

FILED: May 22, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Alan L. Hull, Claimant.

ESTACADA RURAL FIRE DISTRICT #69,
Petitioner,

v.

ALAN L. HULL,
Respondent.

Workers' Compensation Board
0801504

A148377

Argued and submitted on September 11, 2012.

George W. Goodman argued the cause for petitioner. With him on the opening brief were Andrew H. Graham and Cummins, Goodman, Fish, Denley & Vickers, P.C. With him on the reply brief were Andrew H. Graham and Cummins, Goodman, Denley & Vickers, P.C.

Benjamin C. Debney argued the cause for respondent. On the brief were Bennett P. Dalton and Guinn & Dalton.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reversed and remanded.

1 NAKAMOTO, J.

2 At issue in this case is whether claimant's stress-related heart attack must be
3 analyzed under the so-called firefighters' presumption of ORS 656.802(4) or instead,
4 under the heightened standard of proof for mental disorders found in ORS 656.802(3).
5 The Workers' Compensation Board (board) applied the firefighters' presumption, and
6 employer seeks judicial review. For the following reasons, we reverse and remand.

7 The facts, as found by the administrative law judge (ALJ) and adopted by
8 the board, are supported by substantial evidence. Claimant is a fire district chief and has
9 worked for employer for over 30 years. In June 2007, the Clackamas County Sheriff's
10 Office informed claimant that one of his long-time employees had embezzled \$1.9
11 million over several years. The sheriff's office asked claimant to go undercover and to
12 gather evidence against the employee, which claimant agreed to do. Following the
13 employee's arrest, claimant was the subject of public concern and anger over the
14 embezzlement, with some members of the public calling for his removal. Claimant
15 experienced stress as a result of his undercover assignment and the community anger
16 directed at him.

17 In October 2007, after talking to several people about the embezzlement at
18 a high school football game, claimant was having trouble sleeping. He asked his wife
19 whether she had overheard an individual's comment at the game about the embezzlement,
20 and she responded that she was "sick and tired of living and breathing that embezzlement
21 since July" and had seen what the embezzlement had done to claimant and their family.

1 Claimant began to rub his wife's shoulder when his "arm just sort of went numb." He
2 began to experience chest pain and was taken to the hospital. He was diagnosed with
3 myocardial infarction, more commonly known as a heart attack.

4 Five medical experts provided opinions concerning the cause of claimant's
5 myocardial infarction: Drs. Greenberg, Samoil, Semler, DeMots, and Toren. Each
6 doctor agreed that claimant had an underlying coronary artery disease (arteriosclerosis)
7 unrelated to his employment, which contributed to his myocardial infarction. Samoil
8 believed that stress from the embezzlement was a "causative factor" of the myocardial
9 infarction, whereas Greenberg believed that the stress and arteriosclerosis contributed
10 equally to the myocardial infarction. DeMots characterized claimant's "acute stress"
11 during the conversation with his wife about the embezzlement to be "at most a trigger or
12 precipitating factor." Semler and Toren likewise did not exclude claimant's work-related
13 stress as contributing to the myocardial infarction, but they believed that any such
14 contribution was minor.

15 Claimant filed a workers' compensation claim, contending that his
16 myocardial infarction was a compensable occupational disease, ORS 656.804, which
17 employer denied. Claimant requested an evidentiary hearing and argued to the ALJ that
18 the "firefighters' presumption" under ORS 656.802(4), which presumes that the cause of
19 the condition or impairment is related to the firefighter's employment, applied. In
20 denying compensation, the ALJ determined that claimant's heart attack was caused or
21 worsened by mental stress associated with the embezzlement and treated the claim as a

1 mental disorder claim. *See* ORS 656.802(1)(b) ("'[M]ental disorder' includes any
2 physical disorder caused or worsened by mental stress."). The ALJ concluded that the
3 firefighters' presumption does not apply to claims for a mental disorder and, instead,
4 applied the heightened compensability standard for mental disorders set forth in ORS
5 656.802(3). In general, that standard requires the claimant to establish that (1) the
6 employment condition producing the mental disorder exists, (2) the employment
7 condition is not generally inherent in every work situation, (3) the diagnosed mental
8 disorder is generally recognized in the medical or psychological community, and (4)
9 there is clear and convincing evidence that the mental disorder arose out of and in the
10 course of employment. ORS 656.802(3)(a) - (d). The ALJ concluded that claimant did
11 not carry his burden of proving that the mental stress, which led to claimant's heart attack,
12 was work related, and affirmed the denial.

13 Claimant sought review with the board, arguing that the firefighters'
14 presumption applies and that employer did not establish by "clear and convincing
15 medical evidence that the cause of the condition or impairment [was] unrelated to the
16 firefighter's employment" as required by ORS 656.802(4). Employer countered that the
17 firefighters' presumption does not apply, because claimant's myocardial infarction lacks
18 the renal component to qualify as a "cardiovascular-renal disease" as required by ORS
19 656.802(4). In addition, employer contended that claimant did not establish that his
20 myocardial infarction, which was caused by stress, met the criteria for establishing a
21 compensable mental disorder under ORS 656.802(1)(b) and (3).

1 A divided board agreed with claimant and reversed the ALJ's decision. In
2 doing so, the majority framed the issues as follows:

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

13 The majority reasoned that the firefighters' presumption applies to claimant's myocardial
14 infarction, because, when the legislature originally enacted the firefighters' presumption,
15 it relied on submissions and testimony that considered a firefighter's mental stress to
16 contribute, in part, to presumptively compensable diseases, such as cardiovascular-renal
17 disease. The board also ruled that the heightened standard for mental disorders under
18 ORS 656.802(3) does not apply to workers who meet the firefighters' presumption. The
19 board concluded that, under the firefighters' presumption, claimant's myocardial
20 infarction was compensable as a cardiovascular-renal disease.

21 On judicial review, in its first assignment of error, employer renews its
22 argument that a myocardial infarction is not a "cardiovascular-renal disease" and further
23 argues, in its second assignment of error, that, when a cardiovascular disease is caused by
24 a stress-related mental disorder, the firefighters' presumption does not apply, but the
25 higher standard set forth in ORS 656.802(3) applies. Claimant responds that, when the
26 legislature enacted the firefighters' presumption, it intended to include heart conditions,

1 such as myocardial infarctions, in the firefighters' presumption. Claimant also contends
2 that the heightened compensability standard set forth in ORS 656.802(3) establishes
3 whether a condition qualifies as an "occupational disease," and that, because the
4 firefighters' presumption presumes that a condition is an occupational disease, it
5 supersedes the need to satisfy the mental disorder standard under ORS 656.802(3).
6 Because we agree with employer's second assignment of error and resolve the case on
7 that basis, we need not address employer's first assignment of error. Instead, for the
8 purposes of our analysis, we will assume that claimant's myocardial infarction is a
9 cardiovascular-renal disease that qualifies for the firefighters' presumption. *See City of*
10 *Eugene v. McCann*, 248 Or App 527, 533-34, 273 P3d 348 (2012) (declining to address
11 whether "cardiovascular-renal disease" in ORS 656.802(4) requires a firefighter's
12 condition to be a disease of the cardiovascular *and* renal system when case could be
13 resolved on other grounds).

14 We review the board's order for legal error. ORS 183.482(8)(a). The
15 resolution of this case requires us to interpret ORS 656.802; thus, we apply the familiar
16 methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d
17 1143 (1993), as amplified in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Our task
18 is to determine the intent of the legislature when it enacted ORS 656.802, which we glean
19 from the text, context, and legislative history, resorting if necessary to maxims of
20 statutory construction. *Gaines*, 346 Or at 171-72.

21 To establish a compensable occupational disease, generally, a claimant

1 "must prove that employment conditions were the major contributing cause of the
2 disease." ORS 656.802(2)(a). However, certain conditions or impairments suffered by a
3 firefighter are presumed to be work-related under ORS 656.802(4), which provides:

4 "Death, disability or impairment of health of firefighters of any
5 political division who have completed five or more years of employment as
6 firefighters, caused by any disease of the lungs or respiratory tract,
7 hypertension or cardiovascular-renal disease, and resulting from their
8 employment as firefighters is an 'occupational disease.' Any condition or
9 impairment of health arising under this subsection shall be presumed to
10 result from a firefighter's employment. However, any such firefighter must
11 have taken a physical examination upon becoming a firefighter, or
12 subsequently thereto, which failed to reveal any evidence of such condition
13 or impairment of health which preexisted employment. Denial of a claim
14 for any condition or impairment of health arising under this subsection
15 must be on the basis of clear and convincing medical evidence that the
16 cause of the condition or impairment is unrelated to the firefighter's
17 employment."

18 If a claimant's condition or impairment qualifies for the firefighters' presumption, the
19 claim cannot be denied unless the employer proves by clear and convincing medical
20 evidence that the cause of the condition was not work-related. The firefighters'
21 presumption is unusual in that it does not place the burden on the worker to establish the
22 work-disease relationship, but rather shifts the burden to the employer to disprove it.
23 *Wright v. SAIF*, 289 Or 323, 332, 613 P2d 755 (1980).

24 When a firefighter suffers from a physical disorder caused by work-related
25 mental stress, the firefighters' presumption appears to conflict with the heightened
26 compensability standard for mental disorders. "[A]ny physical disorder caused or
27 worsened by mental stress" is a mental disorder, ORS 656.802(1)(b), and a mental
28 disorder is defined as an occupational disease, ORS 656.802(1)(a)(B). Stress-caused

1 physical disorders are not compensable unless the heightened compensability
2 requirements of ORS 656.802(3) are satisfied:

3 "(3) *Notwithstanding any other provision of this chapter*, a mental
4 disorder is not compensable under this chapter unless the worker
5 establishes all of the following:

6 "(a) The employment conditions producing the mental disorder exist
7 in a real and objective sense.

8 "(b) The employment conditions producing the mental disorder are
9 conditions other than conditions generally inherent in every working
10 situation or reasonable disciplinary, corrective or job performance
11 evaluation actions by the employer, or cessation of employment or
12 employment decisions attendant upon ordinary business or financial cycles.

13 "(c) There is a diagnosis of a mental or emotional disorder which is
14 generally recognized in the medical or psychological community.

15 "(d) There is clear and convincing evidence that the mental disorder
16 arose out of and in the course of employment."

17 (Emphasis added.) "The function of a 'notwithstanding clause' is to make the statute an
18 exception to the provision of law to which the clause refers." *SAIF v. Falconer*, 154 Or
19 App 511, 521, 963 P2d 50 (1998), *rev den*, 328 Or 330 (1999) (De Muniz, J., dissenting);
20 *accord Severy v. Board of Parole*, 318 Or 172, 178, 864 P2d 368 (1993). The
21 notwithstanding clause italicized above makes the heightened compensability standard
22 under ORS 656.802(3)(a) to (d) an exception to any provision in ORS chapter 656. And,
23 because the firefighters' presumption is a provision in ORS chapter 656--indeed, a
24 subsection of the same statute--the heightened compensability standard for mental
25 disorders applies instead of the firefighters' presumption.

26 The legislative history supports our plain-text analysis. In 1987, ORS

1 656.802 was amended significantly by House Bill (HB) 2271 to include the
2 compensability standard in ORS 656.802(3).¹ Representative Shiprack, the chair of the
3 House Labor Committee, explained to the Senate Labor Committee the statutory
4 requisites for a worker to establish a compensable mental disorder. During his
5 description of paragraph (b), which requires the worker to establish "conditions other
6 than conditions generally inherent in every working situation," he explained that the
7 standard would not be different for firefighters as compared to other workers:

8 "[Representative Shiprack:] [Paragraph] b says that they've got to be
9 conditions other than those conditions inherent in any, pardon me, in every
10 working situation. So that means that they would have to be something that
11 everyone would, everyone would agree are inherent to what you see
12 everyday in the workplace.

13 "[Senator Hannon:] If I may stop you just for a moment,
14 Representative. *Could that same set of standard[s] be used for office*
15 *worker versus say like a firefighter?* Would the same basis, standard apply
16 in the same workplace?

17 "[Representative Shiprack:] The intent there, Senator, is that in the
18 workplace, you are expected to show up on time, you are expected to
19 cooperate, perhaps, with your fellow employees, you are expected to have
20 certain things unrelated to the specific occupations involved. This may also
21 address itself to the fact that perhaps in every, in every experience, you will
22 suffer times of layoff. It is not--*the intent of this is not to say that a*
23 *firefighter has a more stressful job than someone digging ditches, perhaps,*
24 *although, occasionally it may be that way.* We didn't want to get into that.
25 *That is not the intent of the House to say that this profession is something,*
26 *and this isn't.* But there are certain duties in the workplace that are inherent
27 in every job and that's what we're trying to say it here."

28 Tape Recording, Senate Labor Committee, HB 2271, Apr 23, 1987, Tape 120, Side A

¹ HB 2271 listed the heightened compensability standard for mental disorders under subsection ORS 656.802(2). Or Laws 1987, ch 713, § 4. In 1990, the legislature renumbered ORS 656.802(2) as ORS 656.802(3). Or Laws 1990, ch 2, § 43.

1 (statement of Rep Bob Shiprack) (emphasis added). Rather than explaining that
2 firefighters were held to a different standard, possibly through the firefighters'
3 presumption, Representative Shiprack explained that the bill was not intended to
4 distinguish among the different occupations. The italicized text demonstrates that the
5 legislature intended to apply the heightened standard for mental disorders to all workers
6 with mental disorders, including firefighters, and did not intend to exclude that category
7 of workers based on the firefighters' presumption in ORS 656.802(4).

8 Claimant argues, that when the legislature originally enacted the
9 firefighters' presumption in 1961, it intended the presumption to include conditions
10 caused or worsened by stress. Claimant relies on the board's summary of the legislative
11 history pertaining to the enactment of the firefighters' presumption. That summary
12 referred to testimony from the Oregon State Fire Fighters Council about how "stress and
13 strain" and extreme temperatures, gas, and smoke connected with firefighting predisposes
14 firefighters to heart disease. Testimony, Senate Labor and Industries Committee, HB
15 1018, Mar 8, 1961 (statement of Earl Noble, secretary of the Oregon State Fire Fighters
16 Council). Claimant contends that testimony is evidence that the legislature did not intend
17 to apply the heightened compensability standard for mental disorders under ORS
18 656.802(3) to a firefighter's stress-related claim.

19 We disagree. The testimony that the legislature heard in 1961 did not
20 include stress caused by everyday work situations that employees may face in any job.
21 The testimony from the Oregon State Fire Fighters Council concerned the emotional and

1 physical strain associated with fighting fires and rescuing people in dangerous situations.
2 The 1961 legislature did not contemplate stress related to everyday work activities. That
3 discussion of "everyday stress" did not occur until 1987, when the heightened
4 compensability standard for mental disorders was added to ORS 656.802. And, as we
5 noted above, the legislature contemplated mental stress claims in *all occupations* and
6 chose not to distinguish firefighters. Accordingly, we conclude that, when a worker who
7 would ordinarily qualify for the firefighters' presumption has a claim for a mental
8 disorder, the compensability standard for mental disorders set forth in ORS 656.802(3)
9 applies.

10 In this case, the board found, and the parties do not dispute, that claimant's
11 physical disorder--myocardial infarction--was caused or worsened by mental stress.
12 Thus, claimant's myocardial infarction must be treated as a mental disorder, ORS
13 656.802(1)(b) ("'[M]ental disorder' includes any physical disorder caused or worsened by
14 mental stress."), and must be analyzed under ORS 656.802(3). Therefore, we conclude
15 that the board erred when it applied the firefighters' presumption under ORS 656.802(4)
16 rather than the mental disorder standard set forth in ORS 656.802(3).

17 Reversed and remanded.