

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0575

Order Filed 3/8/11

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

ROBERT FIKE,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
BLOOMINGTON FIREFIGHTERS' PENSION	)	No. 08MR346
BOARD OF TRUSTEES, JAMES POISEL, STEVE	)	
ZIMMERMAN, RONALD FOWLER, TRACEY	)	Honorable
COVERT, and BARB ADKINS,	)	Scott Drazewski,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court. Justices Steigmann and Myerscough concurred in the judgment.

**ORDER**

*Held:* Where the record contains evidence linking plaintiff's disability to degenerative, preexisting conditions, the Board's denial of plaintiff's line-of-duty disability pension was not against the manifest weight of the evidence.

Under section 4-110 of the Illinois Pension Code (Pension Code) (40 ILCS 5/4-110 (West 2008)), plaintiff, Robert Fike, applied for a line-of-duty disability pension with defendant, the Bloomington Firefighters' Pension Board of Trustees (Board). The other defendants, James Poisel, Steve Zimmerman, Ronald Flower, Tracey Covert, and Barb Adkins, are the individuals that comprised the Board that decided plaintiff's application. After an October 2008 hearing, the Board denied plaintiff's request for a line-of-duty disability pension but granted him a nonduty disability pension. Plaintiff then filed a com-

plaint for administrative review in the McLean County circuit court. After a June 2010 hearing, the court "affirmed" the Board's decision.

On appeal, plaintiff argues the Board erred by denying him a line-of-duty disability pension because (1) no evidence supports the trial court's factual findings and (2) the Board's causation determination is against the manifest weight of the evidence. We affirm the circuit court's judgment and confirm the Board's order.

#### I. BACKGROUND

On June 13, 2008, plaintiff filed his section 4-110 pension application based on an injury he received on December 15, 2006. The record on appeal does not include a copy of the application.

On October 31, 2008, the Board held a hearing on plaintiff's application. Plaintiff, a 14-year firefighter with the City of Bloomington, testified in support of his application. He explained, that on December 15, 2006, he was called to a "working structure fire." He came off the fire truck wearing his full gear and self-contained breathing apparatus (SCBA), which weighed about 40 pounds. Plaintiff was assigned to the rapid-intervention team that worked for an hour. Around a half an hour into his work on the rapid-intervention team, plaintiff started feeling back pain that got steadily worse. The pain got to the

point where he would go down on one knee to take the weight off his back. His team continued to work, throwing up a ladder and working with a hose on the structure's outside. They then went inside to overhaul. When he either opened up the wall or pulled down the ceiling, he felt his back hurt and "knew something was wrong." At that point, they were done. When plaintiff removed his pack, his back "hurt bad."

In May 2008, Dr. John Atwater performed a two-level fusion of plaintiff's spine, which took away about 75% of the pain he experienced as a result of the December 2006 injury. However, he was no longer able to bend over. Prior to the December 2006 incident, plaintiff had suffered a few back strains, which always seemed to go away. He denied having problems with his back before December 2006. Plaintiff also denied suffering any other back injuries after December 2006.

In response to some questions raised by the Board, plaintiff testified he worked full duty after the December 2006 incident until April 7, 2008, when he failed the physical-agility test. In the interim, plaintiff did experience back pain and continued to wear a SCBA unit. However, he could not recall how many times he wore the unit and if it was for any working fires. Plaintiff did pass the April 2007 physical-agility test. However, he had problems coming down a ladder as he was "hurting pretty good at that time."

Plaintiff also addressed why he did not fill out an accident report until mid-January 2007. He explained he did not fill out an accident report for every ache and pain he experienced. Plaintiff thought his back pain would go away like in the past. When it did not go away and actually got worse, he documented the incident at that time. Plaintiff did tell his supervisor at the scene his back was "hurting pretty good."

Additionally, plaintiff discussed his delay in getting medical treatment until February 14, 2007. He again noted that, in the past, his back pain would go away with ibuprofen and rest. When the pain got worse, he contacted McLean County Orthopedics. He was assigned to Atwater and given an appointment six weeks away. The following week, he started experiencing numbness and called the office back. He was able to get in two weeks sooner with Dr. Craig Carmichael.

In addition to plaintiff's testimony, the Board considered the reports of Atwater, Dr. David Fletcher, and Dr. Robert Martin; the notes of Dr. Emilio Nardone; the injury report dated April 4, 2007, and a letter noting the report was originally submitted in "mid January of 2007"; and a December 1993 scoliosis study.

In his report, Fletcher found it was "premature to make a decision on disability because [plaintiff] has not yet reached [maximum medical improvement] status." Plaintiff reported to

Fletcher his pain was a 10 out of 10 at the time of the incident and is now a 3 out of 10 after surgery. Fletcher's report contains a medical history. The record on appeal does contain a few random notes from plaintiff's treating physicians for his lower back pain but not a complete set of those medical records.

Fletcher's summary begins with plaintiff's January 21, 2005, appointment with Nardone. At that time plaintiff had neck pain that radiated down his left shoulder and left arm. He also had some numbness. Plaintiff had indicated the pain was the result of an injury he suffered at work on November 11, 2004. In January 2005, Nardone performed surgery on plaintiff's cervical spine. Plaintiff did well after the surgery.

Plaintiff saw Carmichael on February 14, 2007. The summary of the visit noted the heavy SCBA unit plaintiff wore while at work. At that time, plaintiff complained of pain at the lumbosacral junction and in the right posterolateral hip and lateral thigh. The hip and thigh pain was new. The note suggests the pain started in November 2004 and had been getting worse, particularly in December 2006. A February 22, 2007, report for a magnetic resonance imaging of the lumbar spine stated plaintiff had degenerative changes at L4 to S1 and provided details of those changes.

On March 12, 2007, plaintiff received a steroid injection. Two weeks later, plaintiff reported his back felt great

after the injection, but it lasted very briefly. A few days earlier, plaintiff had gone into a fire wearing an SCBA unit, which "substantially flared his back pain." Plaintiff's right buttock and thigh pain was still completely gone. The pain at his lumbosacral junction had gone up a little higher.

On April 9, 2007, plaintiff received another steroid injection. Two weeks later, plaintiff reported the injection helped. However, five days after the injection, he participated in a physical-abilities test at work and was climbing down a ladder, when he experienced a "sudden increase in substantial pain." Plaintiff's current symptoms were mostly on his left side with pain in his back and buttocks and "numbness and tingling in the plantar foot, toes, and posteromedial calf."

On May 23, 2007, plaintiff underwent an electromyography test, which showed radiculopathies at L4 and S1 with evidence of ongoing denervation. Plaintiff also had L4-L5 stenosis that was moderate to severe, L5-S1 left paracentral protrusion or shallow herniation, and mild spondylolisthesis at L4-L5 and L5-S1. Plaintiff's primary concern was that, after surgery, he wanted to be able to return to work. Plaintiff's current plan was to try to tough it out at work as long as possible without surgery.

On July 31, 2007, plaintiff received another steroid injection. A note by Carmichael stated that, on August 14, 2007,

plaintiff reported mild improvement. He still had pain at the lumbosacral junction, a little bit of pain in his hip and thigh, and some numbness in his feet. Plaintiff was trying to tough it out at work and was still worried about not being able to return to work if he had surgery. On September 10, 2007, plaintiff had a facet injection. At a September 24, 2007, appointment, he reported the recent injection worked the best of all of the injections, but the pain was starting to come back a little. Working as a firefighter and carrying a big oxygen tank were noted as aggravating factors. Plaintiff was still trying to avoid surgery as long as possible.

On November 19, 2007, plaintiff underwent radiofrequency ablation. On December 3, 2007, plaintiff reported improvement. His right side was much better but not his left. Prolonged standing, particularly when wearing an air pack at work, was noted as an aggravating factor. On April 7, 2008, Carmichael saw plaintiff and determined he was a "very good candidate for some operative management." Carmichael noted plaintiff had a significant history of spinal stenosis and spondylolisthesis at the L4-L5 level and a disc herniation at L5-S1 on the left side. Plaintiff had bilateral leg weakness, numbness, and tingling.

On May 27, 2008, Atwater operated on plaintiff's lower back. Atwater diagnosed plaintiff with (1) spinal stenosis at L4-L5 and L5-S1, (2) spondylolisthesis at L4-L5, (3) bilateral

L4-S1 radiculopathies, (4) L5-S1 disc herniation on the left side, and (5) degenerative joint disease at L4-L5 and L5-S1. On June 3, 2008, plaintiff reported to Atwater he was feeling really good and had no symptoms radiating into his legs.

Atwater's one-page letter indicated plaintiff suffered a low-back injury while on the job and underwent a course of nonoperative management, conservative therapy, and physical therapy. When those treatments failed, plaintiff underwent a two-level transforaminal lumbar interbody fusion, which "disqualifies him from returning to gainful employment as a firefighter." Atwater stated it was his belief "the need for the surgical intervention was causally related to the incident at work."

Martin's report lists the following diagnosis for plaintiff: (1) spondylolisthesis of L4 on L5; (2) retrolisthesis of L5 on S1; (3) degenerative disease; (4) degenerative disc disease; (5) spinal stenosis and foraminal stenosis at L4-L5; (6) herniated disc at L5-S1 on the left; and (7) status-post spinal fusion at L4-L5 and L5-S1. Regarding causal relationships, Martin stated the following in his report:

"Clearly the spondylolisthesis, retrolisthesis, degenerative disease, and degenerative disc disease were pre-existing conditions. They led to the spinal stenosis and foraminal stenosis. The herniated disc

could have been a pre-existing condition or it could have been caused by the injury at work. The spinal stenosis could have been aggravated by the injury at work. Please see discussion below."

The discussion section then set forth the following:

"This gentleman had significant pre-existing problems with his low back as outlined above. He had an episode at work that precipitated his symptoms that led him to seek medical care. It is not unusual for someone with his level of spinal stenosis to develop symptoms as he describes. This usually happens within 24 to 48 hours of the precipitating event. These symptoms may be severe at first or may gradually worsen with time. If he actually did report this within a week, then the problem which led to his surgery could be an aggravation of a pre-existing condition. I am at a loss to explain how he could have gone without seeking medical care for two months.

Regardless of cause, he has had appropriate medical care, although he seems to

have put off definitive care for a long time.

After having two levels of the lumbar spine fused recently he is clearly incapable of working fire suppression duties now."

In Narvone's records is a report for a January 25, 2005, chest x-ray that notes "[d]egenerative changes are seen in the dorsal spine."

The December 1993 scoliosis study showed plaintiff had (1) minimal to mild s-shaped scoliosis of the thoracolumbar spine, (2) minimal to mild levoscoliosis of the lumbar spine, (3) minimal to mild dextroscoliosis of the thoracic spine, and (4) minimal bilateral posterolateral bone spur formation at the C5-C6 level. At the hearing, plaintiff testified he did not realize he had scoliosis.

At the conclusion of the hearing, the Board voted to deny plaintiff's line-of-duty disability pension but did grant him a nonduty disability pension. On November 11, 2008, the Board entered a written order, finding plaintiff's claim the December 15, 2006, incident was the cause of his disability was not supported by, *inter alia*, the following evidence: (1) the lapse of time between the extremely painful injury and the accident report; (2) the lapse of time between the extremely painful injury and plaintiff receiving medical attention; (3) plaintiff returning to work for his next shift and continuing to

work full time for 14 months after the incident; and (4) plaintiff continuing to wear SCBA gear and enter fire scenes and passing the 2007 physical agility test. The order further noted plaintiff "suffered back problems in 1993" when he joined the fire department. The Board found "[i]t is just as likely that his back problems are simply degenerative in nature, and not resulting from an act of duty, or the cumulative effects of the act of duty."

On December 3, 2008, plaintiff filed his complaint for administrative review with the McLean County circuit court. After hearing the parties' arguments on June 25, 2010, the court upheld the Board's decision. On July 23, 2010, plaintiff filed a timely notice of appeal in compliance with Supreme Court Rule 303 (eff. May 30, 2008). Accordingly, this court has jurisdiction of this appeal under Supreme Court Rule 301 (eff. Feb. 1, 1994).

## II. ANALYSIS

Here, plaintiff asserts the record does not support the Board's denial of his line-of-duty disability pension, which presents a question fact (*Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534, 870 N.E.2d 273, 293 (2006)).

Under section 4-139 of the Pension Code (40 ILCS 5/4-139 (West 2008)), judicial review of an administrative board's decision is conducted in accordance with the Administrative Review Law (735 ILCS 5/art. 3 (West 2008)). With adminis-

trative cases, this court reviews the administrative agency's decision, not the circuit court's. *Williams v. Board of Trustees of Morton Grove Firefighters' Pension Fund*, 398 Ill. App. 3d 680, 687, 924 N.E.2d 38, 45 (2010). Section 3-110 of the Administrative Review Law (735 ILCS 5/3-110 (West 2008)) allows review of "all questions of law and fact presented by the entire record before the court" but does not allow the reviewing court to consider any new or additional evidence. That section further states "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (West 2008).

Courts have construed section 3-110 of the Administrative Review Law to mean the following:

"[I]t is not a court's function to reweigh the evidence or make an independent determination of the facts. Rather, the court's function is to ascertain whether the findings and decision of the agency are against the manifest weight of the evidence. [Citations.] An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. [Citations.]

The mere fact that an opposite conclu-

sion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings. [Citation.] The reviewing court may not substitute its judgment for that of the administrative agency. [Citation.] If the record contains evidence to support the agency's decision, it should be affirmed."

*Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88, 606 N.E.2d 1111, 1117 (1992).

Section 4-110 of the Pension Code (40 ILCS 5/4-110 (West 2008)) provides a firefighter with a special disability pension when the "firefighter, as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty, is found \*\*\* to be physically or mentally permanently disabled for service in the fire department." The exacerbation of a preexisting condition will also qualify for a line-of-duty disability pension. See *Scalise v. Board of Trustees of Westchester Firemen's Pension Fund*, 264 Ill. App. 3d 1029, 1033, 637 N.E.2d 1040, 1043 (1993). In this case, the Board found plaintiff disabled, and no question existed as to whether the December 2006 injury occurred while he was on duty. Thus, the sole issue is causa-

tion.

#### A. Board's Factual Findings

Plaintiff first challenges four of the Board's specific factual findings that the Board noted in concluding plaintiff failed to prove causation. Specifically, plaintiff argues the record contains no evidence supporting those findings.

Since our supreme court has instructed us to begin our review of a case by determining whether any issues have been forfeited (see *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008)), we first address the Board's argument plaintiff should be estopped from arguing the record does not contain any evidence supporting the Board's findings because plaintiff admitted in the circuit court some evidence supported the Board's findings. In support of their argument, the Board cites authority addressing waiver/forfeiture of an issue for failure to raise the issue in the trial court or failing to obtain a ruling on the matter. See *Illinois Farmers Insurance Co. v. Cisco*, 178 Ill. 2d 386, 395, 687 N.E.2d 807, 812 (1997); *In re Marriage of Pond*, 379 Ill. App. 3d 982, 989, 885 N.E.2d 453, 459 (2008). A party's failure to cite legal authority in support of an argument forfeits the issue for review. See *In re Marriage of Wassom*, 352 Ill. App. 3d 327, 333, 815 N.E.2d 1251, 1256 (2004). Because defendants did not cite legal authority on estoppel, we will address the merits of plaintiff's lack-of-evidence argument.

While plaintiff asserts no evidence exists supporting the four factual findings, he nonetheless notes some evidence. Thus, plaintiff's initial argument contradicts itself and is meritless. Within his first argument, plaintiff further contends the factual findings are irrelevant or immaterial to the Board's ultimate causation determination. This court will take those arguments into consideration in analyzing whether the Board's causation determination was against the manifest weight of the evidence.

#### B. Causation

In asserting the Board's causation determination is against the manifest weight of the evidence, plaintiff contends his case is distinguishable from *Evert v. Board of Trustees of Firefighters' Pension Fund*, 180 Ill. App. 3d 656, 662, 536 N.E.2d 143, 147 (1989), where the Second District affirmed the denial of a line-of-duty disability pension. In affirming the denial, the *Evert* court found some competent evidence in the record did exist to support the board's findings and could not conclude those findings were erroneous. *Evert*, 180 Ill. App. 3d at 661, 536 N.E.2d at 147. In that case, all three of the doctors' reports attributed the claimant's disability to a degenerative condition in his lower back. Two of the doctors did not attribute the claimant's physical condition to the lifting work injury. The third doctor, who was the claimant's treating physician, did

state the claimant's symptoms were aggravated at the time of the lifting injury. However, when asked whether it was the long-term degenerative process or the lifting injury that caused the claimant's disability, the doctor did not respond with certainty. *Evert*, 180 Ill. App. 3d at 661, 536 N.E.2d at 146. The record also indicated the claimant did not seek immediate medical attention. *Evert*, 180 Ill. App. 3d at 661, 536 N.E.2d at 147. The Second District noted the record permitted an inference the aggravation was temporary in nature and the degenerative process was the source of the claimant's disability. At best, the treating physician's testimony indicated the lifting injury might have been a factor in the claimant's disability. *Evert*, 180 Ill. App. 3d at 661, 536 N.E.2d at 147.

While the facts of this case are not identical to those in *Evert*, the Second District's reasoning and analysis provide guidance here. Plaintiff insists the record contains no evidence of a degenerative condition. However, the record contains ample evidence plaintiff suffered from degenerative lower back conditions. Moreover, the "causal relationships" section of Martin's report links plaintiff's disability to his degenerative, preexisting conditions. Martin does recognize the work injury could have caused the herniated disc or aggravated the spinal stenosis. Nonetheless, Martin was "at a loss to explain how" plaintiff could have gone without seeking medical care for two months. In

his brief, plaintiff highlights his explanation for the delay in treatment, *i.e.*, attempting rest and ibuprofen and then being unable to get a doctor's appointment. However, the Board did not find plaintiff's testimony credible, noting plaintiff rated the pain he suffered on December 15, 2006, as a 10 out of 10. As in *Evert*, the record does support a reasonable inference any aggravation that occurred on December 15, 2006, of plaintiff's preexisting conditions was temporary and the degenerative conditions led to the disabling surgery.

Even if some of the Board's factual findings are immaterial, the record contains competent evidence supporting the Board's conclusion plaintiff failed to prove a causal link between the injury and the surgery. Accordingly, we find the Board's order was not against the manifest weight of the evidence.

### III. CONCLUSION

For the reasons stated, we affirm the McLean County circuit court's judgment and confirm the Board's order.

Judgment affirmed; order confirmed.