

In the Matter of the Compensation of
ROGER J. THOMPSON, Claimant

WCB Case No. 10-06391

ORDER ON REVIEW

Bennett Hartman Morris & Kaplan, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Herman. Member Lowell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for a heart attack. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld SAIF's denial of claimant's occupational disease claim for a heart attack, finding that the opinions of Drs. Semler and Dawley were sufficient to overcome the "firefighter presumption" in ORS 656.802(4). For the following reasons, we disagree with that conclusion.

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."

The parties do not dispute that the basic facts giving rise to the presumption under ORS 656.802(4) are established. Under such circumstances, we are bound by the presumption if there is no opposing evidence. *Wright v. SAIF*, 289 Or 323, 331 (1980); *Long v. Tualatin Valley Fire*, 163 Or App 397, 400 (1999). Where, as here, however, there is opposing evidence, we "must weigh the evidence, giving the presumption the value of evidence, and determine upon which side the evidence preponderates." *Wright*, 239 Or at 331; *accord Long*, 163 Or App at 400. For the evidence to preponderate in SAIF's favor, there must be "clear and convincing medical evidence that the cause of [claimant's heart] condition or impairment is unrelated to [his] employment." ORS 656.802(4).

To satisfy its burden, SAIF relies on the opinion of Drs. Semler and Dawley. According to Dr. Semler, claimant's heart attack was caused by atherosclerosis, which in turn was unrelated to his employment as a firefighter.

Dr. Dawley initially concurred with Dr. Semler's diagnosis of atherosclerosis. (Exs. 16, 17). Dr. Dawley subsequently stated, however, that claimant "didn't really" have that condition. (Ex. 18-19). Dr. Dawley further opined that "heart attacks are a random biologic event due to plaque rupture, acute blood clot formation in an artery." (Ex. 18-6). Ultimately, Dr. Dawley was unable to say whether or not claimant's heart attack was unrelated to his firefighter employment. (Ex. 18-6, -11, -18, -19). Therefore, we find Dr. Dawley's opinion insufficient to satisfy SAIF's burden of proving, by clear and convincing evidence, that claimant's heart attack was unrelated to his employment as a firefighter. *See* ORS 656.802(4).

We turn to the opinion of Dr. Semler. Dr. Semler was unaware of "any scientific evidence that firefighting per se leads to atherosclerosis * * *." (Ex. 14-5; *see also* Ex. 20; Tr. 46-49). Dr. Semler conceded that the "cause [of] atherosclerosis is still debatable," but asserted that the "current consensus" related atherosclerosis "to "a multitude of factors[,] such as cholesterol disorder, diabetes, smoking, hypertension, obesity, family history and other factors * * *[,] including being "sedentary." (Ex. 14-5, -6; Tr. 18-19). Dr. Semler ultimately opined that claimant's employment as a firefighter played "no role whatsoever" in his atherosclerosis and heart attack. (Tr. 49; *see also* Tr. 19-20).

We are not persuaded, however, that Dr. Semler's opinion satisfies SAIF's "clear and convincing" burden to overcome the statutory presumption. Dr. Semler conceded that the cause of atherosclerosis is unknown. Despite that concession, Dr. Semler ruled out any contribution from claimant's employment as a firefighter. Dr. Semler did not persuasively explain, however, how he was able to make such a categorical exclusion, given that the causes of that condition were unknown. The lack of such a persuasive explanation is particularly significant, given that the record does not establish that claimant had any identified "risk factors" for atherosclerosis.

In sum, after weighing the evidence, we find that SAIF has not established, by clear and convincing medical evidence, that the cause of claimant's heart attack is unrelated to his employment. *See Wright*, 239 Or at 331; *accord Long*, 163 Or App at 400; ORS 656.802(4). Therefore, we reverse.

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 \$18,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's counsel's submission at the hearing level, 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 SAIF. *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 November 28, 2011 is reversed. SAIF's denial is set aside and the claim is remanded to it for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$18,000, to be paid by SAIF. 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 SAIF.

Entered at Salem, Oregon on September 7, 2012

Member Lowell dissenting.

In *Long v. Tualatin Valley Fire*, 163 Or App 397, 400 (1999), the court explained that “ORS 656.802(4) requires an employer to present ‘medical evidence that the cause of the condition or impairment is unrelated to the firefighter’s employment.’” When an employer presents such evidence, our charge is to determine whether that evidence overcomes the statutory presumption in that provision. *Long*, 163 Or App at 400. In making that determination, the *Long* court provided a comparison of the evidence before it in that case, with the evidence presented in *Wright v. SAIF*, 48 Or App 867 (1980). *Id.* at 400-01.

Specifically, the *Long* court explained that *Wright* presented a situation where “the claimant’s treating doctor initially had reported that the claimant’s condition was not caused by his work as a firefighter,” but later reported “that he was unable to make that determination * * * .” *Id.* at 400. Thus, in *Wright*, the court “concluded that the subsequent report significantly diluted the evidentiary value of the first report and that the doctor’s initial report therefore was insufficient to overcome the presumption.” *Id.* (citing *Wright*, 48 Or App at 872).

In contrast, in *Long*, “the doctors’ opinions provided affirmative medical evidence that [the] claimant’s condition [was] unrelated to his employment.” *Long*, 163 Or App at 401. Therefore, “the Board was not bound by the presumption to find in [the] claimant’s favor.” *Id.* Disagreeing with the claimant’s argument that such opinions did not support a “finding that employer overcame the presumption by clear and convincing evidence,” the court explained that, “in contrast to *Wright*, all three doctors determined that the cause, whatever else it is, is not related to [the] claimant’s employment.” *Id.* Because nothing in the record, “other than the presumption, diminishe[d] or dilute[d] those conclusions,” the court held that it was correct to conclude “that [the] employer overcame the presumption by clear and convincing evidence.” *Id.*

Here, as acknowledged by the majority, Dr. Semler presented an unwavering and unequivocal opinion that the cause of claimant’s atherosclerosis and resulting heart attack, “whatever else it is, is not related to claimant’s employment.” *Id.* There is no contrary medical evidence. Like *Long*, nothing in this record, “other than the presumption, diminishes or dilutes” Dr. Semler’s conclusion. *Id.* Therefore, consistent with *Long*, I would conclude that SAIF overcame the presumption by clear and convincing evidence. *Id.* Because the majority determines otherwise, I respectfully dissent.