ESTATE OF GREGORY SULLWOLD
(Appellee)

v.

THE SALVATION ARMY
(Appellant)

and

CHESTERFIELD SERVICES, INC.
(Insurer)

Decided: November 8, 2013
Argued: July 12, 2013

EN BANC PANEL MEMBERS:

Majority: Hearing Officers Elwin, Collier, Goodnough, Jerome, Pelletier, and Stovall
Dissent: Hearing Officer Greene

BY: Hearing Officer Elwin

[¶1] The Salvation Army appeals from a decision of a Workers' Compensation Board hearing officer (*Knopf, HO*) granting the Estate of Gregory Sullwold benefits pursuant to 39-A M.R.S.A. §§ 215, 216 (2001 & Supp. 2012). The Salvation Army contends that the hearing officer erred (1) by applying the statutory presumption set forth in 39-A M.R.S.A. § 327 (2001) that Mr. Sullwold's death was work-related, and (2) when applying the presumption, by improperly shifting the burden of proof on the issue of work-relatedness to the Salvation Army pursuant to *Hall v. State*, 441 A.2d 1019 (Me. 1982). We conclude that *Hall*

remains good law even after the 1992 reform to the Workers' Compensation Act, and that the hearing officer did not err when applying the presumption. Accordingly, we affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Gregory Sullwold died of a heart attack in his home in Brunswick on February 23, 2010, at age 62. He had been married to Carla Sullwold for 41years. At the time of his death, he was working for the Salvation Army as portfolio specialist and comptroller, overseeing the financial interests of the eastern territory. He worked at the Salvation Army's Manhattan location until 2009, when he relocated to Brunswick where he worked from a home office. The Salvation Army supplied Mr. Sullwold with necessary equipment to work at home, including a computer and a smart phone.

[¶3] During his tenure with the Salvation Army, from 1988 until 2010, the eastern territory's assets increased in approximate value from one billion dollars to two and one-half billion dollars. His duties included managing those assets in conjunction with the investment committee and a consulting company, securing debt financing, managing a sizable endowment from a prominent charitable foundation, overseeing an endowment for six community centers, and reforming the Salvation Army's pension structure.

[¶4] Mr. Sullwold typically began working early in the day and worked well into the evening, checking e-mails and news on world markets. The hearing officer found that he was under "extraordinary and relentless stress" in performing his duties that was increased by unpredictable events, including the September 11, 2001 attack on the World Trade Center (which resulted in a flood of contributions) and the economic downturn of 2008 (which had a severe, detrimental effect on the Salvation Army's finances). He repeatedly asked the Salvation Army to hire an employee who would assist him with his workload and be groomed to replace him upon his retirement, but none was hired. Three of Mr. Sullwold's coworkers corroborated that his work life was unusually stressful.

[¶5] Mr. Sullwold had a history of heart problems. After a heart attack in 1993, he received periodic medical treatment for underlying coronary artery disease and atherosclerosis. Thereafter, he exercised regularly, frequently walking on a treadmill at a pace that allowed him to work while walking. In the weeks or months leading up to his fatal heart attack, Mr. Sullwold experienced increasing symptoms, including chest pain and shortness of breath during mild exercise. Nonetheless, with the exception of trying to reduce his travel schedule, Mr. Sullwold maintained his usual work habits without significant complaint to medical providers.

[¶6] On February 23, 2010, Mr. Sullwold began his work day at approximately 8:30 a.m. in his home office. Phone records confirm that he had a number of communications throughout the day. At approximately 3:30 in the afternoon, he took a break to walk on his treadmill; he had his smart phone with him. Just after 4:00 p.m., Ms. Sullwold discovered her husband unconscious on the floor with his smart phone next to him and the treadmill still running. The television was on and tuned to a financial news program. He had suffered a fatal heart attack.

[¶7] The Estate filed a petition for award pursuant to 39-A M.R.S.A. §§ 215 and 216. The hearing officer applied the rebuttable presumption available to claimants "when the employee has been killed or is physically or mentally unable to testify," that "the claimant received a personal injury that arose out of and in the course of employment." 39-A M.R.S.A. § 327. Determining that the Salvation Army failed to rebut the presumption, the hearing officer granted the petition. The Salvation Army filed a motion for additional findings of fact and conclusions of law. The hearing officer issued additional findings without altering the decision, then requested that the full Board review the decision pursuant to 39-A M.R.S.A. § 320 (Supp. 2012).[1] The full Board declined to review the decision.

[1] Title 39-A M.R.S.A. § 320 (Supp. 2012) has since been amended. P.L. 2013, ch. 63, § 12 (effective October 9, 2013).

[¶8] The Salvation Army then filed both an appeal to the newly-reformed Appellate Division, and a petition for appellate review to the Law Court. By decision dated March 12, 2013, the Law Court denied the petition, *Estate of Gregory Sullwold v. The Salvation Army*, 2013 ME 28, 63 A.3d 1061, and the appeal proceeded in the Appellate Division. The Executive Director of the Workers' Compensation Board determined that the issues presented on appeal warranted consideration by an *en banc* panel of the Appellate Division pursuant to Me. W.C.B. Rule, ch.13, § 2(1)(C).

II. DISCUSSION

[¶9] The Salvation Army contends that the hearing officer erred first, by applying the section 327 presumption in this case because the Estate failed to establish the prerequisite for its application—a link between the employee's death and the employment—and second, by shifting the burden of proof to the employer to disprove the facts established by the presumption pursuant to *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982).

A. Standard of Review

[¶10] The Appellate Division's role on appeal is "limited to assuring that the [hearing officer'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). The hearing officer's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2012). To the extent we must construe provisions of the Workers' Compensation Act, "our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id.* We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.*, 507 A.2d 581, 583 (Me. 1986).

B. Does the Presumption in 39-A M.R.S.A. § 327 apply?

[¶11] Title 39-A M.R.S.A. § 327 provides:

> In any claim for compensation, when the employee has been killed or is physically or mentally unable to testify, there is a rebuttable presumption that the employee received a personal injury arising out of and in the course of employment, that sufficient notice of the injury has been given and that the injury or death was not occasioned by the willful intention of the employee to injure or kill the employee or another.

The Law Court has described the presumption as serving

> a relatively unique function. Because it bears on "arising out of and in the course of his employment," it concerns not the existence of a single readily perceptible fact but rather relates to an ultimate, and somewhat complex, legal conclusion which, generally, is reached by evaluating the combined effect of an aggregate of subsidiary facts. For this reason, in the present context any single fact which the

> employer's presentation of countervailing evidence may indicate will tend to have much less impact than it would were we concerned with the effect of a presumption concerning the existence, or non-existence, of a particular fact more readily capable of being proved by direct perceptions.

Toomey v. City of Portland, 391 A.2d 325, 332 (Me. 1978).

[¶12] In *Toomey*, the Law Court construed the precursor to section 327,[2] which contained nearly identical language, to establish two expressed and one implied prerequisites for application of the presumption. The expressed prerequisites are: "(1) an incident which causes the employee to be killed or otherwise made physically or mentally unable to testify in aid of (2) a pending claim for compensation relating to that incident." *Id*. at 330. The implied prerequisite, which the Court referred to as "linkage," requires evidence

> of circumstances which indicate that the bringing of a claim for compensation is a rational act—that is, that the incident to which the claim relates has some rational potential of eventuating in an award of compensation when it is deemed supplemented by testimony which, within reasonable limits, may be conceived as potentially forthcoming from the employee were the employee available as a witness.

Id. at 332.

[2] Title 39 M.R.S.A. § 64-A, first enacted pursuant to P.L. 1965, ch. 408, § 7 (effective Nov. 30, 1965), provided:

> In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify, there shall be a rebuttable presumption that the employee received a personal injury arising out of and in the course of his employment, that sufficient notice of the injury has been given, and that the injury or death was not occasioned by the willful intention of the employee to injure or kill himself or another.

[¶13] In this case, the hearing officer determined that the Estate established all three prerequisites, and concluded that the presumption should apply because:

> (1) Mr. Sullwold suffered a heart attack from which he succumbed and is unable to testify; (2) Ms. Sullwold has filed a claim for benefits arising from his death; and (3) there is a rational potential for award given the facts in this case, as a matter of law. That rational potential is born of the fact that Mr. Sullwold's heart attack occurred during normal work hours, in a place sanctioned by the Army for work, and perhaps while he was conducting business on his [smart phone] while walking on his treadmill.

[¶14] The Salvation Army contends that the record does not support the determination that the required linkage exists. Instead, it asserts that the evidence shows only that the employee was taking a break to exercise on his treadmill and that his cell phone was nearby. For the linkage to exist, however, the claimant does not have to prove that the fatal injury arose out of and in the course of employment—that is the function of the presumption itself. The claimant must merely establish that the evidence, when supplemented by testimony that reasonably could be conceived as forthcoming from the employee were he available, could potentially result in an award.

[¶15] In addition to the findings that Mr. Sullwold's heart attack occurred during normal work hours in a place sanctioned by the Salvation Army for work, the hearing officer also found as fact that Mr. Sullwold frequently walked on the treadmill, "at a pace that allowed him to work while walking," and that as part of his work day, he watched financial news programs to keep abreast of world

markets. She also found that he "was under extraordinary and relentless stress in performing his duties." Given these factual findings, it is reasonably conceivable that if Mr. Sullwold had been available as a witness, he would have testified that he was engaged in work-related duties at the time of the heart attack, either conducting business on his smart phone or watching a financial news program, and that he had been under significant work stress for a long time. Accordingly, the hearing officer did not err when determining that the required linkage existed and by employing the section 327 presumption for the Estate's benefit.

C. Does the section 327 Presumption Shift the Burden of Proof?

[¶16] The Salvation Army argues that the hearing officer erred by applying the section 327 presumption in a manner that shifted the burden of proof to the employer pursuant to *Hall v. State*, 441 A.2d 1019, and M.R. Evid. 301(a), and contends that the hearing officer should have placed a mere burden of production on the employer pursuant to *Toomey*, 391 A.2d 325. Even though the hearing officer expressly stated that she was applying the *Toomey* standard, and that her "findings and conclusions were based on the presumption included in the Act itself, specifically § 327, not the rules of evidence," the Salvation Army contends that the hearing officer, in fact, applied *Hall*.

[¶17] Under the *Hall* approach, when the presumption applies, an employer must affirmatively prove the nonexistence of the presumed facts; i.e. that it is *more*

probable than not that that presumed facts did not exist. 441 A.2d at 1021. Pursuant to the *Toomey* decision, an employer is required to adduce evidence which, if believed, is sufficient to make it *as probable that the presumed facts did not exist as that they did exist*, at which point the effect of the presumption is negated and the claimant would have to affirmatively prove all elements of the claim. 391 A.2d at 332 n.7; *see also Hinds v. John Hancock Mutual Life Ins. Co*., 155 Me. 349, 363-64, 155 A.2d 721 (1959) (superseded by Rule as noted in *Poitras v. R.E. Glidden Body Shop, Inc*., 430 A.2d 1113, 1119 n. 1 (Me. 1980)); *Metcalf v. Marine Colloids, Inc.*, 285 A.2d 367, 368 (Me. 1972).

[¶18] When the Law Court decided the *Toomey* case, neither the statute nor the Board's rules required that the rules of evidence be applied in Board proceedings. By the time of the *Hall* decision in 1982, however, the Workers' Compensation Board had promulgated a rule making the rules of evidence applicable. Me. W.C.C. Rule 15 (effective August 31, 1981 to Jan. 8. 1993; renumbered in 1984 as Rule 22.5 and in 1985 as Rule 22.7). When applying the presumption in *Hall*, the Court followed M.R. Evid. 301(a), which directs that an evidentiary presumption "impose[s] on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

[¶19] As part of the 1992 reform of the Workers' Compensation Act, *see* P.L. 1991, ch. 885, §§ A-7, A-8 (effective Jan. 1, 1993), the Legislature enacted 39-A M.R.S.A. § 309(2), which provides that "[t]he board or its designee need not observe the rules of evidence observed by courts[.]"[3] The Salvation Army contends that the rule articulated in *Hall* did not survive the enactment of section 309(2) because it is based on a rule of evidence and that the hearing officer should have reverted to the rule stated in *Toomey*.

[¶20] We agree with the Salvation Army that when enacting section 309(2), the Legislature called into question whether hearing officers must continue to follow M.R. Evid. 301(a) when applying the section 327 presumption. The plain language of section 309(2), stating that "the board or its designee *need not* observe the rules of evidence observed by courts," expresses a legislative intention to allow the Board an additional degree of flexibility in the conduct of its proceedings. The Law Court has likewise recognized a legislative intent to delegate broad authority to the Board to interpret the Act, either by rule or through its decision-making authority when the statutory language is ambiguous. *See Bridgeman v. S.D. Warren Co.,* 2005 ME 38, ¶ 11, 872 A.2d 961; *Jasch v. Anchorage Inn,* 2002 ME

[3] Title 39-A M.R.S.A. § 309(2) (Supp. 2012) provides:

> The board or its designee need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. The board or its designee shall admit evidence if it is the kind of evidence on which reasonable persons are accustomed to relying in the conduct of serious affairs. The board or its designee may exclude irrelevant or unduly repetitious evidence.

106, ¶ 9, 799 A.2d 1216; *see also Russell v. Russell's Appliance Serv*., 2001 ME 32, ¶ 10 n.3, 766 A.2d 67.

[¶21] In light of that flexibility and authority to interpret the Act, we conclude that although section 309(2) no longer requires us to apply Rule 301(a) when applying the section 327 presumption, it plainly does not prohibit us from doing so. Further, we conclude that because the holding in *Hall* was known to the Legislature when it amended the Act in 1992, and the language of section 327 remained unchanged, *Hall* remains good law. *Cf. Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 10, 847 A.2d 1169. We are persuaded that the burden-shifting approach followed in *Hall* is the better approach by the reasoning articulated in the Advisory Note following Rule 301(a):

> [The *Toomey* rule] involves the logical impossibility of treating a presumption as evidence to be balanced against other evidence when it is not evidence at all but a rule about evidence. The difficulties . . . are enhanced because it does not take into account the different types of presumptions. Most presumptions are grounded upon an inference; that is, a deduction of fact that may logically and reasonably be drawn from another fact or group of facts. Evidence of these underlying facts can be balanced against evidence of contrary facts. It is not helpful, however, to say that the presumption persists to the point of equilibrium.

[¶22] Accordingly, we now clarify that even after the enactment of section 309(2), when section 327 is invoked and is determined to be applicable, the burden of persuasion shifts to the party against whom the presumption is directed to negate

the facts established by the presumption. If the hearing officer did, as the Salvation Army contends, choose to follow the *Hall* standard, she committed no error.

C. Did the Hearing Officer Err when Applying the Section 327 Presumption?

[¶23] To defeat the presumption, the Salvation Army was required to establish and to persuade the hearing officer that it was more probable than not that the injury did not arise out of and in the course of employment.

> "[I]n the course of" employment relates to the time, place, and circumstances under which an injury occurs, the place where the employee reasonably may be in performance of the employee's duties, and whether it occurred while fulfilling those duties or engaged in something incidental to those duties. . . . "[A]rising out of" employment means that there must be some causal connection between the conditions under which the employee worked and the injury, or that the injury, in some proximate way, had its origin, its source, or its cause in the employment.

Standring v. Town of Skowhegan, 2005 ME 51, ¶ 10, 870 A.2d 128; *see also Comeau v. Maine Coastal Servs.*, 449 A.2d 362, 366 (Me. 1982). In cases involving aggravation of a pre-existing medical condition, it must be shown as a matter of legal causation that the work generated a risk "substantially in excess of that to which people not so employed are exposed on a normal, non-employment day." *Wescott v. S.D. Warren*, 447 A.2d 78, 80 (Me. 1982); *see also Bryant v. Masters Machine Co.*, 444 A.2d 329, 337 (Me. 1982).

[¶24] The Salvation Army submitted voluminous evidence in support of its position that Mr. Sullwold's death did not arise out of and in the course of

employment, including evidence that he had a previous heart attack; that he had a family history of heart problems; that he had a prior unsuccessful angioplasty; and that he experienced recent cardiac symptoms. It also provided a medical opinion from Dr. Shaw stating that the heart attack was not brought on by work stress but by the impact of exertion from the treadmill activity on the pre-existing cardiac condition. Finally, the Salvation Army asserts that the evidence showed that Mr. Sullwold had changed his clothes and was taking a break from work when he was on the treadmill engaged in non-work related activity, and contends that the mere proximity of the smart phone does not establish that he was working.

[¶25] The hearing officer ostensibly applied *Toomey* and pursuant to that case was not persuaded that these facts were sufficient even to place the evidence in equilibrium. If she had actually applied the *Hall* standard, as the Salvation Army suggests, we must conclude that she was likewise not persuaded under that stricter standard that these facts made it more likely than not that Mr. Sullwold's death did not arise out of and in the course of employment.

[¶26] In her assessment of the evidence, the hearing officer credited the medical opinion from Dr. Minton[4] that Mr. Sullwold experienced chronic and

[4] The dissent would vacate the hearing officer's decision because (among other reasons) it would conclude that Dr. Minton's testimony is not competent to prove that work-related stress contributed to Mr. Sullwold's death under the standard for admissibility of scientific evidence set forth in *Searles v. Fleetwood Homes of Pa.*, 2005 ME 94, ¶¶ 22-23, 878 A.2d 509. Dr. Minton's medical findings and opinions were subjected to full and fair cross-examination by the Salvation Army, and the Salvation Army did not raise any issues related to the admissibility of this evidence on appeal. Dr. Minton's

relentless stress at work that contributed significantly to and exacerbated his underlying cardiac condition, resulting in his death. She expressly found Dr. Minton's medical opinion to be more persuasive than that of Dr. Shaw. In addition, she found that the heart attack occurred at Mr. Sullwold's normal workplace during his work day, and he was watching financial programs to keep abreast of market news while on the treadmill. *See Wescott*, 447 A.2d at 81 (holding evidence sufficient to conclude that deceased employee's work activities, which were physical in nature, precipitated and accelerated the onset of his myocardial infarction without resort to the presumption, despite proof that the employee had a pre-existing heart condition).

[¶27] The hearing officer considered the evidence presented by the Salvation Army, weighed that evidence against the countervailing evidence, and concluded that the Salvation Army did not rebut the presumption that Mr. Sullwold's death arose out of and in the course of employment. She does not appear to have shifted the burden of proof to the Salvation Army, as required by *Hall*. We nevertheless find no error because, having been held to a less stringent standard, we cannot conclude that the Salvation Army was harmed by this approach.

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qualifications to give a medical opinion on the cause of death have not been questioned. Because the issue of admissibility of scientific evidence is not before us, we do not address it further. *See Holland v. Sebunya*, 2000 ME 160, ¶ 9 n.6, 759 A.2d 205, 209 ("The failure to mention an issue in the brief or at argument is construed as either an abandonment or a failure to preserve that issue.").

III. CONCLUSION

[¶28] In conclusion, (1) the hearing officer did not err when determining that the presumption found in 39-A M.R.S.A. § 327 applied in this case; (2) the Law Court's decision in *Hall v. State*, 441 A.2d 1019, remains good law; and (3) any error in the hearing officer's application of the presumption did not harm the employer by affecting the result. *See Wescott*, 447 A.2d at 81.

The entry is:

The hearing officer's decision is affirmed.

Hearing Officer Greene, dissenting

[¶29] I respectfully dissent. For the reasons that follow, I would conclude that the hearing officer erred both when choosing to and when applying the presumption set forth in title 39-A M.R.S.A. § 327 (2001). I also disagree with the majority's conclusion that *Hall v. State*, 441 A.2d 1019 (Me. 1982) remains good law after the 1992 revision of the Workers' Compensation Act. Finally, because unlike the majority I conclude that the hearing officer erred in applying the presumption, I reach the additional question of whether this error was harmless and conclude that, in the absence of the presumption, the petitioner did not meet her burden of proving medical causation by competent evidence. Accordingly, I would vacate the hearing officer's decision.

I. BACKGROUND

[¶30] On February 23, 2010, Gregory Sullwold died of a heart attack due to long-standing atherosclerotic cardiovascular disease. Although he worked at home, his death occurred while he was using a treadmill on a break from work.

[¶31] The hearing officer concluded that Mr. Sullwold's death "result[ed] from" a compensable work injury, thus entitling the petitioner, Carla Sullwold, to death benefits pursuant to 39-A M.R.S.A. §§ 215 & 216 (2001). The hearing officer based her decision on the opinion of Dr. Minton, a cardiovascular medicine specialist retained by Ms. Sullwold. She made findings based on Dr. Minton's report, that "Mr. Sullwold's chronic work stress significantly accelerated his underlying coronary atherosclerosis and CAD (coronary artery disease), resulting in sudden cardiac death at age [62] due to acute coronary syndrome while at work in his home office" and that "chronic work stress played a major role in Mr. Sullwold's death."

II. DISCUSSION

[¶32] The Salvation Army argues that the hearing officer erred when determining that the rebuttable presumption of compensability found in 39-A M.R.S.A. § 327 applies in this case,[5] and in the manner in which the presumption

[5] It is unclear from the hearing officer's decision whether she actually relied on the section 327 presumption, even though she purports to conclude that it was applicable. The hearing officer characterized the evidence presented by Ms. Sullwold as "ample," convincing," and "persuasive,"

was applied—shifting the burden of proof to the Salvation Army. I would agree with the Salvation Army's contentions. Furthermore, I would find that any error in the application of the presumption was not harmless because without the presumption Ms. Sullwold did not meet her burden of proof. *See Wescott v. S.D. Warren*, 447 A.2d 78, 81 (Me. 1982) (not addressing the employer's contention that the presumption was improperly applied where it was clear from the language of the decree that the Commissioner did not rely on the presumption). The evidence she submitted was incompetent to establish that the injury arose out of and in the course of employment.

A. The section 327 presumption does not apply.

[¶33] Title 39-A M.R.S.A. § 327 provides:

> In any claim for compensation, when the employee has been killed or is physically or mentally unable to testify, there is a rebuttable presumption that the employee received a personal injury arising out of and in the course of employment, that sufficient notice of the injury has been given and that the injury or death was not occasioned by the willful intention of the employee to injure or kill the employee or another.

[¶34] Thus far, the Law Court has applied the presumption of compensability in former 39 M.R.S.A. § 64-A, identical to current section 327, only in cases where the immediate medical cause of death was clear, leaving only the question whether there were any precipitating work activities or stimuli—

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indicating that she weighed the evidence. However, assuming that the hearing officer relied on the presumption, I would conclude that she did so incorrectly.

information that the employee might have been capable of providing. For example, the presumption was noted potentially to apply when employees were found dead or unconscious without signs of obvious physical trauma at their place of work, *Weeks v. State*, 389 A.2d 325, 327 (Me. 1978) (nevertheless determining that the employee met the burden of proof without application of presumption), or shortly after leaving work, *Wescott*, 447 A.2d at 81 (same). In *Freeman v. Co-hen Egg Co.*, 430 A.2d 1107, 1108 (Me. 1981), the Court held that the presumption was properly applied in the case of an employee who was found dead, from what was later determined to be heart failure, inside a hen house near where he had been spray-painting for the employer.

[¶35] The presumption also has been applied in cases involving external physical trauma. *See Metcalf v. Marine Colloids, Inc.*, 285 A.2d 367, 369 (Me. 1972) (holding presumption rebutted where employee was found unconscious on employer's warehouse floor near bales of peat moss after engaging in risky nonwork-related activity, and later died from traumatic injuries); *see also Hall*, 441 A.2d at 1022 (holding presumption rebutted where on-duty state park manager drowned while retrieving his daughter's beach ball when his work included no water-related duties); *Toomey v. City of Portland*, 391 A.2d 325, 333 (Me. 1978) (holding presumption not rebutted when police officer was killed in an automobile collision just over the city line while operating his personal vehicle and while on

a route and time consistent with his going home from work). In each of these three cases the actual medical cause of the employee's death was clear, leaving only the question of whether the decedent was acting in the course of his employment when encountering the risk (a fall, a drowning, and a motor vehicle accident, respectively) resulting in his death, *information about which the employee in each case might have been able to provide*. None of the cases in which the presumption has been applied involved a claim, like in the present case, that the employee's death was the result of a long-standing disease process allegedly accelerated by work activities or conditions, thus making the circumstances existing at or near the time of death unimportant to the issue of medical causation.

[¶36] Whether the presumption applies is governed by three prerequisites established by the Law Court in *Toomey*:

> (1) an *incident* which causes the employee to be killed or otherwise made physically or mentally unable to testify in aid of (2) a pending claim for compensation relating to that *incident* [and (3)] . . . evidence presented of circumstances which indicate that the bringing of a claim of compensation is a rational act—that is, that the *incident* to which the claim relates has some rational potential of eventuating in an award of compensation when it is deemed supplemented by testimony which, within reasonable limits, may be conceived as potentially forthcoming from the employee were the employee available as a witness.

Id. at 330-31(emphasis added).

[¶37] Since its 1982 decision in *Hall*, the Law Court has not addressed this judicially-created standard for application of the presumption. Most recently,

however, the Court concluded that the "physically or mentally unable to testify" requirement had not been met where an employee claimed to be unable to recall the circumstances of the injury, explaining that "[h]ad the Legislature intended the presumption to apply to employees who are unable to remember certain facts related to a claim, it would have made that meaning explicit with express language." *Husvar v. Eng'rd Prods., Inc.*, 2000 ME 132, ¶¶ 3-4, 755 A.2d 498. Thus, the Court strictly construed the statute in *Husvar*, even though there would appear to be very little difference, in terms of the policy behind the statute, between the inability to testify and the inability to remember.

[¶38] Since the Law Court established the standard for the application of the presumption in *Toomey*, it has refined the analysis for determining whether an injury has arisen out of and in the course of employment. In *Bryant v. Masters Machine Co.*, 444 A.2d 329, 341-43 (Me. 1982), the Court clarified the "legal causation" requirement that applies when a work event or activity aggravates a pre-existing condition. *See also Wescott*, 447 A.2d at 80. In *Comeau v. Maine Coastal Services*, 449 A.2d 362 (Me. 1982), the Court reviewed its prior decisions on "arising out of and in the course of employment" issues and provided a non-exclusive list of factors for evaluating the compensability of any injury where "the fact pattern of a case does not fall snugly within the arising out of and in the course of requirement." *Id*. at 366-67. These factors focus heavily on the circumstances in

which the injury occurred, i.e. the "in the course of" prong, rather than the existence of employment risks and their contribution to the injury.

[¶39] After *Comeau* and *Bryant* were decided, the Legislature abrogated the "rule of liberal construction" set forth in the statute and followed by the Court in its earlier decisions. *See* 39 M.R.S.A. § 94-A (3) (repealed and replaced by P.L. 1985 c. 372, § A, 34(3) (effective June 30, 1985); formerly codified at 39 M.R.S.A. § 94-A(3) (1989); now codified at 39-A M.R.S.A. § 153(3)). The Legislature also enacted the requirement that the employment contribute to the disability "in a significant manner" when a work injury aggravates a pre-existing condition. *See* 39-A M.R.S.A § 201(4) (2001). These post-*Toomey/Hall* jurisprudential and legislative developments, which (1) refine the concept of legal causation in the case of a pre-existing condition, and (2) establish guidelines for determining when a person is acting in the course of employment, are pertinent to an assessment of whether the circumstances of this case demonstrated "some rational potential of eventuating in an award of compensation when it is deemed supplemented by testimony" that Mr. Sullwold might have given if alive.

[¶40] The hearing officer found that Mr. Sullwold collapsed while "taking a break to walk on his treadmill" as part of his normal "exercise regimen." Although he worked at home with the Salvation Army's permission, using the treadmill was not an activity which even indirectly benefited the Salvation Army.

See Comeau, 449 A.2d at 365 n.3. Although Mr. Sullwold had his smart phone with him and, according to Ms. Sullwold, might have had a nearby television tuned to a news or financial channel, the use of the treadmill was not "incidental to the employment" and represented more than an "insubstantial deviation from the employment." *Id*. In this regard he was no different from an employee who collapses during a break from work while away from the employer's premises, even if accessing information from an electronic device for either personal or business purposes.

[¶41] Unlike a specific work activity required or permitted to be performed at home (for example, a police officer's cleaning a service revolver), using a home office does not render all risks associated with the use of the home employment risks. *See* Arthur Larson and Lex K. Larson, 1 *Larson's Workers' Compensation Law*, §16.10[4], 16-37 (2011) ("[O]nce it is established that the home premises are also the work premises . . . it follows that the hazards of home premises *encountered in connection with the performance of the work* are also hazards of the employment." (emphasis added)).

[¶42] In view of the basic facts, the employee's collapse while using a treadmill in his home, and given the sedentary nature of his work earlier that day, I would conclude that the hearing officer erred when determining that these facts gave rise to a "rational potential of eventuating in an award of compensation."

[¶43] The majority reasons that "it is reasonably conceivable that if Mr. Sullwold had been available as a witness, he would have testified that he was engaged in work-related duties at the time of his heart attack, either conducting business on his smart phone or watching a financial news program, and that he had been under significant work stress for a long time." Such testimony from Mr. Sullwold concerning his activities at the time of his collapse, however, would have shown at most that he was, in some sense (although not under the *Comeau* criteria), still within the course of his employment, not whether he was exposed to a risk of injury from his employment. And to the extent that there was a risk of injury from his use of the treadmill itself, it was a non-work risk.

[¶44] In my view, an incident occurring in a home where an office is located should be distinguished from one which occurs on the actual physical premises of the employer or at a job site, in terms of the application of the section 327 presumption, because the risks involved in activities within the home are not generally related to or incidental to work. When, as here, the circumstances show that the employee was actually engaged in *non-work* physical activity at the time of his collapse, the fact that he had an office in the same dwelling structure and was carrying a device he used for both work and personal communication are very thin reeds upon which to apply the presumption, even under the most liberal interpretation of section 327. To apply section 327 in this case logically would

mean that a sudden cardiac death, no matter when or where it occurs, would always provide the surviving dependent with the benefit of the presumption because of the "potential" that the decedent might have been engaged in some sort of communication concerning, or perhaps simply thinking about, work, or that, as the majority posits, he or she might have testified to having been "under significant work stress for a long time." Indeed, the use of the term "killed" in the statute suggests an intention that the presumption should be limited to situations where the *immediate circumstances* surrounding the incident involving the death or inability to communicate indicate a possible work-related cause.

[¶45] Applying the presumption in circumstances similar to this case also would provide employees generally with the kind of presumption the Legislature has chosen to bestow specifically on firefighters who die as a result of "cardiovascular injury or disease and pulmonary disease." *See* 39-A M.R.S.A. § 328 (2001).

B. *Hall v. State* is no longer good law.

[¶46] Assuming that the section 327 presumption applies, I would conclude, as held in *Toomey*, that it operated as articulated in *Hinds v. John Hancock Mutual Life Ins. Co.*, 155 Me. 349, 364, 155 A.2d 721 (1959):

> [A] disputable presumption persists until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium, or, stated otherwise, until the evidence satisfies the jury

> or factfinder that it is as probable that the presumed fact does not exist as that it does exist.

This interpretation treats the presumption as imposing upon the employer a burden of production, rather than the burden of persuasion. *See Theriault v. Burnham*, 2010 ME 82, ¶¶ 8-10, 2 A.3d 324.

[¶47] The Law Court later stated that the subsequent adoption of M.R. Evid 301(a), shifting the burden of proof in the case of all presumptions, and the former Commission rules applying the Maine Rules of Evidence in all hearings, meant that the presumption under former section 64-A operated to "place upon the employer the burden of proving that the nonexistence of the presumed fact is more probable than its existence." *Hall*, 441 A.2d at 1021 (quotation marks omitted). In 1992, however, the Legislature specifically provided that hearing officers "need not observe the rules of evidence observed by courts[,]" 39-A M.R.S.A. § 309(2) (Supp. 2012), and current Board rules do not require that hearing officers follow the Maine Rules of Evidence.

[¶48] Because in *Hall*, the Court found the adoption of the rules of evidence critical to the change in the operation of the presumption, and the Act and the Board's rules currently do not require that the rules of evidence be followed, the effect of the presumption should be the same as the Court indicated when it was first enacted in 1965. *See* P.L. 1965, ch. 408, § 7. Otherwise, the intent of the Legislature in enacting the presumption, in terms of its effect on the respective

burdens of proof, will have been defeated by the subsequent adoption of M.R. Evid. 301(a), which no longer applies in workers' compensation cases.

[¶49] The majority agrees that the 1992 repeal of the requirement that the Board observe the rules of evidence "calls into question whether the hearing officer must continue to follow M.R. Evid. 301(a) when applying the section 327 presumption." However, the majority reasons in part that "the holding in *Hall* was known to the Legislature when it amended the Act in 1992, and the language of section 327 remained unchanged." But the Legislature *did* effect a change in the 1992 Act—the abolishment of the requirement that the rules of evidence be followed. Because the adoption of M.R. Evid. 301(a) was the sole basis for the statement in *Hall* that the burden of proof had changed, the failure of the Legislature also to modify the language of the presumption in 1992 is no indication of a legislative intent that the *Hall* rule continue to be followed when the statute and Board's rules no longer require that the rules of evidence be followed. And, when the Law Court in *Toomey* articulated the standard for determining whether the presumption applies, the effect of the presumption was *not* to change the burden of proof. *See Metcalf*, 285 A.2d at 371-72 (Wernick, J., concurring) ("[Title] 39 M.R.S.A. § 64-A was enacted after sufficient time had elapsed for *Hinds* to have become well known in the jurisprudence of Maine.").

[¶50] Unlike other statutory presumptions, the one in section 327 is not simply an evidentiary presumption; it creates a presumption not only of the existence of certain facts, but of the legal conclusion that "the employee received a personal injury arising out of and in the course of employment." *See Toomey*, 391 A.2d at 330-31. Because of the force of this presumption, it should not apply in cases such as this, in which there is no evidence to suggest the possible occurrence of a work injury leading to the employee's sudden collapse. *Compare Freeman*, 430 A.2d at 1108 (applying presumption when employee collapsed in hen house where he was in the process of spray-painting for the employer).

[¶51] In my view, the effect of the presumption, if it applied, should have been to place a mere burden of production on the Salvation Army. I would further find as a matter of law that the evidence adduced by the Salvation Army was sufficient to place the evidence in equilibrium, thus eliminating the effect of the presumption in this case.

C. The evidence was incompetent to support a finding of medical causation, thus the petitioner did not meet her burden of proof.

[¶52] Because in my view the presumption did not apply and the burden of proof rested on Ms. Sullwold, it was incumbent on her to adduce evidence sufficient for the hearing officer to find that the injury arose out of and in the course of employment.

[¶53] In a combined effects case, the "arising out of and in the course of employment" requirement is satisfied by showing both medical and legal cause. *Bryant*, 444 A.2d at 336-37. I would find that the evidence submitted by Ms. Sullwold to establish medical causation, specifically, the medical report and deposition testimony of Dr. Minton, was incompetent to establish causation, and therefore insufficient to meet her burden of proof, because it did not meet the threshold for admissible scientific expert testimony.[6] *See Searles v. Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶¶ 22-23, 878 A.2d 509.

[¶54] In *Searles*, while declining to decide whether to adopt the standard established by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Law Court explained that in order

[6] Although the Salvation Army did not request an *in limine* ruling as to the admissibility of Dr. Minton's written opinion, it did not waive any challenge to the competency of the evidence, a corollary to its argument on appeal that the petitioner prevailed only because of the improper application of the section 327 presumption. Such a process for rulings, after a preliminary hearing, on the admissibility of expert testimony is not explicitly provided for under the Board rules and, in general, is less preferable than exposing the weakness of the scientific reliability of the opinion through cross-examination of the expert or the exposition of facts at trial different from those assumed by the expert. *See Carmichael v. Verso Paper, LLC*, 679 F. Supp. 2d 109, 119-120 (D. Me. 2010); *City of Owensboro v. Adams*, 136 S.W.3d 446, 450-51 (Ky. 2004). Indeed, the employer's cross-examination of Dr. Minton during his July 6, 2011, deposition was specifically aimed at questioning the scientific basis for his causation opinion, thus alerting both Ms. Sullwold's attorney and the hearing officer that legal adequacy of the foundation of his opinion was at issue.

The majority, in footnote 4 of its opinion, declines to address the issue of the competency of the evidence, because this issue was not specifically raised by the Salvation Army on appeal. However, implicit in its argument that the presumption was improperly applied is the Salvation Army's contention that it was prejudiced by this error. Having concluded that there was no error by the hearing officer in the application of the presumption, the majority did not need to decide whether, assuming there was error, it was harmless. However, having reached a different conclusion concerning the presumption, I address the competency of the evidence, because it is necessary to my conclusion that the hearing officer's decision should be vacated.

to be admissible, expert testimony must "meet a threshold level of reliability." 2005 ME 94, ¶ 22. The Court further stated:

> Indicia of scientific reliability may include the following: whether any studies tendered in support of the testimony are *based on facts similar to those at issue*; whether the hypothesis of the testimony has been subject to peer review; whether an expert's conclusion has been *tailored to the facts of the case*; whether any other experts attest to the reliability of the testimony; the nature of the expert's qualifications; and, *if a causal relationship is asserted, whether there is a scientific basis for determining that such a relationship exists*.

Id. ¶ 23, 878 A.2d 509 (citations omitted) (emphasis added).

[¶55] The hearing officer found, verbatim from Dr. Minton's report, that "Mr. Sullwold's chronic work stress significantly accelerated his underlying coronary atherosclerosis and CAD, resulting in sudden cardiac death at age [62] due to acute coronary syndrome while at work in his home office" and that "chronic work stress played a major role in Mr. Sullwold's death." Dr. Minton provided his medical opinion after a "file review" conducted on March 7, 2011 at the request of Ms. Sullwold's attorney, for which he was provided with various medical records, a death certificate, e-mail correspondence between Ms. Sullwold's attorneys summarizing information obtained from Carla Sullwold, a February 7, 2011, two-page affidavit of Carla Sullwold, and a February 14, 2011, six-page chronological summary prepared by Ms. Sullwold of what she considered to be various work and non-work stressors and events from 1987 to the time of his death.

[¶56] During his deposition, Dr. Minton also discussed nine scientific articles that he contended supported the proposition that stress can be a significant causative factor in the development of coronary artery disease and atherosclerosis. At the time of the deposition he had also corresponded by e-mail with Ms. Sullwold's attorney concerning Dr. Shaw's report expressing a contrary opinion, also based on a medical records review.

[¶57] From this information, Dr. Minton concluded that as of the time of his collapse on February 23, 2010, Mr. Sullwold was suffering from coronary artery disease, left ventricular dysfunction with ischemic cardiomyopathy, hyperlipidemia, and peripheral vascular disease with mild changes in the carotid arteries. This chronic condition followed a 1992 myocardial infarction and an unsuccessful attempt at an angioplasty to remedy an obstructed left anterior descending coronary artery, as reflected in subsequent ejection fraction levels of 45% to 55%. Dr. Minton also noted that recent treatment records had documented complaints of "occasional angina with exertion in cold temperatures."

[¶58] Relying on the medical records and historical information from Ms. Sullwold, Dr. Minton concluded in his report that Mr. Sullwold's

> chronic work stress significantly accelerated his underlying coronary atherosclerosis and CAD resulting in sudden cardiac death at age [62] due to an acute coronary syndrome while at work in his home office. The work stress in his situation was longstanding, relentless and accelerating, and interfered with his general lifestyle, his optimism, his sense of safety and his family life.

Dr. Minton stated that the "clear causal relationship between psychological stress and the acceleration of CAD and sudden cardiac death is well established in the medical literature with countless peer-reviewed publications," and pointed to the physiological mechanisms by which mental stress affects cardiovascular pathology.

[¶59] Dr. Minton's testimony was not competent under the *Searles* standard because Dr. Minton, a cardiologist with no specialized training in psychology or psychiatry, formed his opinions that Mr. Sullwold had suffered a pathological change (acceleration) in his cardiac condition due to chronic work stress (1) without the benefit of a psychological evaluation that used accepted methods in the field of clinical psychology including, first and foremost, an interview of the patient; (2) without benefit of the later hearing and/or deposition testimony of Ms. Sullwold and Mr. Sullwold's co-workers, which alone was insufficient to prove that work stress was the medical cause of an injury, *see Walsh v. Knox County*, 535 A.2d 438, 440 (Me. 1988); (3) without any prior medical or psychological assessment, prepared after an evaluation by a qualified expert, of a psychological condition assessed to have been either caused or contributed to by work stress; and (4) based on medical records that did not indicate any significant concerns about

work stress.[7] In addition, the information from Ms. Sullwold that was relayed to Dr. Minton listed myriad other sources of stress which, in her view, appeared to have had an impact on her husband, including his sense of "impending doom" related to his lengthy battle with cardiovascular disease and other physical ailments.

[¶60] In my view, Dr. Minton performed what can best be described as a "psychological autopsy" of Mr. Sullwold. A psychological autopsy has been described as

> an attempt in retrospect to discern the state of mind of the decedent at the time of his death[, and] requires some understanding of the nature of the decedent's life prior to and leading up to the time of the death. This understanding is obtained by interviewing individuals and reviewing records in order to render an opinion as to the reason for the decedent[']s death].

Bethley v. Keller Constr., 836 So. 2d 397, 401-02 (La. App. 2002) (upholding the exclusion of testimony amounting to a psychological autopsy on the issue whether the employee's suicide was work related). Although courts in other states have permitted consideration of psychological autopsies on the issue of the decedent's state of mind at the time of his or her death, such as where a suicide is alleged to have resulted from a prior work injury, they have required careful consideration of

[7] After initially issuing his written opinion, Dr. Minton was provided with a July 5, 2011 letter from Dr. Goodstein, a psychiatrist who had treated Mr. Sullwold until 2004. Although his records had since been destroyed, Dr. Goodstein did not "recall a time that [Mr. Sullwold] felt that the workplace was a major contributor to any psychological difficulties." Dr. Minton's only response when shown this letter at the time of his deposition was "a lot can happen in six and a half or seven years."

the factual foundation for such opinions. *See id.* at 401-03 & n.8 (questioning the reliability of the psychological autopsy method, in a case of alleged suicide precipitated by mental stress from a prior work injury, where much of the evidence was "obtained from significant others of the deceased" including those with "a financial interest in the case"); *see also Corkern v. T.K. Valve*, 934 So. 2d 102, 106 (La. App. 2006) (requiring consideration of the following factors in determining whether the workers' compensation judge abused his or her discretion in ruling on the admissibility of a psychological autopsy: (1) whether the expert had ever met or interviewed the deceased, (2) the source of information on which the expert relied, (3) the reliability of such source, (4) whether such information was corroborated by information from other sources, and (5) the reliability of the corroborative evidence).[8] *See also* James R.P. Ogloff & Randy K. Otto, *Psychological Autopsy: Clinical and Legal Perspectives*, 37 ST. LOUIS L.J. 607,

[8] Other courts have allowed consideration of expert opinions based on psychological autopsies performed by psychologists or psychiatrists when the state of mind of the decedent at the time of death was at issue, such as in the case of a suicide alleged to have been causally connected to a prior work injury. *See Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 384 S.E. 2d 549 (N.C. App. 1989) (affirming fact-finder's rejection of such an opinion, noting questionable reliability of such opinions in view of many potential sources of stress and lack of acceptance of methods for such evaluations in the field of clinical psychology); *Campbell v. Young Motor Co.*, 684 P.2d 1101 (Mont. 1984) (holding expert testimony admissible to demonstrate "chain of causation" between work injury and later suicide of worker); *Kostelac v. Feldman's, Inc*., 497 N.W. 2d 853 (Ia. 1993) (same). Such use of expert opinions based upon psychological autopsies, even if permissible in Maine, is clearly distinguishable from their use to establish, not the state of mind of the person at the time of his or her death but, rather, the existence and cause of a long-standing, chronic mental state which, in turn, impacts ("accelerates") a pre-existing physiological disorder. In the latter circumstance, the asserted causal connection between the death and a work-related mechanism (stress) is indirect and far more attenuated and, therefore, should require more reliable evidence than a psychological autopsy can provide, such as contemporaneous medical records corroborating the mental and physical toll being taken by work stress.

630-33 (1993) (describing use of psychological autopsy in workers' compensation cases).

[¶61] Research has not disclosed any case in which the Law Court has sanctioned the psychological autopsy approach in light of the *Searles* standard. To the contrary, in the context of claims of mental injuries resulting from work stress, the Law Court has recognized that

> [t]he danger of illusory and fictional claims is as real and present in workers' compensation as it is in the law of torts. Where a mental injury occurs rapidly and can be readily traced to a specific event . . . there is a sufficient badge of reliability to assuage the Court's apprehension. Where, however, a mental injury develops gradually and is linked to no particular incident, the risk of groundless claims looms large indeed.
>
> There is an additional factor which causes us concern. We are here dealing with what may broadly be referred to as a neurosis or psychoneurosis which has been defined as a functional mental disorder marked by fears and anxieties in which there is a minimal loss of contact with reality. . . . In such cases singling out any individual stimulus as *the* cause of the neurosis would be a difficult, if not impossible, task.

Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1018 (Me. 1979) (citations omitted). The concern about the difficulty of reliably assessing work stress as a contributor to such a gradually developing mental injury led the *Townsend* Court to require the claimant in such a case "to demonstrate either that he was subjected to greater pressures and tensions than those experienced by the average employee or, alternately, by clear and convincing evidence show that ordinary and usual work-related pressures predominated in producing the injury."

Id. at 1020. After *Townsend* was decided, the Legislature codified this requirement to apply to all claims for mental injuries due to work stress. P.L. 1987, ch. 252, now codified at 39-A M.R.S.A. § 201(3) (2001).

[¶62] In addition to its concerns expressed in *Townsend* about reliably determining whether work stress, as distinguished from other sources of stress, has caused a mental injury, the Law Court long ago "recognize[d] that the difficulty of determining compensability of heart attacks is considered one of the most prolific and troublesome problems in workers' compensation law." *Bruton v. City of Bath*, 432 A.2d 390, 392 n.1 (Me. 1981). In addressing the compensability of heart attacks in the context of emotional rather than physical stress, the Court has focused on the specific work events and activities occurring shortly before the heart attack in view of the non-work risk factors for cardiovascular disease. *See id.* at 393 (affirming Commission's conclusion that "work activities were not unusually stressful or emotional"); *Stadler v. Nativity Lutheran Church*, 438 A.2d 898 (Me. 1981) (same).

[¶63] In view of these clearly expressed jurisprudential and legislative concerns about the difficulty of separating out and measuring the impact of the various psychological stressors affecting a person, particularly over an extended period of time, and the non-work factors that influence the development and progression of cardiovascular disease, I do not believe that the methodology used

by Dr. Minton to determine the existence of chronic injurious work stress, a psychological autopsy based solely on statements from Ms. Sullwold and with virtually no corroboration in the medical records, is legally sufficient under Maine workers' compensation jurisprudence. Dr. Minton's limited qualifications for assessing the sources and impact of psychological stressors and, more importantly, his methods for conducting such a psychological autopsy, do not demonstrate sufficient scientific reliability.

[¶64] Next, with regard to existence of a causal relationship between any chronic work stress and the "acceleration" of Mr. Sullwold's underlying cardiovascular condition, Dr. Minton relied on the "clear causal relationship between psychological stress and the acceleration of CAD and sudden cardiac death . . . well established in the medical literature and countless peer-reviewed publications," without indicating whether such general causation or epidemiological studies demonstrate a sufficiently common and measurable association between chronic stress and "the acceleration of CAD" to establish a likely causal connection in a given case. *See Estate of George v. Vt. League of Cities*, 2010 VT 1, ¶¶ 18-45, 993 A.2d 367 (explaining the difference between epidemiological or general causation studies that identify agents that are associated with an increased risk of disease and specific causation evidence, showing a statistical frequency of that association, usually twice as high among the exposed

group as compared to the non-exposed group, as a threshold for concluding that an agent was *more likely than not* the cause of an individual's disease). Indeed, Dr. Minton acknowledged in his deposition testimony that while "there is no question that sudden cardiac, myocardial infarction . . . with stress [is] causally related. . . it has been a more elusive goal to show that this chronic [atherosclerotic] process is made worse by chronic stress."

[¶65] Even assuming that Dr. Minton was qualified to offer an opinion concerning the existence, extent, and cause of any stress Mr. Sullwold may have been experiencing during the months or years before his death, there was no scientifically reliable way for him to assess whether and to what extent such stress actually affected the progress of or accelerated his cardiovascular disease. Although a person may be subject to external stressors, both in and out of work, this does not mean that he or she has suffered a physical or mental *injury* as a result.

[¶66] Finally, Ms. Sullwold presented no other expert to attest to the reliability of Dr. Minton's opinion, and Dr. Shaw's opinion was to the contrary.

[¶67] Accordingly, without the operation of the section 327 presumption to relieve Ms. Sullwold of her burden of proof entirely, I would conclude the hearing officer could not determine that Ms. Sullwold had met the burden of proof because

she did not adduce competent evidence that Mr. Sullwold suffered an injury arising out of and in the course of his employment, resulting in his death.

III. CONCLUSION

[¶68] For the foregoing reasons, I conclude that the hearing officer erred when affording the benefit of the section 327 presumption to Ms. Sullwold, and when applying that presumption. I further conclude that the error was not harmless because in the absence of the presumption, Ms. Sullwold did not meet her burden of proof; the medical evidence she submitted is not competent to support a finding of medical causation. Accordingly, I respectfully dissent.

Attorney for Appellant:
Arthur J. Lamothe, Esq.
Law Office of Arthur J. Lamothe
P.O. Box 425
Brunswick, ME 04011

Attorney for Appellee:
G. William Higbee, Esq.
McTeague Higbee
P.O. Box 5000
Topsham, ME 04086

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 (Supp. 2012).
