
In the Matter of the Compensation of
ALAN L. HULL, Claimant
WCB Case No. 08-01504
ORDER ON REVIEW
Guinn & Munns, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: *En Banc*; Members Biehl, Lowell, Langer, Weddell, and Herman. Member Lowell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that upheld the self-insured employer's denial of his occupational disease claim for a myocardial infarction (MI). On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," summarized as follows.

Claimant, a fire district chief, has worked as a firefighter for the employer for over 30 years. (Tr. 10, 12). In June 2007, he was informed that one of the department's longtime employees had embezzled almost two million dollars from the department over the course of many years. (Tr. 22-24, 28). He was asked by the sheriff's office "to go undercover" and gather evidence against the embezzling employee. (Tr. 24).

Approximately one week later, in the first week of July 2007, the employee was arrested. (*Id.*) Following the arrest, claimant was the subject of public concern and anger over the embezzlement, with some calling for him to be fired. (Tr. 67-68). Claimant experienced stress as a result of his "undercover assignment," as well as the community anger directed at him. (Tr. 65-68).

On October 19, 2007, claimant attended a high school football game as part of an effort to ensure the community that only one person was involved in the embezzlement, and that the department was doing what it could to recover the lost money. (Tr. 35-36). He talked with several people about the embezzlement. (Tr. 36).

After he returned home that evening, he was having trouble sleeping. (*Id.*) At approximately 1:30 a.m. (on October 20), he asked his wife whether she had overheard an individual's comment at the football game about the embezzlement.

(Tr. 36-37). His wife responded that she was “so sick and tired of living and breathing that embezzlement since July.” (Tr. 37). She added that she had seen what the embezzlement had done to claimant and their family, and that she was “sick and tired of it.” (*Id.*)

Claimant then went to rub his wife’s back when his “arm just sort of went numb.” (*Id.*) Thereafter, he experienced chest pain and directed his wife to call for emergency assistance. (Tr. 37-38). He was taken to the hospital and treated for an acute MI. (Tr. 39-40; Exs. 14, 15).

Five medical experts provided opinions concerning the cause of claimant’s MI: Drs. Greenberg, Samoil, Semler, DeMots, and Toren. All of those experts agreed that claimant had underlying coronary artery disease (arteriosclerosis) unrelated to his employment, which contributed to the MI.¹ Dr. Samoil believed that stress from the embezzlement at the department was the major cause of the MI, whereas Dr. Greenberg believed that the aforementioned stress and arteriosclerosis contributed equally to the MI. (Exs. 42-8, 46-53, 48-2). Dr. DeMots characterized claimant’s “acute stress” of the conversation with his wife about the embezzlement to be “at most a trigger or precipitating factor.” (Ex. 49-3). Drs. Semler and Toren likewise did not exclude claimant’s work-related stress as contributing to the MI, but believed that any such contribution was minor. (Exs. 47-27, 50-4).

The employer denied claimant’s claim for his MI. (Ex. 39). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer’s denial, finding that the “firefighter’s presumption” under ORS 656.802(4) did not apply. On review, claimant contends that the presumption applies, and that the employer has not met its burden of establishing by clear and convincing evidence that the cause of his MI was unrelated to his employment. *See* ORS 656.802(4). The employer counters that the presumption does not apply, and that claimant has not established compensability under ORS 656.802(1)(b), (3).² We find that the “firefighter’s presumption” applies, and reverse. We reason as follows.

¹ Claimant is seeking compensation for his MI, not his arteriosclerosis.

² The employer does not dispute that the claim is compensable if it is determined that the presumption under ORS 656.802(4) applies.

ORS 656.802(4) provides:

“Death, disability or impairment of health of firefighters of any political division who have completed five or more years of employment as firefighters, caused by any disease of the lungs or respiratory tract, hypertension or cardiovascular-renal disease, and resulting from their employment as firefighters is an ‘occupational disease.’ Any condition or impairment of health arising under this subsection shall be presumed to result from a firefighter’s employment. However, any such firefighter must have taken a physical examination upon becoming a firefighter, or subsequently thereto, which failed to reveal any evidence of such condition or impairment of health which preexisted employment. Denial of a claim for any condition or impairment of health arising under this subsection must be on the basis of clear and convincing medical evidence that the cause of the condition or impairment is unrelated to the firefighter’s employment.”

Claimant contends that he has satisfied all of the criteria of ORS 656.802(4), which would establish compensability of his claimed MI. We agree, addressing each requirement, in turn.

It is undisputed that claimant is a firefighter of a political division who has completed five or more years of employment as a firefighter. However, in response to claimant’s reliance on the “firefighter’s presumption,” the employer contends that the claimed MI does not qualify as a “cardiovascular-renal disease” because it does not involve a “renal” component. Therefore, it asserts that the MI is not an “occupational disease” within the meaning of the statute and cannot be “presumed” to result from claimant’s employment.

In *Carolyn McCann*, 62 Van Natta 2508 (2010), which issued subsequent to the ALJ’s order and the parties’ briefs, we disagreed with such an interpretation of ORS 656.802(4). In doing so, we noted that

“such an interpretation is not supported by the case law or legislative history. When dealing with heart conditions, the court has not required a renal component of a cardiovascular condition for the presumption to

attach to a claim, and a review of the legislative history reveals that the phrase “cardiovascular-renal disease” was intended to be broadly interpreted to encompass both cardiovascular diseases involving the heart and blood vessels, and those that may also involve a renal component (although not necessary). *See, e.g., Wright v. SAIF*, 48 Or App 867 (1980) (on remand); *Long v. Tualatin Valley Fire*, 163 Or App 397, 399-401 (1999); Submission from Herbert E. Griswold, M.D., House Labor and Industries Committee, Feb. 2, 1961; Submission from Earl R. Noble, Oregon State Fire Fighters Council, House Labor and Industries Committee, Jan. 24, 1961.” *McCann*, 62 Van Natta at 2512 n 5.

Accordingly, consistent with *McCann*, claimant’s MI constitutes a “cardiovascular-renal disease” within the meaning of ORS 656.802(4).

We next address whether claimant took “a physical examination upon becoming a firefighter, or subsequently thereto, which failed to reveal any evidence of such condition or impairment of health which preexisted employment.” *See* ORS 656.802(4). For the following reasons, we conclude that he did.

In *Winston-Dillard RFPD v. Addis*, 134 Or App 98 (1995), the court concluded that the claimant, who had taken cardiac stress tests or stress EKGs, had undergone the customary tests that the medical profession would use for detecting cardiovascular disease. Consequently, the court held that the stress tests taken by the claimant were sufficient to meet the requirements of ORS 656.802(4).

We find the present case to be similar to *Addis*. Here, claimant underwent annual firefighter examinations and biennial stress tests. (Exs. 31-5, -6, 42-1, 6, -7). Those tests included “a pulmonary function stress test” and an “EKG.” (Exs. 31-5, 42-1, -7). Dr. Samoil, who was presented with claimant’s April 2007 pulmonary function tests, stated that claimant’s biennial stress tests “were all within normal limits” and documented “[t]he lack of any myocardial ischemia symptomatology.” (Ex. 42-8). Based on Dr. Samoil’s opinion, we conclude that those examinations “failed to reveal any evidence of [an MI that] preexisted [claimant’s] employment.” *See* ORS 656.802(4). There is no contrary medical opinion.

We disagree with the employer that claimant was required to submit the actual results of his physical examinations. ORS 656.802(4) requires the undertaking of “a physical examination upon becoming a firefighter, or subsequently thereto”; it does not prescribe evidentiary rules for how such a physical examination must be established.

Here, claimant provided a sworn statement concerning his physical examinations and their results. (Ex. 31-5, -6). Moreover, Dr. Samoil reviewed claimant’s medical history, including examination reports and test results. (See Ex. 42-1, -6, -7). That evidence was admitted into the record without any objection from the employer. We decline the employer’s request to determine that such evidence is *per se* “incompetent” to establish that claimant underwent the necessary physical examination under ORS 656.802(4).

Finally, we consider whether the firefighter’s presumption of ORS 656.802(4) applies or whether claimant’s MI, which was caused by mental stress, must meet the criteria for establishing a compensable mental disorder under ORS 656.802(1)(b) and (3). In other words, does the firefighter’s presumption apply to cardiovascular-renal diseases (or other qualifying conditions under ORS 656.802(4)) “caused or worsened by mental stress.” See ORS 656.802(1)(b).

In interpreting statutes, the appropriate first step in determining the legislature’s intent is to examine the statutory text and context. *State v. Gaines*, 346 Or 160, 171 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993). We may also consider any applicable legislative history. *Gaines*, 346 Or at 171-72, 177-78. The objective of statutory interpretation is to “pursue the intention of the legislature if possible.” *Id.* at 165; see also ORS 174.020 (“In the construction of a statute, a court shall pursue the intention of the legislature if possible.”).

As set forth above, ORS 656.802(4) provides, in relevant part that:

“[d]eath, disability or impairment of health of firefighters
* * * caused by any disease of the lungs or respiratory
tract, hypertension or cardiovascular-renal disease, and
resulting from their employment as firefighters is an
‘occupational disease.’ Any condition or impairment of
health arising under this subsection shall be presumed to
result from a firefighter’s employment.”

ORS 656.802(1)(a) defines “occupational disease” as “any disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein, and which requires medical services or results in disability or death * * *.” In *Dethlefs v. Hyster Co.*, 295 Or 298, 310 (1983), the Supreme Court held that this provision required that the work exposure be “the major cause of the disease.” *See also SAIF v. Noffsinger*, 80 Or App 640, 645-46, *rev den*, 302 Or 342 (1986) (“Of course, because ORS 656.802(1)(a) requires that the disease be one ‘to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein,’ the claimant must also prove that work conditions, when compared with non-work conditions, were the major contributing cause of the disease”) (citing *Dethlefs*; *SAIF v. Gygi*, 55 Or App 570, *rev den*, 292 Or 825 (1982)).

Thus, as applied here, under ORS 656.802(1)(a) and (4), it would be presumed that claimant’s work conditions were the major contributing cause of his claimed cardiovascular-renal disease (the MI). However, as set forth above, the medical evidence establishes that claimant’s MI was caused, in part, by work-related mental stress. This is significant because an “occupational disease” includes “[a]ny mental disorder,” and “mental disorder” includes “any physical disorder caused or worsened by mental stress.” ORS 656.802(1)(a)(B); ORS 656.802(1)(b). Moreover, ORS 656.802(3) further provides that, “[n]otwithstanding any other provision of this chapter, a mental disorder is not compensable under this chapter unless the worker establishes,” *inter alia*, that: (1) employment conditions were the major contributing cause of the mental disorder; and (2) there is clear and convincing evidence that the mental disorder arose out of and in the course of employment.

Thus, if claimant was not a qualifying firefighter under ORS 656.802(4), his claimed MI would be treated as a “mental disorder” because it is a “physical disorder caused or worsened by mental stress.” *See* ORS 656.802(1)(b). Claimant would then need to meet the heightened standards of proving a compensable mental disorder as set forth in ORS 656.802(3). Conversely, if analyzed as a “cardiovascular-renal disease” under ORS 656.802(4), the claim would be presumptively compensable, with the employer required to demonstrate with “clear and convincing evidence that the cause of the condition or impairment [was] unrelated to the firefighter’s employment.”

Both ORS 656.802(1)(b) and ORS 656.802(4) employ the far-reaching term “any” to describe the scope of their respective applicability. *Compare* ORS 656.802(1)(b) (“‘mental disorder’ includes any physical disorder caused or worsened by mental stress”) and ORS 656.802(4) (“[d]eath, disability or impairment of health of [qualifying] firefighters * * * caused by any * * * cardiovascular-renal disease * * * is an ‘occupational disease’ [and] [a]ny condition or impairment of health arising under this subsection shall be presumed to result from a firefighter’s employment”). Thus, the text of both statutes suggests that each has broad applicability.

Neither ORS 656.802(1)(b) nor ORS 656.802(4), however, expressly address the issue that we must resolve—namely, whether claimant’s claim for his cardiovascular-renal disease (the MI) should be analyzed under the so-called “firefighter’s presumption,” or treated as a “mental disorder” because his MI was “caused or worsened by mental stress.” *See* ORS 656.802(1)(b). To determine “the intention of the legislature,” we turn to the legislative history of the applicable provisions. *See Gaines*, 346 Or at 165 (the objective of statutory interpretation is to “pursue the intention of the legislature if possible”).

The firefighter’s presumption, currently codified in ORS 656.802(4), was enacted in 1961. *See* Or Laws 2009, ch 583, § 1. At the time of its passage, the occupational disease statute did not set forth a separate compensability standard for “mental disorders.”

The legislative history shows that the bill enacting the firefighter’s presumption was initiated by the Oregon State Fire Fighters Council. Minutes, Senate Labor and Industries Committee, HB 1018, March 8, 1961. The intent of the bill was “to give relief to firefighters because statistical studies indicated firefighters were much more likely to suffer from heart and lung diseases due to exposure to smoke and gases under strenuous conditions.” *Wright v. SAIF*, 289 Or 323, 328 (1980) (citing Minutes, Senate Labor and Industries Committee, HB 1018, March 8, 1961).

The statistical studies and other evidence submitted by the Oregon State Fire Fighters Council linked the “mental stress” of being a firefighter to the presumptively compensable conditions set forth in ORS 656.802(4). Specifically, the legislature was provided with the following submission of Earl R. Noble of the Oregon State Fire Fighters Council in support of the proposed legislation, concerning a firefighter’s employment as it relates to the presumptively compensable diseases:

“High blood pressure, hardening of the arteries, and other such diseases definitely are influenced by stress. These conditions occur in fire fighters.”

“Emotional and muscular effort may cause great elevation of blood pressure in the individuals. Stress can also cause changes to occur in the heart.”

“I believe that the following occupational factors of fire fighting predispose to heart disease: stress and strain, * * * .”

“Hypertension, arteriosclerosis, and some of the collagen diseases are related to stress. Expressed or repressed emotions or muscular effort may cause great elevation of blood pressure.”

“Stress can also produce morphologic changes in the heart. Cardiac infarcts, hypertension, and angina pectoris may be regarded as diseases of adaptation. Arteriosclerosis appears to be definitely more common among persons who are exposed to stress and strain than in the population at large.” Submission from Earl R. Noble, Oregon State Fire Fighters Council, House Labor and Industries Committee, Feb. 2, 1961, with quotations from Herman N. Bundesen, M.D. and Nathaniel E. Reich, M.D.³

Mr. Noble also testified and presented his submission to the Senate. Senator Grenfell responded that the bill was “good and badly needed.” Minutes, Senate Labor and Industries Committee, HB 1018, March 8, 1961.

Additionally, the legislature was also provided with the following medical statement in support of the firefighter’s presumption:

³ We recognize that some of the passages refer to only “stress,” which could indicate only physical stress, mental stress, or both. However, several of the passages specifically single out the “emotional” or “mental” stress associated with being a firefighter.

“As to the incidence of heart disease, let me state that in all major cities of this country, to the best of my knowledge, [f]irefighting is recognized as adding materially to the frequency of such occurrence and is considered an occupational hazard. This is in line with general medical opinion, for in any unusually stressful occupation (either or both mentally or physically stressful) the incidence of heart disease, particularly coronary thrombosis, is definitely increased, and the age for the development of such disorders is decreased.”
Submission from John R. Montague, M.D., Chief Medical Advisor to the Fire and Police Disability and Retirement Board of the City of Portland, Senate Labor and Industries Committee, April 13, 1961.

In sum, the legislative history indicates that ORS 656.802(4) was initiated by proponents based on evidence of an increased likelihood of firefighters suffering from the diseases ultimately deemed presumptively compensable, including evidence showing that mental stress contributed to those diseases. *See Wright*, 239 Or at 328; Minutes, Senate Labor and Industries Committee, HB 1018, March 8, 1961. Submission from Earl R. Noble, Oregon State Fire Fighters Council, House Labor and Industries Committee, Feb. 2, 1961, with quotations from Herman N. Bundesen, M.D. and Nathaniel E. Reich, M.D. Submission from John R. Montague, M.D., Chief Medical Advisor to the Fire and Police Disability and Retirement Board of the City of Portland, Senate Labor and Industries Committee, April 13, 1961. The history does not show that the legislature called into question the medical evidence specifically identifying mental stress as a contributor to the presumptively compensable conditions.⁴

⁴ Early in the process, a representative questioned the source of some of the medical opinions advanced by Mr. Noble, but did not identify a particular concern about mental stress contributing to the proposed presumptively compensable disease. *See* Minutes, House Labor and Industries Committee, HB 1018, January 24, 1961. In any event, Mr. Noble responded that he would furnish more facts and secure some statements from local and state medical authorities. *Id.* Mr. Noble subsequently submitted a statement from Dr. Herbert E. Griswold, Professor of Medicine, Department of Cardiology, University of Oregon Medical School, stating that firefighters had an increased chance of developing a heart attack over the general population. *See* Minutes, House Labor and Industries Committee, HB 1018, February 2, 1961. Mr. Noble also subsequently testified and presented additional reports to the legislature in support of the bill. *See* Minutes, Senate Labor and Industries Committee, HB 1018, March 8, 1961 and March 20, 1961.

Based on the foregoing, we conclude that, when adopting the statute creating the categories of presumptively compensable diseases, the legislature relied on the submissions presented by proponents of the bill.⁵ As set forth above, those submissions considered that a firefighter's mental stress contributed in part to the "death, disability or impairment of health" caused by those diseases. *See* ORS 656.802(4). Therefore, we find that the work-related mental stress of a firefighter was recognized as a causal factor of those presumptively compensable diseases.⁶

In 1987, the legislature enacted the "mental disorder" provision currently codified at ORS 656.802(3). *See* Or Laws 1987, ch 713, § 4. As set forth above, that provision requires a heightened standard of proof to prove the compensability of "a mental disorder." *See* ORS 656.802(3). There is no dispute that this provision was also intended to apply to firefighters making claims for "mental disorders." At the time of its passage, however, the amendment had no impact on the firefighter's presumption because the presumption only covered "physical disorders," whereas ORS 656.802(3) was only concerned with "mental disorders."

In 1995, however, the legislature amended ORS 656.802 to provide that, as used in chapter 656, "'mental disorder' includes any physical disorder caused or worsened by mental stress." *See* Or Laws 1995, ch 332, § 56. This amendment was intended to overrule the Supreme Court's decisions in *DiBrito v. SAIF*, 319 Or 244 (1994), and *Mathel v. Josephine County*, 319 Or 235 (1994), which had held that stress-caused physical disorders should be analyzed as accidental injuries under ORS 656.005(7). As noted by *SAIF v. Falconer*, 154 Or App 511, 517-18 (1998), "[t]he legislature added the language to ORS 656.802 to ensure that stress-caused physical disorders were analyzed under the more stringent requirements for an occupational disease claim."

⁵ In reaching this conclusion, we acknowledge that the legislative history concerning the enactment of the firefighter's presumption does not contain an explicit endorsement from a legislator that the presumption was enacted with these submissions in mind. Nevertheless, considering the circumstances surrounding the creation of the presumption, we are persuaded that, in adopting the legislation, the legislature relied on these submissions. *See Wright*, 239 Or at 328.

⁶ It is unsurprising that the 1961 legislature did not expressly include "mental stress" related language in the statute itself. As discussed above, at the time of enactment, the workers' compensation scheme did not distinguish between "physical" and "mental" disorders. Rather, as set forth below, the concept of a separate compensability analysis/standard for "mental disorders" or "mental stress" did not appear until 1987. Moreover, the idea of treating certain "physical disorders" as "mental disorders" was not enacted until 1995. Consequently, we do not find the absence of "mental stress" type language in the 1961 statute to indicate an intention by the legislature to preclude compensability of presumptively compensable claims that possessed a mental component.

There is no dispute that the text of the 1995 amendment, codified at ORS 656.802(1)(b), applies to claims by firefighters for “physical disorders caused or worsened by mental stress” that are not governed by the presumptively compensable conditions or impairments of health set forth in ORS 656.802(4). The text of ORS 656.802(1)(b), however, does not expressly state an intention to weaken the presumptively compensable diseases under ORS 656.802(4). Likewise, our review of the legislative history of ORS 656.802(1)(b) does not indicate any such intention, as that history only generally references physical disorders caused or worsened by mental stress, it does not mention the firefighter’s presumption or the presumptively compensable conditions set forth in ORS 656.802(4).⁷ *See, e.g.*, Tape Recording, Senate Labor and Government Operations, meeting jointly with House Labor, SB 396, January 30, 1995, Tape 16, Side B, Tape 46, Side B (statements of Rep. Kevin Mannix). The lack of any such intent, as expressed in either the text of the statute or the legislative history, to override the firefighter’s presumption is significant given the submissions supporting the legislation adopted by the 1961 legislature, which, as set forth above, considered presumptively compensable diseases to contain a “mental stress” component. Given that understanding, and coupled with the primary purpose of the 1995 amendments to ORS 656.802 (to overrule a holding that stress-caused physical disorders were to be analyzed as injuries), we are unable to infer a legislative intent to declare that the death, disability or impairment of health caused by a cardiovascular-renal disease is no longer presumptively compensable whenever a firefighter’s work-related “mental stress” plays a role in that condition or impairment of health.

Moreover, whereas ORS 656.802(1)(b) and (3) apply broadly to workers making mental disorder claims, ORS 656.802(4) is a statute specific to a particular subset of workers, *i.e.*, firefighters, and specific to particular conditions or impairments of health, *i.e.*, those caused by any disease of the lungs or respiratory tract, hypertension or cardiovascular-renal disease. In the event of an inconsistency between a general and particular provision, “the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.” ORS 174.020(2); *Anthony D. Vestal*, 58 Van Natta 773, 776 (2006). In other words,

⁷ The only reference to firefighters that we have identified in the legislative history relates to “preexisting conditions,” not the firefighter’s presumption or ORS 656.802(1)(b).

“[w]here there is a conflict between two statutes, both of which would otherwise have equal force and effect, and the provisions of one are particular, special and specific in their directions, and those of the other are general in their terms, the special provisions must prevail over the general provisions [.]” *Smith v. Multnomah County Board of Commissioners*, 318 Or 302, 309 (1994) (quoting *State v. Preston*, 103 Or 631, 637 (1922)).

Here, we find ORS 656.802(4), which is applicable only to qualifying firefighters and specifically identified conditions or impairments of health, more specific than ORS 656.802(1)(b) and (3), which is a broad statute applicable to workers generally and to generic physical disorders caused or worsened by mental stress. Although it could be argued that the “mental disorder” provision of ORS 656.802(1)(b) is “more specific” due to its defining of “mental disorder” as “any physical disorder caused or worsened by stress,” that argument is undermined when the legislative history of ORS 656.802(4) is considered. As set forth above, that history indicates that the legislature considered “mental stress” to contribute to the “physical disorders” of firefighters that were classified as presumptively compensable.

In arguing for a different result, the employer emphasizes the use of the term “notwithstanding” in ORS 656.802(3). As noted above, that provision states that “[n]otwithstanding any other provision of this chapter, a mental disorder is not compensable under this chapter unless the worker” meets the specified criteria set forth in ORS 656.802(3). “The function of a ‘notwithstanding’ clause * * * is to except the remainder of the sentence containing the clause from other provisions of a law that is referenced in that particular notwithstanding clause.” *O’Mara v. Douglas County*, 318 Or 72, 76 (1993).

By its terms, however, ORS 656.802(3) only applies if we determine that claimant’s physical disorder (*i.e.*, his cardiovascular-renal disease) should be treated as a “mental disorder” under ORS 656.802(1)(b), rather than as a presumptively compensable “occupational disease” under ORS 656.802(4). In other words, ORS 656.802(3) assumes that the compensability of a “mental disorder” is at issue. Thus, any application of that statute is contingent on a prior determination to disregard the presumptive compensability of the conditions or impairments of health listed in ORS 656.802(4), and to treat those conditions or impairments as “mental disorders” under ORS 656.802(1)(b). For the reasons set forth above, we do not find that the legislature intended such a result.

Consequently, because the presumptively compensable physical disorders of ORS 656.802(4), which the language and legislative history indicate include those caused or worsened by mental stress, are not analyzed as “mental disorders,” the “notwithstanding” clause of ORS 656.802(3) does not apply to the claimed MI condition.

Accordingly, we find that the presumption under ORS 656.802(4) applies to claimant’s claimed cardiovascular-renal disease (MI). The employer does not contend that there is “clear and convincing medical evidence that the cause of the condition or impairment is unrelated to [claimant’s] employment.” *See* ORS 656.802(4). Therefore, we reverse. *Id.*

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services at hearing and on review is \$12,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant’s appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ’s order dated March 18, 2010 is reversed. The employer’s denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant’s attorney is awarded an assessed fee of \$12,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on March 30, 2011

Member Lowell dissenting.

Under ORS 656.802(1)(b), “any physical disorder caused or worsened by mental stress” shall be considered a “mental disorder” and be subjected to the heightened compensability standards of such disorders as set forth in ORS 656.802(3). (Emphasis added). Despite such sweeping language, the majority determines that ORS 656.802(1)(b) does not apply to “any” such physical disorder. Rather, the majority concludes that ORS 656.802(1)(b) applies to “some” or “most” physical disorders, expressly exempting those set forth in ORS 656.802(4) when “caused or worsened by mental stress.” Because I find that result unsupported by the relevant statutes and applicable rules of statutory construction, I respectfully dissent.

As set forth in the majority opinion, ORS 656.802(1)(b) was added to Chapter 656 in 1995. Thus, that provision was enacted well *after* the 1961 passage of the “firefighter’s presumption” (codified at ORS 656.802(4)).

In enacting legislation, the legislature’s awareness of existing laws is presumed. *State v. Waterhouse*, 209 Or 424, 436 (1957); *see also State v. Biscotti*, 219 Or App 296, 302 (2008) (it is ordinarily assumed that the legislature is aware of other statutes *in pari materia*); *City of Salem v. Salisbury*, 168 Or App 14, 34 (2000) (“the legislature is deemed to have existing statutes in mind when it enacts new legislation”). Thus, in assessing the impact of ORS 656.802(1)(b), we are to presume that, in enacting that statute, the legislature was aware that ORS 656.802(4) provided that certain physical disorders, including those caused or worsened by mental stress, were presumptively compensable occupational diseases.

Proceeding from that presumption, I turn to the language used by the legislature to enact its policy wishes. *State v. Gaines*, 346 Or 160, 171 (2009) (“there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes”) (internal quotations and citations omitted). Here, the legislature enacted ORS 656.802(1)(b) to apply to “any physical disorder caused or worsened by mental stress.” The use of the term “any” in this context is synonymous with “every.” *See Fleming v. United Services Automobile Assoc.*, 329 Or 449, 456 (1999); *Totten v. New York Life Ins. Co.*, 298 Or 765, 772 (1985).

Giving meaning to “the words by which the legislature undertook to give expression to its wishes” (*see Gaines*, 346 Or at 171), I would find that ORS 656.802(1)(b) applies to “*any* physical disorder caused or worsened by mental stress.” Such an application would necessarily include those physical disorders set forth in ORS 656.802(4). Simply put, the legislature could have, but did not, provide for any exception to the sweeping language used in ORS 656.802(1)(b). Therefore, I would find that the physical disorders set forth in ORS 656.802(4) are subject to the provisions of ORS 656.802(1)(b) when they are “caused or worsened by mental stress.”⁸

This approach is further supported by the “doctrine of implied repeal of statutes.” Under that doctrine, “when the legislature enacts a subsequent statute [that] is repugnant to or in conflict with a prior statute, but contains no language expressly repealing the prior statute, the prior statute is impliedly repealed.” *State v. Shumway*, 291 Or 153, 160 (1981); *see also State v. Ferguson*, 228 Or App 1, 4 (2009) (“if earlier and later statutes are in irreconcilable conflict, then the earlier must yield to the later by implied repeal’ or amendment”) (quoting *Anthony et al. v. Veatch et al.*, 189 Or 462, 481 (1950), appeal dismissed, 340 US 923 (1951)). Although implied repeal “is not favored and must be established by plain, unavoidable, and irreconcilable repugnancy between the prior and subsequent statutes,” *City of Lowell v. Wilson*, 197 Or App 291, 309, *rev den*, 339 Or 406 (2005) (internal quotations marks omitted), here, we have such an irreconcilable conflict.

⁸ I do not quarrel with the legislative history cited by the majority to the effect that, in enacting the “firefighter’s presumption” in 1961, the legislature was presented with information suggesting a relationship between the mental stress associated with being a firefighter and some of the identified presumptively compensable conditions. I do, however, question the significance of that history.

As the majority acknowledges, at the time of the 1961 legislation, and for a period well after, the workers’ compensation statutes did not recognize a distinction between “physical disorders” or “mental disorders”; rather, all disorders were treated the same. Therefore, before the passage of ORS 656.802(1)(b) in 1995, a claim by a qualified firefighter for a presumptively compensable condition under ORS 656.802(4) that was caused or worsened by mental stress would be treated the same as a condition that did not involve a mental-stress component. This would be the case even if the legislative history of the firefighter’s presumption contained *no* mention of “mental stress.” Therefore, I do not accord much significance to the legislative history relied on by the majority.

Moreover, it does not follow that when the legislature subsequently made a decision to distinguish between “physical” and “mental” disorders, and to treat “*any* physical disorder caused or worsened by mental stress” as a “mental disorder,” that we should presume that the legislature intended to carve out claims made by qualifying firefighters for physical disorders caused or worsened by mental stress, including those physical disorders identified in ORS 656.802(4). Had the legislature so intended, it could have excepted the physical disorders in ORS 656.802(4) from the phrase “*any* physical disorder.” The legislation, however, contains no such exception.

Specifically, claimant has claimed a cardiovascular-renal disease (MI) that was caused or worsened by mental stress. Because ORS 656.802(4) is the earlier of the two statutes, under the doctrine of implied repeal of statutes, it “must yield to the later by implied repeal or amendment.” *Ferguson*, 228 Or App at 4. Thus, unlike the majority, I would find that where presumptively compensable physical disorders under ORS 656.802(4) are “caused or worsened by mental stress,” they must be treated as “mental disorders” as set forth in ORS 656.802(1)(b) and (3).⁹

In reaching a different conclusion, the majority effectively concludes that ORS 656.802(4) trumps ORS 656.802(1)(b) insofar as a presumptively compensable physical disorder under ORS 656.802(4) is caused or worsened by mental stress. In doing so, the majority does not address the presumption that the legislature is aware of existing statutes or the “doctrine of implied repeal.” Rather, its approach implicitly presumes the opposite -- namely, that the legislature was *unaware* of ORS 656.802(4) when it enacted ORS 656.802(1)(b), and that, therefore, the use of the term “any” in subsection (1)(b) does not encompass subsection (4). Because I find that approach and conclusion at odds with the text of the statute and principles of statutory construction, I disagree with the majority.

I also disagree with the majority’s decision to give preference to ORS 656.802(4) because it is purportedly “more specific” than ORS 656.802(1)(b). *See* ORS 174.020(2) (in the event of an inconsistency between a general and particular provision, “the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent”). It is equally supportable that the “mental disorder” provision of ORS 656.802(1)(b) is “more specific” than ORS 656.802(4) because the former applies to a particular type of physical disorder (*i.e.*, one “caused or worsened by mental stress”), whereas the latter applies to broader, more general types of physical disorders unrelated to mental stress. Thus, I would not rely solely on this statutory maxim to resolve the conflict between these statutes.

In sum, there is no dispute that claimant’s MI is a “physical disorder caused or worsened by mental stress.” *See* ORS 656.802(1)(b). Consequently, I would treat his claim as a “mental disorder” as required by ORS 656.802(1)(b), rather than as a presumptively compensable “cardiovascular-renal disease” under ORS 656.802(4). Treated as such, I would uphold the employer’s denial for

⁹ The doctrine of implied repeal logically follows from the presumption that the legislature is aware of existing statutes. In presuming awareness of existing statutes, subsequent enactments that limit or qualify earlier statutes are rightly understood as modifications or repeals.

the reasons set forth in the ALJ's order, namely, because there is not clear and convincing evidence that claimant's employment conditions were the major contributing cause of his MI. Because the majority determines that ORS 656.802(1)(b) does not apply, I respectfully dissent.