant filed a petition for workers' compensation benefits and requested authorization to treat with a cardiologist for his heart and hypertension[1] issues, compensability, and attorney's fees. (R. 5-7.) Because he was a firefighter suffering from heart disease, a statutory presumption that his work caused the heart disease was available to him. Specifically, section 112.18, Florida Statutes, establishes that certain health conditions resulting in a firefighter's disability or death, including heart disease, "shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence." § 112.18(1)(a), Fla. Stat. (2014). For the presumption to apply, the firefighter must have successfully passed a physical examination at the time he or she entered service. *Id.*

The Employer stipulated that there was no evidence of heart disease on the Claimant's pre-employment physical exam. (R. 12, 631.) It was also undisputed that he was a certified firefighter, that he currently suffered from heart disease, and that

[1]The JCC denied the Claimant's claims as they related to hypertension. (R. 620.) The Claimant has not cross appealed that denial.

he suffered a disability on November 17, 2014. (R. 12, 631.) Accordingly, because he had "successfully passed a physical exam at the time he … entered service," he was entitled to the statutory presumption that his heart attack was accidental and suffered in the line of duty. § 112.18(1)(a), Fla. Stat.

Because the Claimant was entitled to the statutory presumption, the primary issue presented to the JCC was whether the Employer had successfully overcome that presumption. (R. 20, 27-29.) That issue further boiled down to the conflicting testimony of two board-certified cardiologists on whether the cause of the Claimant's heart attack was knowable. (R. 20, 28.) The JCC was thus obligated to weigh the cardiologist's testimony, described below, and resolve any conflicts in the evidence.

Alan Schimmel, M.D., examined the Claimant and reviewed certain medical records, including hospitalization and treating-physician records. (R. 380-81.) Dr. Schimmel testified that the Claimant suffered from coronary artery disease, and that a portion of his plaque became disrupted and resulted in an acute thrombosis. (R. 386.) He acknowledged the Claimant had multiple cardiac risk factors and that things like stress, smoking, and genetics could potentially cause heart disease, but testified that risk factors alone do not cause plaque rupture. (R. 381, 384, 386-87, 392, 395, 396.) Significantly, he testified that "no one really knows what causes acute coronary thrombosis," that heart disease is "multifactorial," and that he could

not identify with any degree of reasonable medical certainty which risk factors, if any, caused the Claimant's heart issues. (R. 384, 386-87, 397.) He further explained risk factors just make it "more likely to develop heart disease," but there are people who are diabetic, hypertensive, dyslipidemic smokers who never develop heart disease, and there are people with no risk factors who develop severe heart disease. (R. 387, 397.)

Dr. Schimmel also provided evidence supporting the presumption that the Claimant's heart disease was caused by his employment as a firefighter. Specifically, Dr. Schimmel testified that stress could potentially cause a plaque rupture. (R. 384.) He also testified that it was "unusual" for the Claimant's heart attack to have occurred at the time of day that it did. (R. 390-91.) Finally, he provided a report that the Claimant's stressful work environment could have provoked acute coronary thrombosis with plaque rupture. (R. 406, 432, 452.)

Harold Dietzius, M.D., examined the Claimant and reviewed his medical records, including his hospitalization records, notes from his primary care physician, cardiology consultations, and lab work. (R.459-61.) Dr. Dietzius testified that the Claimant's risk factors of developing coronary artery disease were diabetes, hyperlipidemia, and a strong family history of premature coronary artery disease, and that "his risk factors contribute to his coronary artery disease over his work." (R. 466, 472.) He also noted in a report that, because of the risk factors, he did not

believe the Claimant's coronary artery disease was a work-related issue. (R. 518.) He further testified that the risk factors had "risen to the level of actual causative factors within a reasonable degree of medical certainty" because diabetes and hyperlipidemia cause plaque formation, and plaque formation causes coronary artery disease. (R. 472-73.) Like Dr. Schimmel, he also testified the Claimant's heart attack was multifactorial and that the Claimant had a plaque rupture. (R. 480-81.) Significantly, on cross-examination, he testified that no medical test can confirm the exact cause of a heart attack; not everyone with high cholesterol, diabetes, or a family history would have plaque buildup and a heart attack; and the cause of the plaque rupture was unknown. (R. 481-83.)

II. The JCC's Order

The JCC carefully considered the opinions of Dr. Schimmel and Dr. Dietzius and weighed all of the evidence presented. (R. 612.) He emphasized that, although he might not specifically reference every piece of evidence, he had "fully considered all the factual evidence." (R. 612.) He thoroughly summarized the opinions of both doctors and noted Dr. Dietzius's ultimate opinion that the Claimant's risk factors had risen to the level of actual causative factors within a reasonable degree of medical certainty. (R. 614-17.) He also noted Dr. Dietzius's admissions that "there was not a test that could be used to directly determine an exact cause for [the Claimant's] heart disease/plaque rupture," that the cause of the plaque rupture was

"unknown," and that not everyone with the same risk factors as the Claimant would develop plaque buildup. (R. 615, 619.)

The JCC determined that, based on the parties' stipulations, the Claimant had established the legal presumption under section 112.18, Florida Statutes, for his heart disease. (R. 617.) After reviewing and evaluating the opinions of both Dr. Schimmel and Dr. Dietzius, the JCC then held that the Employer had failed to rebut the legal presumption. Specifically, he made a finding that the testimony of Dr. Schimmel was "more persuasive that the cause of the [Claimant's] heart disease cannot be determined especially when multifactorial in nature." (R. 619.) He provided the following reasoning in support of this finding:

> As noted herein, Dr. Dietzius rendered his ultimate opinion on causation based on his training, experience, and a review of medical studies that were epidemiological by nature. However, the undersigned did not find the testimony to be persuasive or sufficient as competent evidence or clear and convincing evidence by which to establish a rebuttal of the Legal Presumption. The evidence further did not meet the standard to constitute major contributing cause. Dr. Dietzius himself noted that there was not a test that could be used to directly determine a cause for [the Claimant's] plaque rupture. The doctor stated "And can you say—you know, is there any medical test that will say it is the cholesterol versus the diabetes versus the family history versus some other thing? Prior to that event, the answer is no." Instead, the doctor's opinion was based on studies done of patients in the aggregate where the doctor admitted that he could not say that everyone who had the same risk factors as the [Claimant] developed or would develop plaque buildup. The doctor agreed that the cause for the plaque rupture was unknown and that he did not think anyone would ever be able to state what exactly caused the heart disease.

(R. 618-19.)

Based on his findings, the JCC awarded the Claimant authorization of an appointment with a board-certified cardiologist and compensability of his heart disease. (R. 619-20.) He also determined the Claimant's attorney had performed a valuable service and was entitled to reimbursement of costs of litigation and attorney's fees at the expense of the Employer. (R. 620.) He reserved jurisdiction to determine the amount of attorney's fees and costs if the parties were unable to agree. (R. 620.) He also reserved jurisdiction to determine the entitlement and amount for reimbursement of taxable costs under section 440.34, Florida Statutes. (R. 620.)

The Employer did not file a petition for rehearing. (R. 4.) Rather, the Employer immediately appealed the JCC's Final Compensation Order to this Court. (R. 4, 622-23.)

SUMMARY OF ARGUMENT

The Employer's initial brief has complicated the ultimate question for this Court: whether there is evidentiary support for the JCC's finding that Dr. Schimmel's testimony on causation was more persuasive than Dr. Dietzius's testimony on causation. The answer is straightforward: competent and substantial evidence supports the JCC's finding because both doctors suggested that the cause of the Claimant's heart attack was unknowable. This Court should affirm the Final Compensation Order.

The Employer attempts to avoid this result by mischaracterizing its first and second issues on appeal as issues of law on which the JCC's findings are purportedly due no deference by this Court. But, when the evidence is viewed through the proper lens of whether it supports the decision below, it is clear the JCC's order must be affirmed.

The Employer also attempts to avoid affirmance by arguing the JCC has applied an incorrect burden of proof and overlooked Dr. Dietzius's testimony. The Employer failed to file a petition for rehearing and thus failed to preserve these perceived errors for appellate review. Regardless, both arguments are baseless. The JCC thoroughly considered whether the Employer's evidence met either burden of persuasion and concluded, with evidentiary support, that it did not. The JCC also thoroughly considered Dr. Dietzius's testimony and explained his reasons for rejecting Dr. Dietzius's causation opinion.

The Employer attempts to detract from the substantial, competent evidence supporting the JCC's decision by focusing on evidence that, in its view, would support a contrary decision. The evidence cited by the Employer, viewed in the light most favorable to affirmance, does not contradict the JCC's findings. Even if it did, however, it is simply irrelevant on appeal whether it is possible to recite contradictory record evidence that supported the arguments rejected below.

Finally, because competent and substantial evidence supports the JCC's findings, the presumption itself establishes the occupational cause for the Claimant's heart disease. In addition, this Court lacks jurisdiction to consider the JCC's award of attorney's fees because he reserved jurisdiction to determine the amount of such fees.

For all the reasons argued in this brief, this Court should affirm the final compensation order and dismiss for lack of jurisdiction the portion of the appeal challenging the award of attorney's fees and costs.

ARGUMENT

I. Competent, substantial evidence supports the JCC's finding that the Employer failed to rebut the firefighter's presumption.

This Court may affirm the JCC's determination that the Employer failed to rebut the firefighter's presumption on multiple, independent bases: (1) the Employer has failed to preserve the issue for appellate review, (2) competent and substantial evidence supports the JCC's finding that the Employer's evidence was not persuasive, or (3) competent and substantial evidence supports the JCC's finding that the Employer was unable to overcome the statutory presumption under any burden of persuasion. The Claimant discusses each basis for affirmance, along with the proper standard of review, below.

A. The issue is not preserved for appeal.

A party must make a timely objection below to preserve an issue for appeal. *Verkruysse v. Florida Carpenters Reg'l Council*, 27 So. 3d 157, 159 (Fla. 1st DCA 2010). For an error that "appears for the first time in a JCC's final order, an objection to the error must be preserved by filing a motion for rehearing on the issue." *Id.*; *see also* Fla. Admin. Code R. 6Q-6.122 (permitting post-order request for hearing "[t]o seek clarification in matters of law or fact that the judge may have overlooked or misapprehended"). This is because "[t]he purpose of the preservation rules is to prevent parties from taking advantage of the appellate process without first allowing the JCC an opportunity to address any perceived errors." *Verkruysse*, 27 So. 3d at 159.

The Employer argues on appeal that the JCC failed to apply the correct burden of proof. (Initial Br. at 21; 25-34.) Specifically, the Employer contends the JCC applied an "exact cause" standard in contravention of the statute. (Initial Br. at 21, 24-28, 33.) As discussed in Issue I.B, *infra* at 11-13, the Claimant maintains that the JCC did not misinterpret the statute or apply an incorrect burden of proof. However, even assuming *arguendo* that he did, the Employer has failed to preserve the issue for appeal. The alleged burden-of-proof issue appeared for the first time in the JCC's final order. Yet, the Employer failed to file a motion for rehearing to give the JCC an opportunity to address the perceived error in the first instance and instead

appealed immediately to this Court. The Employer's failure to file a motion for re-hearing to clarify the burden of proof applied by the JCC precludes it from claiming error on that basis now.

The Employer relies on *Johns Eastern Company v. Bellamy*, 137 So. 3d 1058 (Fla. 1st DCA 2014), for its argument that the JCC failed to apply the correct burden of proof. (Initial Br. at 25-26.) However, unlike here, the employer in *Johns Eastern Company* had preserved the burden-of-proof issue by filing a motion for rehearing before the JCC.[2] (Appendix, p. 8-11.) In its motion for rehearing, the employer had explicitly argued, based on the JCC's contradictory statements regarding the applicable burden of proof, that "the Court appears to have required that the employer/carrier rebut the presumption with a single non-occupational cause at the higher burden of clear and convincing evidence in contravention of the cited case law." (Appendix, p. 10, 19.) The burden-of-proof issue had been preserved in *Johns Eastern Company.* It has not been preserved here.

B. This case does not present a question of statutory interpretation subject to *de novo* review.

Even assuming the Employer has preserved the first issue for appellate review, it has not presented a pure question of law reviewable under the *de novo*

[2] This Court may take judicial notice of its own records. *See Hillsborough County Bd. of County Com'rs v. Pub. Employees Relations Com'n*, 424 So. 2d 132 (Fla. 1st DCA 1982).

standard. The Employer characterizes its first issue on appeal as one of statutory interpretation by asserting that the JCC applied an "exact cause" standard in contravention of the statute. (Initial Br. at 24, 27-34.) This assertion is wrong. The Employer is lifting the "exact cause" language—which it then repeats a dozen times throughout its brief—from the JCC's summary of Dr. Dietzius's testimony. (*See* R. 615 ("[T]he doctor admitted that there was not a test that could be used to directly determine an exact cause for Claimant's heart disease/plaque rupture.")) The JCC was merely observing that Dr. Dietzius had replied under questioning that no medical test could determine the cause of the heart attack and that the cause for plaque rupture was unknown. (R. 615, 619, 481.) Then, based on evidence that causation was unknowable, the JCC concluded the Employer had failed to rebut the presumption. (R. 619.) The JCC did not misinterpret the statutory presumption; rather, it appropriately weighed and resolved conflicts in the evidence and determined Dr. Dietzius's testimony was not "persuasive or sufficient as competent evidence or clear and convincing evidence" to overcome the presumption. (R. 619.)

In reality, the Employer is disputing the JCC's findings and asking this Court to reweigh the evidence on appeal to reach a different conclusion than the one reached by the JCC. However, this Court is not permitted to conduct a *de novo* review to determine independently whether the evidence satisfies the applicable standard. *Punsky v. Clay County Sheriff's Office*, 18 So. 3d 577, 583-84 (Fla. 1st

DCA 2009) (*en banc*). Rather, this Court's role is limited to a review of the case to determine "whether there was an evidentiary basis of support for whatever decision the trier of fact reached," or, more specifically, "whether there is substantial competent evidence in accordance with logic and reason to sustain the finding of the [JCC]." *Id*. Under this standard, a JCC's findings and conclusions "will be sustained if permitted by any view of the evidence and its permissible inferences," *Orange City Water Co. v. Barkley*, 432 So. 2d 698, 698 (Fla. 1st DCA 1983), and "it is irrelevant that there is also competent substantial evidence to support a contrary finding," *Tradewinds Mfg. Co. v. Cox*, 541 So. 2d 667, 668 (Fla. 1st DCA 1989). For the reasons discussed below, substantial and competent evidence supports the JCC's decision.

C. The Employer failed to persuade the JCC that the Claimant's heart attack was caused by a non-work-related factor.

The Employer argues the JCC was required to accept its evidence—Dr. Dietzius's testimony that the Claimant's risk factors were actual causative factors—as sufficient to overcome the firefighter's presumption. (Initial Br. at 28-34.) The Employer's argument is plainly contradicted by this Court's *en banc* precedent in *Punsky v. Clay County Sherriff's Office*, 18 So. 3d 577 (Fla. 1st DCA 2009). Specifically, the Employer ignores the following points of law: its evidence must "convince" or "persuade" the JCC; the presumption remains with the Claimant and can provide the competent, substantial evidence to support the JCC's ruling; and the

existence of risk factors is insufficient to rebut the presumption. The Employer's argument also ignores the competent and substantial record evidence supporting the JCC's determination. For these reasons, as explicated below, the Employer's argument must fail.

First, the Employer's argument ignores the requirement that its evidence must persuade the JCC. The firefighter's presumption "is not overcome until the trier of fact **believes** that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." *Punsky*, 18 So. 3d at 582 (emphasis added); *accord City of Tarpon Springs v. Vaporis*, 953 So. 2d 597, 599 (Fla. 1st DCA 2007) (evidence must "convince" JCC). It is fully within the JCC's discretion to "reject evidence, even uncontroverted testimony, which he does not believe." *White v. Bass Pro Outdoor World, LP*, 16 So. 3d 992, 993 (Fla. 1st DCA 2009). Here, the JCC did not believe Dr. Dietzius's testimony that he could attribute the Claimant's heart attack to his risk factors over his work. (R. 618-19.) Substantial, competent evidence supports this decision: Dr. Schimmel had testified that he could not identify with any degree of medical certainty which risk factors, if any, caused the heart attack; that risk factors alone do not cause plaque rupture; that "no one really knows what causes acute coronary thrombosis;" and that there are people with multiple risk factors that never develop heart disease and vice versa, and Dr. Dietzius had testified, contrary to his ultimate opinion on causation, that the cause of plaque

rupture was unknown and that no test could ascertain the cause of the disease. (R. 384, 386-87, 397-98, 481-83.) In fact, as the JCC noted, although Dr. Dietzius's opinion was based on studies of patients in the aggregate, he could not testify that everyone with the Claimant's risk factors would in fact develop heart disease. (R. 481-82.) The JCC acted within its discretion in weighing the evidence and finding the Employer's evidence unpersuasive, and it is not the role of this Court to second guess his findings on appeal.

Second, the Employer's argument—that "there are no work-related causes" for the Claimant's heart attack and that "100% of the causes" of his heart disease are non-work factors—disregards the nature and purpose of the firefighter's presumption. (Initial Br. at 31-34.) The presumption recognizes that firemen are subjected during their career to multiple hazards and extreme anxiety, and that such exposure could result in the development of heart disease and other conditions. *Caldwell v. Division of Retirement, Fla. Dep't of Admin.*, 372 So.2de 438 (Fla. 1979) (superseded by statute on other grounds as stated in *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 50-54 (Fla. 2012)). Thus, "[a] claimant's burden of proving major contributing cause … is fully met where the presumption is applied." *Fuller v. Okaloosa Corr. Inst.*, 22 So. 3d 803, 806 (Fla. 1st DCA 2009). In other words, the presumption recognizes that serving as a fireman is itself a risk factor for heart disease and presumes that working as a fireman is the major contributing cause of

such disease. Requiring the JCC to accept the Employer's evidence as persuasive in the face of contradictory evidence would render the presumption meaningless for firefighters with other cardiac risk factors.

In addition, the presumption "does not vanish in the face of evidence to the contrary;" rather, it "remains with the claimant who establishes his or her entitlement to the presumption and the presumption is itself sufficient to support an ultimate finding of industrial causation." *Punsky*, 18 So. 3d at 582-83. Notably, "[i]f a JCC finds that a claimant is entitled to the presumption even in the face of contrary evidence, the presumption itself can provide the competent, substantial evidence to uphold the JCC's ruling for the claimant." *Id.* at 584. Here, the JCC determined the Claimant was entitled to the presumption despite Dr. Dietzius's testimony that the Claimant's risk factors had risen to the level of actual causative factors. (R. 618-19.) Thus, the presumption itself provides additional competent and substantial evidence to uphold the JCC's findings.

Finally, although the Employer's argument focuses heavily on the Claimant's cardiac risk factors, "the mere existence of risk factors" is not sufficient to rebut the presumption. *Punsky*, 18 So. 3d at 583. There is no dispute the Claimant had multiple risk factors, but, despite the presence of those risk factors, Dr. Schimmel was unable to identify with any degree of reasonable medical certainty which, if any, caused the heart attack. (R. 386.) Dr. Schimmel explained that many people suffer from the

same risk factors as the Claimant and never develop heart disease. (R. 387.) Dr. Dietzius agreed on this point. (R. 482.) Based on this evidence, the JCC did not believe Dr. Dietzius's testimony that the risk factors contributed to his heart attack over his work. (R. 618-19.)The JCC properly upheld the presumption in the face of unpersuasive evidence.

In sum, the JCC acted within his discretion in weighing the evidence and finding the Employer's evidence unpersuasive. Dr. Schimmel's testimony, aspects of Dr. Dietzius's testimony, and the presumption itself provide an evidentiary basis of support for the JCC's finding that the cause of the Claimant's heart attack is unknowable. This Court should affirm the final compensation order on this basis.

Because substantial, competent evidence supports the JCC's determination that the Employer's rebuttal evidence was not persuasive, "it is irrelevant" whether Dr. Dietzius's testimony was sufficient to support a contrary finding by the JCC. *See, e.g., Tradewinds Mfg. Co.*, 541 So. 2d at 668 (if competent and substantial evidence supports the JCC's finding, "it is irrelevant that there is also competent substantial evidence to support a contrary finding"). Thus, this Court need not address the competency of the Employer's evidence. Regardless, for the sake of thoroughness, the Claimant addresses the competency of the Employer's evidence below.

D. The Employer failed to present competent evidence to overcome the presumption.

The Employer contends it provided competent evidence to overcome the statutory presumption and complains about the JCC's determination that it failed to meet either the competent-evidence or the clear-and-convincing standards. (Initial Br. at 25-34.) The Employer's argument fails because competent, substantial evidence supports the JCC's determination that it failed to satisfy either burden of persuasion.

The degree of persuasion required to overcome the firefighter's presumption depends on the circumstances of the case. *Punsky*, 18 So. 3d at 579. If the claimant relies exclusively on the presumption, the employer may rebut that presumption with competent, substantial evidence that is accepted and credited by the JCC. *Id.* at 584. If, however, "there is evidence supporting the presumption that is accepted as credible by the JCC," the employer must present "clear and convincing" evidence in rebuttal. *Punsky*, 18 So. 3d at 584; *accord Johns Eastern Co.*, 137 So. 3d 1058.

The competent, substantial evidence must "convince" the JCC "that the disease was caused by some non-work-related factor." *City of Tarpon Springs*, 953 So. 2d at 599. This Court has held that an employer failed to carry its burden to rebut the firefighter's presumption with competent evidence where the evidence showed that the Claimant's heart disease was caused by a virus, but both doctors had testified

that the source of the virus was unknown. *See Walters v. State, DOC, Div. of Risk Mgmt.*, 100 So. 3d 1173, 1176 (Fla. 1st DCA 2012).

As an initial matter, there is nothing inappropriate about the JCC's utilization of what the Employer describes as a "catch-all" finding. (Initial Br. at 26.) The Employer argued to the JCC that it had satisfied both the competent-evidence and clear-and-convincing standards and thus invited the JCC to make a ruling on both burdens of persuasion. (R. 27.) The Employer cannot now successfully complain about a ruling that it invited the JCC to make. *See Muina v. Canning*, 717 So. 2d 550, 553 (Fla. 1st DCA 1998) *cause dismissed*, 718 So. 2d 169 (Fla. 1998). Moreover, as discussed below, Dr. Dietzius's testimony was not sufficient to overcome the presumption under either burden of persuasion.

Assuming *arguendo* that the lower burden of persuasion applies, substantial, competent evidence supports the JCC's finding that the Employer's rebuttal evidence was not sufficient as competent evidence to overcome the firefighter's presumption. Dr. Dietzius's evidence was not competent because, as the JCC pointed out, it was contradictory. (R. 618-19.) Dr. Dietzius attested that the Claimant's risk factors had risen to the level of actual causative factors. (R. 472-73.) But, consistent with Dr. Schimmel, Dr. Dietzius also attested that everyone with the Claimant's risk factors would not develop heart disease, that the cause of the plaque rupture was unknown, and that no test could determine the cause. (Tr. 483.) The JCC's decision

not to accept the Employer's evidence as sufficient is perfectly logical: because both doctors agreed that the cause of the Claimant's heart attack is unknowable, Dr. Dietzius's contradictory testimony that it is knowable within a reasonable degree of medical certainty is not sufficient as competent evidence to overcome the statutory presumption. *See, e.g., Walters*, 100 So. 3d at 1176 (state failed to rebut presumption where source of virus "not proven and may not be knowable"). There is simply no merit to the Employer's argument that the JCC's order "offers no logical or reasonable explanation as to why 'competent evidence' was not proven." (Initial Br. at 27.)

Likewise, competent, substantial evidence supports the JCC's determination that the Employer's evidence did not meet the standard to constitute major contributing cause. Section 440.09(1), Florida Statutes, defines "major contributing cause" as "the cause which is more than 50 percent responsible for the injury as compared to all other causes combined." The Claimant met his burden of proving major contributing cause by establishing his entitlement to the statutory presumption. *See Fuller*, 22 So. 3d at 806 (presumption satisfies claimant's burden of proving major contributing cause). As such, the Employer was required to "disprove occupational causation by medical evidence" to rebut the presumption. *See id.* (quoted). The Employer failed to do so because it produced only the self-contradictory opinions of Dr. Dietzius. The Employer's argument that it met this

standard by providing evidence that "100% of the causes" are non-work related factors is premised on a misunderstanding of the presumption, see Issue I.C, *supra* at 13-17, and a mischaracterization of Dr. Dietzius's testimony as "uncontradicted."[3] As such, the Employer's argument must fail.

Finally, because the Employer's evidence did not satisfy the lower, competent-evidence standard, it is unnecessary to determine whether the higher standard applies. Regardless, the Claimant disagrees with the Employer's contention that the higher standard is inapplicable. The Claimant presented medical evidence to support the statutory presumption of occupational causation. Specifically, Dr. Schimmel attested that stress could potentially cause a plaque rupture, that it was "unusual" for the Claimant's heart attack to have occurred at the time of day that it did, and that the Claimant's stressful work environment could have provoked acute coronary thrombosis with plaque rupture. (R. 384, 490-91, 406.) The JCC accepted Dr. Schimmel's opinion as persuasive. (R. 619.) Thus, this additional evidence supporting occupational causation provides a basis for application of the clear-and-convincing standard, and the Employer failed to meet this higher burden of

[3]As discussed throughout this brief, Dr. Schimmel's testimony that he was unable to identify with any degree of medical certainty which risk factors, if any, caused the Claimant's heart attack obviously contradicted Dr. Dietzius's testimony that he could. And, although the Employer claims Dr. Dietzius's testimony that "stress" is not a risk-factor for coronary heart was also uncontradicted (Initial Br. at 32), that testimony is contradicted both by the presumption and by Dr. Schimmel's testimony that the stressful environment could have provoked the Claimant's plaque rupture.

persuasion for the same reason it failed to meet the lower, competent-evidence burden.

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The Employer has not preserved for appellate review its argument that the JCC failed to apply the correct burden of proof. Moreover, although packaged as an issue of statutory interpretation, the Employer's first argument asks this Court to reweigh Dr. Dietzius's testimony and make an independent determination as to its proper weight. The Employer asks too much. This Court's role is limited to determining whether there is an evidentiary basis of support for the JCC's decision. Because competent and substantial evidence supports the JCC's determination that the Employer failed to rebut the statutory presumption, this Court must affirm the final compensation order.

Even if this Court were to consider and accept the Employer's first argument, which it should not, the Employer asks for an inappropriate remedy. The Employer asks this Court to enter an order "finding that the [Employer] satisfied the elements of F.S. §112.18 and presented competent evidence." (Initial Br. at 23.) However, if the Court concludes the JCC applied an incorrect burden, it should instead remand this case to the JCC for application of the appropriate standard. *See, e.g., Johns Eastern Co.* , 137 So.3d at 1059 (remanding for application of appropriate burden of proof).

II. Competent, substantial evidence supports the JCC's acceptance of Dr. Schimmel's opinion.

The Employer's second issue on appeal presents a reiteration of its first argument. This Court should affirm the JCC's acceptance of Dr. Schimmel's opinion on causation for the reasons previously discussed. The Claimant separately addresses the specific arguments raised in the Employer's second issue and discusses additional bases for affirmance, along with the proper standard of review, below.

A. The issue is not preserved for appeal.

The Employer argues the JCC overlooked or ignored portions of Dr. Dietzius's testimony. (Initial Br. at 36-43.) This alleged error did not appear until issuance of the final order. Yet, as discussed in Issue I.A., *supra* at 10-11, the Employer failed to file a motion for rehearing to give the JCC an opportunity to address the perceived error in the first instance. Consequently, the Employer has also failed to preserve its second issue for appeal to the extent it claims the JCC overlooked record evidence. *See Verkruysse*, 27 So. 3d at 159 (an objection to an error that "appears for the first time in a JCC's final order … must be preserved by filing a motion for rehearing on the issue").

B. This issue is not subject to *de novo* review.

The Claimant again disagrees with the Employer's asserted standard of review. The Employer contends *de novo* review is appropriate because this Court "is not in an inferior position to that of the JCC" in interpreting medical evidence

presented by deposition. (*See* Initial Br. at 35 (citing *H & A Frank's Const., Inc. v. Mendoza*, 582 So. 2d 780, 781-82 (Fla. 1st DCA 1991); *Skip's Shoes & W. Boots v. Green*, 578 So. 2d 439 (Fla. 1st DCA 1991))). The cases cited by the Employer do not undermine the general standard of review applicable to JCC findings; in fact, neither case references a "*de novo*" standard of review. *See H & A Frank's Const., Inc.*, 582 So. 2d at 782 (reviewing to determine whether there is articulable support and a rational basis for the JCC's conclusion); *Skip's Shoes and Western Boots*, 578 So. 2d at 441. More importantly, this Court has since rejected the suggestion that it may "undertake an independent review of the medical evidence presented by deposition in a workers' compensation case" and reaffirmed the proposition that "the resolution of medical conflict is within the fact-finding authority of the JCC." *See Chavarria v. Selugal Clothing, Inc.*, 840 So. 2d 1071, 1081 (Fla. 1st DCA 2003). Thus, the JCC's acceptance of one physician's testimony over that of another is reviewed only to determine "whether competent substantial evidence *supports* the decision below, *not* whether it is possible to recite contradictory record evidence which supported the arguments rejected below." *Wintz v. Goodwill*, 898 So. 2d 1089, 1093 (Fla. 1st DCA 2005) (quoting *Mercy Hosp. v. Holmes*, 679 So. 2d 860, 860 (Fla. 1st DCA 1996)).

C. Competent, substantial evidence supports the JCC's acceptance of Dr. Schimmel's testimony.

The JCC may "accept the testimony of one physician over several others." *City of W. Palm Beach Fire Dept. v. Norman*, 711 So. 2d 628, 629 (Fla. 1st DCA 1998). The JCC is not required to explain why he did so as long as it does not appear that he ignored or overlooked the rejected opinion testimony. *Chavarria*, 840 So. 2d at 1078-79. To that point, the statutory procedures governing the JCC provide that "[t]he order making an award or rejecting the claim … shall set fort the findings of ultimate facts and the mandate; and the order need not include any other reason or justification for such mandate." § 440.25(4)(e), Fla. Stat.; *accord Chavarria*, 840 So. 2d at 1080-81. However, "the JCC who is thorough enough to note reasons for acceptance of certain medical testimony will make clear that he or she had not simply ignored contrary opinions." *Chavarria*, 840 So. 2d at 1082.

The JCC did not overlook or ignore Dr. Dietzius's testimony. The JCC described the testimony of both doctors, including Dr. Dietzius's testimony that the Claimant suffered from multiple cardiac risk factors and his rejected testimony that

those risk factors had risen to the level of actual causative factors. (R. 614-17.)[4] The JCC then accepted Dr. Schimmel's testimony as more persuasive than Dr. Dietzius's testimony regarding the cause of the Claimant's heart disease. (R. 618-19.) And, although he was not required to do so, the JCC explicitly stated his reasons for doing so in in his order: Dr. Dietzius's ultimate opinion on causation was less persuasive because he also testified that no test could determine a cause for the Claimant's plaque rupture, that not everyone with the same risk factors as the Claimant would develop the plaque buildup, and that the cause of the plaque rupture was unknown. (R. 614-15; 618-19.) The JCC's thoroughness in describing and weighing the medical evidence "make[s] clear that he … had not simply ignored contrary opinions." *See Chavarria*, 840 So. 2d at 1082 (quoted).

Moreover, the JCC's stated reasons are logical and supported by articulable facts in the record. Dr. Dietzius's testimony that not everyone with the Claimant's

[4] The Employer faults the JCC for not specifically identifying three portions of Dr. Dietzius's testimony: the Claimant's risk factors contribute to his heart disease over his work; the major three risk factors for coronary disease are high cholesterol, diabetes, and family history; and Dr. Dietzius did not believe the Claimant's heart disease was a work-related issue. (Initial Br. at 36-38.) As discussed above, the JCC did not overlook or ignore this evidence. Regardless, even if he did, the evidence would not warrant reversal and remand because it would not "change the outcome of the case." *See Miami-Dade County v. Mitchell*, 159 So. 3d 172, 173 (Fla. 1st DCA 2015), *reh'g denied* (Mar. 6, 2015). There was never any dispute that the Claimant suffered from multiple cardiac risk factors, and Dr. Dietzius's testimony that the Claimant's heart disease was not work-related and that the risk factors contributed to his heart disease over his work was cumulative to his testimony that the risk factors had risen to the level of actual causative factors, which the JCC acknowledged.

risk factors would develop plaque buildup was consistent with Dr. Schimmel's testimony that people with multiple cardiac risk factors do not necessarily develop heart disease. (R. 616-17.) Likewise, Dr. Dietzius's testimony that the cause of the plaque rupture was unknown and that no test could determine a cause for the plaque rupture was consistent with Dr. Schimmel's testimony that no one really knows what causes a heart attack. (R. 616-17.) In other words, portions of Dr. Dietzius's testimony in fact supported Dr. Schimmel's ultimate opinion on causation. Thus, the JCC's stated reasons for finding Dr. Schimmel's opinion more persuasive are perfectly logical.

Because there is an evidentiary basis to support the JCC's stated reasons for accepting Dr. Schimmel's opinion over Dr. Dietzius's opinion, it is irrelevant whether it is also "possible to recite contradictory record evidence which supported the arguments rejected below." *See Wintz*, 898 So. 2d at 1093 (quoted). Regardless, the Employer's attempts to do so are unavailing. Much of the Employer's argument conflates risk factors with causation. For example, the Employer contends Dr. Schimmel's testimony that he could not determine whether the risk factors caused the Claimant's heart disease is inconsistent with his testimony that genetics and smoking could cause heart disease. (R. 397.) However, Dr. Schimmel was merely acknowledging the unsurprising fact that smoking and genetics are cardiac risk factors, not that a smoker or individual with a family history would definitively

develop heart disease. (R. 397.) Likewise, the fact that Dr. Schimmel did not review the records of the Claimant's treating physician does not undermine his testimony because Dr. Schimmel was well aware of the Claimant's medical history, including his treatment for diabetes, high cholesterol, and hypothyroidism; his "strongly positive history of premature coronary disease;" and the fact that he had a smoking habit but had quit 32 years ago. (R. 381, 404-06.) No one disputed that the Claimant had multiple risk factors, and that those risk factors could cause heart disease. The problem with the Employer's argument is that the undisputed existence of these risk factors is not enough to rebut the presumption. *Punsky*, 18 So. 3d at 583.

The Employer also attempts to undermine the JCC's crediting of Dr. Schimmel's opinion by claiming he "misdiagnosed the [Claimant] as having hypertension which was rejected by the JCC." (Initial Br. at 41, 42.) The JCC's finding regarding hypertension is not an issue in this appeal. Regardless, a review of Dr. Schimmel's testimony indicates he merely observed the Claimant was diagnosed with hypertension on the day of the heart attack, and that it "may have been a reaction to the pain he was having." (R. 395, 405). His observation was consistent with Dr. Dietzius's testimony that acute pain may result in elevated blood pressure and provides no basis to contradict the JCC's findings on heart disease.

Finally, the Employer contends the JCC's crediting of Dr. Schimmel's testimony was illogical because, unlike Dr. Dietzius, Dr. Schimmel did not reference

authoritative texts or treatises, and because "Dr. Dietzius testified in a more clear and emphatic manner." (Initial Br. at 40-43.) The Employer overlooks the fact that experts are precluded from bolstering their testimony with treatises or texts, and that statements from such treatises or texts may not be used as substantive evidence. *See, e.g.*, *Duss v. Garcia*, 80 So. 3d 358, 364 (Fla. 1st DCA 2012). Thus, that Dr. Schimmel did not reference treatises or texts to bolster his opinion—and that Dr. Dietzius did—does not contradict the JCC's findings. Further, regardless of whether Dr. Dietzius's testimony was "clear" or "emphatic," it was not consistent or persuasive. The JCC acted within his discretion in determining credibility, resolving conflicts in the evidence, and accepting the testimony of Dr. Schimmel over Dr. Dietzius.

***

The Employer has not preserved for appellate review its contention that the JCC overlooked or ignored record evidence and it again misconstrues this Court's role in reviewing the JCC's order. The only question for this Court is whether competent, substantial evidence supports the JCC's acceptance of Dr. Schimmel's testimony over Dr. Dietzius's testimony. The answer is yes. The JCC's reasons for rejecting Dr. Dietzius's causation opinion accord with logic and reason: because both doctors suggested the cause of the Claimant's heart attack is unknowable, Dr. Dietzius's contradictory testimony that it is knowable within a reasonable degree of

medical certainty is not persuasive or sufficient as competent evidence to overcome the statutory presumption. It is thus irrelevant whether there is contradictory record evidence that could support the arguments rejected below.

Even if this Court were to consider and accept the Employer's second argument, which it should not, the appropriate remedy would not be to enter an order "finding that the [Employer] satisfied the elements of F.S. §112.18 and presented competent evidence." (Initial Br. at 23.) Rather, the Court would be required to remand the case for further proceedings to give the JCC an opportunity to reconsider any evidence he overlooked or ignored. *See, e.g., Miami-Dade County v. Mitchell*, 159 So. 3d 172, 173 (Fla. 1st DCA 2015), *reh'g denied* (Mar. 6, 2015) ("Where it is demonstrated that the JCC overlooked or ignored evidence, which if considered by the JCC could change the outcome of the case, the proper remedy is reversal and remand for consideration of this evidence.").

III. Competent, substantial evidence supports a determination that there is an occupational cause for the Claimant's heart disease.

The Employer argues there is no finding or evidence reflecting proof of an occupational cause. (Initial Br. at 44.) The Employer is wrong. The presumption itself operates to establish an occupational cause for the Claimant's heart disease. *See Fuller*, 22 So. 3d at 806 ("A claimant's burden of proving major contributing cause … is fully met where the presumption is applied."). However, if this Court accepts the Employer's previous arguments that the JCC applied an incorrect burden

of proof or overlooked record evidence, it should not also conclude that the Claimant failed to establish occupational causation. Rather, as discussed *supra* at 22-23, 30, the proper remedy would be for this Court to remand the case to the JCC to give him an opportunity to apply the correct burden of proof and/or reconsider any evidence he overlooked or ignored. *See Johns Eastern Co.*, 137 So. 3d at 1059 (remanding for application of appropriate burden of proof); *Miami-Dade Cnty.*, 159 So.3d at 173 (remanding to consider evidence overlooked by the JCC that could have changed the outcome of the case)

IV. This Court lacks jurisdiction to review the JCC's award of attorney's fees.

The Employer contends that, because the JCC's final order should be reversed, the JCC also erred as a matter of law by awarding attorney's fees and reserving jurisdiction to determine the entitlement and amount of taxable costs. (Initial Br. at 45.) The JCC awarded the Claimant attorney's fees but reserved jurisdiction to determine the amount of fees. (R. 620.) The JCC also reserved jurisdiction to determine both entitlement and the amount for reimbursement of taxable costs. (R. 620.) This portion of the JCC's order is non-final; thus, this Court lacks jurisdiction to review it. *See Polk County Bd. of County Commissioners v. Lyon-Spires*, 85 So. 3d 582 (Fla. 1st DCA 2012) (memorandum opinion) (citing cases).

Regardless, the JCC's award of attorney's fees to the Claimant is correct because the Employer prevailed on compensability in a proceeding in which the Employer denied that an accident occurred. § 440.34(3), Fla. Stat. (2014). The Employer has not argued the Claimant failed to meet the statutory exceptions for payment of his attorney's fees set forth in section 440.34, Florida Statutes, and has thus waived any argument in that regard. *See F.M.W. Properties, Inc. v. Peoples First Fin. Sav. & Loan Ass'n*, 606 So. 2d 372, 377 (Fla. 1st DCA 1992) (appellate court will not consider issues not set forth as points on appeal).

CONCLUSION

This Court should affirm the final compensation order and dismiss for lack of jurisdiction the portion of the appeal challenging the award of attorney's fees and costs.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing has been furnished via email this 25th day of April, 2016 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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