



Compensability of mental disorders and presumptions in our current workers' compensation law

By Claims Policy Analyst Julia Hier
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ORS 656.802

- Occupational diseases
- Mental disorders
- Presumptions





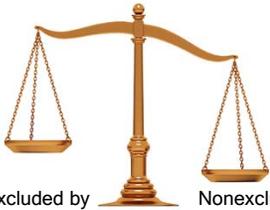
Mental disorders

- Worker's burden of proof
- Generally, major contributing cause (>50% of the cause) plus four additional criteria under ORS 656.802(3)



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Major contributing cause



Factors excluded by
ORS 656.802(3)(b) +
nonwork-related
factors

Nonexcluded
work factors

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1. Excluded work factors: ORS 656.802(3)(b)

The employment conditions producing the mental disorder are conditions other than conditions generally inherent in any of the following:

- Every working situation
- Reasonable disciplinary, corrective or job performance evaluation actions by the employer
- Cessation of employment or employment decisions attendant upon ordinary business or financial cycles

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2. Real and objective

- The employment conditions producing the mental disorder exist in a real and objective sense.



3. Diagnosis is recognized

- There is a diagnosis of a mental or emotional disorder that is generally recognized in the medical or psychological community.



4. Clear and convincing evidence

- There is clear and convincing evidence that the mental disorder arose out of and in the course of employment.

Compensability of mental disorders



Worker has the burden to establish:

1. Major contributing cause (nonexcluded work factors > excluded factors/everything else).
2. Conditions exist in the real and objective sense.
3. The diagnosis is generally recognized in the medical or psychological community.
4. Clear and convincing evidence that the mental disorder arose out of and in the course of employment.

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Current presumptions

Currently, ORS 656.802 has two sections that address presumptions for certain firefighters:

- Heart and lung presumption (ORS 656.802(4))
- Cancer presumption (ORS 656.802(5))



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Presumptions: How do they work?

- If the worker qualifies, and if the worker is diagnosed with one of the qualifying diseases, it's presumed to be from his or her employment.
 - The employer can overcome this presumption with clear and convincing evidence.
- If the worker does not qualify, the worker can pursue the claim without the benefit of the presumption.



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Questions?



ORS 656.802 Occupational disease; mental disorder; proof.

- (1)(a) As used in this chapter, “occupational disease” means 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, including:
- (A) Any disease or infection caused by ingestion of, absorption of, inhalation of or contact with dust, fumes, vapors, gases, radiation or other substances.
 - (B) Any mental disorder, whether sudden or gradual in onset, which requires medical services or results in physical or mental disability or death.
 - (C) Any series of traumatic events or occurrences which requires medical services or results in physical disability or death.
- (b) As used in this chapter, “mental disorder” includes any physical disorder caused or worsened by mental stress.
- (2)(a) The worker must prove that employment conditions were the major contributing cause of the disease.
- (b) If the occupational disease claim is based on the worsening of a preexisting disease or condition pursuant to ORS 656.005 (7), the worker must prove that employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease.
 - (c) Occupational diseases shall be subject to all of the same limitations and exclusions as accidental injuries under ORS 656.005 (7).
 - (d) Existence of an occupational disease or worsening of a preexisting disease must be established by medical evidence supported by objective findings.
 - (e) Preexisting conditions shall be deemed causes in determining major contributing cause under this section.
- (3) Notwithstanding any other provision of this chapter, a mental disorder is not compensable under this chapter unless the worker establishes all of the following:
- (a) The employment conditions producing the mental disorder exist in a real and objective sense.
 - (b) The employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles.
 - (c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community.
 - (d) There is clear and convincing evidence that the mental disorder arose out of and in the course of employment.
- (4) 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.

(5)(a) Death, disability or impairment of health of a nonvolunteer firefighter employed by a political division or subdivision who has completed five or more years of employment as a nonvolunteer firefighter is an occupational disease if the death, disability or impairment of health:

(A) Is caused by brain cancer, colon cancer, stomach cancer, testicular cancer, prostate cancer, multiple myeloma, non-Hodgkin's lymphoma, cancer of the throat or mouth, rectal cancer, breast cancer or leukemia;

(B) Results from the firefighter's employment as a nonvolunteer firefighter; and

(C) Is first diagnosed by a physician after July 1, 2009.

(b) Any condition or impairment of health arising under this subsection is presumed to result from the firefighter's 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 condition or impairment was not caused or contributed to in material part by the firefighter's employment.

(c) Notwithstanding paragraph (b) of this subsection, the presumption established under paragraph (b) of this subsection may be rebutted by clear and convincing evidence that the use of tobacco by the nonvolunteer firefighter is the major contributing cause of the cancer.

(d) The presumption established under paragraph (b) of this subsection does not apply to prostate cancer if the cancer is first diagnosed by a physician after the firefighter has reached the age of 55. However, nothing in this paragraph affects the right of a firefighter to establish the compensability of prostate cancer without benefit of the presumption.

(e) The presumption established under paragraph (b) of this subsection does not apply to claims filed more than 84 months following the termination of the nonvolunteer firefighter's employment as a nonvolunteer firefighter. However, nothing in this paragraph affects the right of a firefighter to establish the compensability of the cancer without benefit of the presumption.

(f) The presumption established under paragraph (b) of this subsection does not apply to volunteer firefighters.

(g) Nothing in this subsection affects the provisions of subsection (4) of this section.

(h) For purposes of this subsection, "nonvolunteer firefighter" means a firefighter who performs firefighting services and receives salary, hourly wages equal to or greater than the state minimum wage, or other compensation except for room, board, lodging, housing, meals, stipends, reimbursement for expenses or nominal payments for time and travel, regardless of whether any such compensation is subject to federal, state or local taxation. "Nominal payments for time and travel" includes, but is not limited to, payments for on-call time or time spent responding to a call or similar noncash benefits.

(6) Notwithstanding ORS 656.027 (6), any city providing a disability and retirement system by ordinance or charter for firefighters and police officers not subject to this chapter shall apply the presumptions established under subsection (5) of this section when processing claims for firefighters covered by the system.

[Amended by 1959 c.351 §1; 1961 c.583 §1; 1973 c.543 §1; 1977 c.734 §1; 1983 c.236 §1; 1987 c.713 §4; 1990 c.2 §43; 1995 c.332 §56; 2009 c.24 §1]