

In the Matter of the Compensation of
CARL D. BOULDEN, Claimant

WCB Case No. 15-02539, 15-00926

ORDER ON REVIEW

Bennett Hartman Morris & Kaplan, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

The insurer requests review of Administrative Law Judge (ALJ) McWilliams's order that set aside its denial of claimant's occupational disease claim for follicular lymphoma (non-Hodgkin's lymphoma). On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ set aside the insurer's denial, finding that it had not rebutted the presumption under ORS 656.802(5) that claimant's impairment of health, caused by follicular lymphoma, resulted from his employment as a firefighter. In reaching that conclusion, the ALJ found the opinions of Drs. Okada and Weese insufficiently persuasive to satisfy the insurer's burden of proof.

On review, the insurer contends that the opinions of Drs. Okada and Weese establish that it is highly probable that claimant's work activities as a firefighter were not a fact of consequence in causing or contributing to the development of his follicular lymphoma. According to the insurer, its medical evidence, therefore, was sufficient to rebut the statutory presumption. We disagree with the insurer's position, reasoning as follows.

ORS 656.802(5)(b)¹ provides that certain identified cancers (including the claimed condition) are presumed to result from a qualifying firefighter's employment, subject to a carrier's right to rebut that presumption. The parties do not dispute the proposition that the conditions necessary for initiating the presumption under ORS 656.802(5) are established.

¹ ORS 656.802(5)(b) provides that:

“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.*” (Emphasis added).

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, 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.

The insurer has the burden of both production and persuasion. *See SAIF v. Thompson*, 360 Or 155, 169 (2016) (interpreting “firefighter’s presumption” under ORS 656.802(4) to shift burden of production and persuasion to the carrier). Furthermore, for the evidence to preponderate in the insurer’s favor, there must be “clear and convincing medical evidence” that claimant’s cancer was not “caused or contributed to in material part by” his employment. ORS 656.802(5)(b). “Clear and convincing” means, in this context, “that the truth of the facts asserted must be highly probable.” *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 407 (1987); *accord SAIF v. Brown*, 159 Or App 440, 445 n 2 (1999).

Although the statute does not define “in material part,” the legislative history shows that the legislature intended for that phrase to be defined in accordance with the definition of “in material part” under ORS 656.245, as interpreted in *Mize v. Comcast Corp-AT&T Broadband*, 208 Or App 563, 571 (2006); *see Steven D. Fisher*, 64 Van Natta 1230, 1233 (2012); Audio Recording, House Labor Committee, HB 2420, January 30, 2009; Audio Recording, House Floor Debate, HB 2420, February 10, 2009; Audio Recording, Senate Commerce and Workforce Development Committee, HB 2420, February 25, 2009. Under *Mize*, “in material part” means a “fact of consequence.” 208 Or App at 571. Thus, for the insurer to rebut the presumption in ORS 656.802(5), it must be highly probable that claimant’s employment was not a “fact of consequence” in causing or contributing to his cancer. *See Leonard C. Damian, II*, 64 Van Natta 2082, 2083 (2012) (reasoning that, to rebut the presumption in ORS 656.802(5), the truth of the facts the carrier asserts must make it highly probable that the claimant’s employment was not a “fact of consequence” in causing or contributing to his testicular cancer).²

² In comparison, a denial under ORS 656.802(4) (relating to lung disease, respiratory tract, hypertension or cardiovascular-renal disease) requires “clear and convincing evidence that the *cause* of the condition or impairment is unrelated to the firefighter’s employment.” (Emphasis added).

Here, at the insurer's request, Dr. Okada, an assistant professor of medical oncology, reviewed claimant's medical records related to his diagnosis and treatment for follicular lymphoma. (Ex. 142-1, -3). According to Dr. Okada, the available studies do not indicate an association strong enough for him to opine that "potential exposure to organic solvents or other chemicals during claimant's work activities in this case were a material cause of his development of follicular lymphoma." (Ex. 142-2). Instead, he concluded that "it is highly likely (75% chance or greater) that [c]laimant's work activities * * * were not a material cause of his development of follicular lymphoma." (*Id.*)

Dr. Weese, claimant's treating oncologist, concurred with Dr. Okada's opinions. (Ex. 143-3). He also explained that he had performed his own review of "available studies" and agreed with Dr. Okada that those studies "do not indicate an association which is strong enough to draw a causal connection between potential exposure to organic solvents or other chemicals during [claimant's] work activities and the development of the follicular lymphoma." (*Id.*) Dr. Weese also agreed with Dr. Okada that "it is highly unlikely (75% chance or greater) that [claimant's] work activities were a material cause of the development of follicular lymphoma." (*Id.*)

Neither Dr. Okaka nor Dr. Weese defined a "material cause." Under ORS 656.802(5)(b), the relevant inquiry is whether claimant's cancer "was not caused or contributed to in material part by [his] employment" (*i.e.*, whether claimant's employment was not a fact of consequence in causing or contributing to his cancer). Because even a minor cause can be a fact of consequence, the relevant inquiry was whether claimant's work exposure as a firefighter was a fact of consequence in causing or contributing to his cancer.³ We reason as follows.

Dr. Okada's opinion is that claimant's work activities were not a *material cause* of his *development* of the cancer. (Ex. 142-2). Dr. Weese agreed that claimant's work activities were not a *material cause* of the *development* of claimant's cancer. (Ex. 143-3). We do not interpret those opinions, however, to persuasively analyze whether claimant's cancer was "contributed to in material part by" his employment.

³ In reaching this conclusion, we recognize that no incantation of "magic words" or statutory language is required, provided that the physicians' opinions otherwise meet the appropriate legal standard. See *Freightliner Corp. v. Arnold*, 142 Or App 98, 105 (1996). Nonetheless, for the reasons expressed above, we are not persuaded that the physicians satisfy the express statutory standard necessary to rebut the "firefighter's presumption."

The insurer contends that the use of the term “development” by the physicians in their opinions should be interpreted to encompass the “contributed to in material part” provision prescribed in ORS 656.802(5)(b).⁴ However, there is no indication that the physicians intended that particular meaning when using the term “development.” In the absence of such an explanation (or indication) from the physicians, the record does not support the insurer’s asserted interpretation of the physicians’ opinions. To the contrary, Dr. Weese’s deposition testimony confirms that he was unable to rule out claimant’s firefighting as a contributor to his cancer.⁵

In conclusion, based on the aforementioned reasoning, we are not persuaded that either physician opined that it is highly probable that claimant’s work activities were not a “fact of consequence” in causing or contributing to his cancer. Because the aforementioned physicians’ opinions do not meet the appropriate legal standard, they do not rebut the “firefighter’s presumption” under ORS 656.802(5) by clear and convincing evidence. Therefore, we affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 services on review is \$4,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issue, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

⁴ According to the insurer, the common definition and use of the term “contribute” (and its various conjugations) make clear that the Legislature intended the term “contributed” to have its common meaning of “helped cause or bring about.” In support of its argument, it cites to the Oxford Dictionary and “Merriam Webster.” Yet, *Webster’s Third New International Dictionary* includes a definition for “contribute” of “have a share in any act or effect.” *Webster’s Third New Int’l Dictionary* 496 (unabridged ed 2002). Oregon appellate courts often reference *Webster’s Third New International Dictionary* when determining the common and ordinary meaning of a word. *See, e.g., SAIF v. Allen*, 320 Or 192, 199 (1994); *Johnson v. SAIF*, 219 Or App 82, 86 (2008). Thus, consideration of the dictionary definition for the word “contribute” does not support the insurer’s argument that the term necessarily encompasses a “causal” aspect.

⁵ During his deposition, Dr. Weese was asked if he could say that “there has been no contribution, no relationship between [claimant’s] exposures as a firefighter and his cancer? Can you rule that out?” Dr. Weese responded: “Again, based upon what I read last night, I can’t, not now.” (Ex. 144-15).

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 insurer. *See* ORS 656.382(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated February 12, 2016, as amended February 16, 2016, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, to be paid by the insurer. 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 insurer.

Entered at Salem, Oregon on August 31, 2016