

In the Matter of the Compensation of  
**ROBERT B. RITCHEY, JR., Claimant**

WCB Case No. 15-04987

ORDER ON REVIEW

Bennett Hartman Morris & Kaplan, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Johnson, Weddell, and Somers. Member Weddell concurs in part and dissents in part. Member Johnson dissents in part and concurs in part.

The self-insured employer requests review of Administrative Law Judge (ALJ) McWilliams’s order that: (1) set aside its denial of claimant’s occupational disease claim for testicular cancer; and (2) awarded penalties and attorney fees for an allegedly unreasonable denial. On review, the issues are compensability, penalties, and attorney fees.<sup>1</sup> We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ’s “Findings of Fact” and provide the following summary.

Claimant, a 42-year-old firefighter, was diagnosed with testicular cancer in 2015. (Ex. 4). He filed an occupational disease claim for that condition, which the employer denied. (Exs. 7, 15). He requested a hearing.

At hearing, claimant relied on the statutory presumption that his cancer resulted from firefighting. *See* ORS 656.802(5).<sup>2</sup> The employer provided the opinions of two medical experts to rebut the presumption.<sup>3</sup>

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<sup>1</sup> The employer has requested oral argument, contending that this case presents an issue of first impression that will have significant impact. We do not ordinarily entertain oral argument. OAR 438-011-0015(2). We may, nevertheless, allow oral argument where the case presents an issue of first impression that could have substantial effect on the workers’ compensation system. OAR 438-011-0031(2). The decision to grant a request for oral argument is solely within our discretion. OAR 438-011-0031(3). Here, because the written arguments thoroughly address the issues before us, we do not consider oral argument to be necessary. Accordingly, we decline to grant the request. *See Creighton E. Kenney*, 66 Van Natta 808, 811 n 2 (2014).

<sup>2</sup> ORS 656.802(5) provides, in part:

“(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:

Dr. Forsythe, claimant's radiation oncologist, stated that the causes of testicular cancer are largely unknown or the result of genetic factors. (Exs. 16-2, 19-15). He did not know what had caused claimant's testicular cancer. (Ex. 16-2).

According to Dr. Nichols, a testicular cancer specialist who performed a records review at the employer's request, firefighting "is not felt to be contributory to the development of testicular cancer." (Ex. 17-5). He opined that firefighting was not a material cause of claimant's development of testicular cancer; rather, claimant most likely has a heritable predisposition for the development of the disease. (Ex. 17-7).

At hearing, the employer's counsel represented that the employer had a verbal report from Dr. Nichols at the time of the denial. (Tr. 2, 3). Claimant did not dispute that representation; rather, he argued that the evidence that the employer had at the time of the denial did not provide a valid basis for denying the claim. (Tr. 22).

#### CONCLUSION OF LAW AND OPINION

The ALJ found the opinions of Drs. Nichols and Forsythe insufficiently persuasive to rebut the statutory "firefighter presumption" and set aside the denial. Further finding that the employer did not have sufficient evidence to justify the issuance of the denial, the ALJ awarded a penalty and attorney fee under ORS 656.262(11)(a).

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"(A) Is caused by \* \* \* testicular cancer \* \* \* ;

"(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."

<sup>3</sup> The employer did not dispute the existence of the conditions necessary for initiating the presumption.

On review, the employer argues that the medical evidence was sufficient to rebut the statutory presumption. The employer also contends that the penalty and attorney fee awards were not justified. For the following reasons, we affirm the ALJ's decision setting aside the denial, but we reverse the penalty and related attorney fee awards.

ORS 656.802(5)(b) provides that certain identified cancers (including testicular cancer) are presumed to result from a qualifying firefighter's employment, subject to a carrier's right to rebut that presumption. 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); *Leonard C. Damien, II*, 64 Van Natta 2082, 2083 (2012). Where 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; *Damien*, 64 Van Natta at 2083.

For the evidence to preponderate in the employer's favor, there must be "clear and convincing medical evidence" that claimant's testicular cancer was not "caused or contributed to in material part by" his employment. ORS 656.802(5)(b). To be "clear and convincing," the truth of the facts asserted must be highly probable. *Riley Hill Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 407 (1987); *SAIF v. Brown*, 259 Or App 440, 445 n 2 (1999). "In material part" means a "fact of consequence." *Mize v. Comcast Corp-AT&T Broadband*, 208 Or App 563, 571 (2006); *Steven D. Fisher*, 64 Van Natta 1230, 1233 (2012). Even a minor cause can be a "fact of consequence." *Mize*, 208 Or App at 571.

The employer has the burden of production and persuasion. *SAIF v. Thompson*, 360 Or 155, 169 (2016).

Here, the employer relies primarily on the opinion of Dr. Nichols. Dr. Nichols's conclusion that firefighting is not contributory to the development of testicular cancer is based on his personal experience with patients, his knowledge of the literature and modern scientific principles, and the positions of other authoritative bodies regarding cancer causation. (Ex. 17-5). Specifically, in his practice with over 1,000 patients (as well as other large practices with which he is familiar), there was not a predominance of any particular occupation and a significant portion of patients were students or had not started in an occupation. (Ex. 17-6). Moreover, according to Dr. Nichols, there is no "high grade" scientific evidence proving that firefighting is a significant discrete risk factor or cause in the development of testicular cancer. (Ex. 17-3). He asserted that the literature

suggesting an association or causation of testicular cancer with firefighting is not generally accepted. (Ex. 17-2). He stated that those studies were “dated, appear only in low impact journals, do not incorporate modern molecular research methodologies, and, largely, represent a scientific age gone by.” (*Id.*) He further stated that the nation’s cancer organizations (*e.g.*, the American Cancer Society, the American Society of Clinical Oncology, and the American Cancer Institute) do not list specific occupations or behaviors as risk factors for testicular cancers, as they do for certain other cancers. (*Id.*) He also noted that the U.S. Preventive Services Task Force has not targeted any occupations for screening for testicular cancer. (Ex. 17-3). Accordingly, in assessing the risk factors for testicular cancer, he did not include firefighting. (Ex. 17-6). He also stated that if firefighting was a risk factor, it would be an “extremely minor contributor to the overall number of cases.” (*Id.*)

With regard to the development of claimant’s cancer in particular, Dr. Nichols did not completely rule out firefighting, but he was confident (within a statistical interval of “95 percent plus”) that there was no contribution. (Ex. 18-19, -20). Stating that he was only “qualified to debate the merits of the presumption \* \* \* on a scientific level,” he opined that “scientifically it is extraordinarily unlikely that [claimant’s] occupation contributed to the development of testicular cancer.” (Ex. 18-27). Yet, when he was asked to accept the “policy choice” that had been made by the “firefighter” presumption, based on the “very skimpy clinical evidence” he had and the absence of “evidence from the available scientific tools,” he did not “see any reason why [claimant’s cancer] would be outside the presumption.” (*Id.*)

After reviewing Dr. Nichols’s opinion, we are not persuaded that it overcomes the statutory presumption. Consistent with the *Mize* conclusion, even a minor cause can be a “fact of consequence.”<sup>4</sup> *Id.*, 208 Or App at 571. Generally, Dr. Nichols considered firefighting to be, at most, an “extremely minor contributor to the overall number of [testicular cancer] cases.” (Ex. 17-6). Thus, his opinion, that “scientifically it is extraordinarily unlikely that [claimant’s] occupation contributed to the development of testicular cancer,” does not persuasively establish that it is highly probable that claimant’s firefighting employment was not a “fact of consequence” (*i.e.*, even a minor cause) in contributing to his testicular cancer. *See Carl D. Boulden*, 68 Van Natta 1388, 1389 (2016) (physicians’

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<sup>4</sup> The legislative history for ORS 656.802(5)(b) shows that the legislature implemented the *Mize* definition for “in material part” in ORS 656.245. *See Fisher*, 64 Van Natta at 1233; 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.

opinions that it was highly likely that the claimant's firefighting activities were not a material cause of his development of a cancer identified in ORS 656.802(5) did not persuasively rebut the firefighter presumption). Moreover, Dr. Nichols acknowledged that there was no evidence or reason in claimant's particular situation that the statutory presumption did not apply.

Accordingly, in the absence of clear and convincing medical evidence that claimant's testicular cancer was not caused or contributed to in material part by his firefighting employment, we find that the employer has not rebutted the firefighter presumption.<sup>5</sup> Therefore, we affirm that portion of the ALJ's order that set aside the employer's denial.

We turn to the penalty and attorney fee issue. The ALJ concluded that there was no evidence to support the assertion that the denial was based on the employer's consultation with a medical expert and the specific facts of claimant's work as a firefighter. Instead, the ALJ determined that the employer's counsel communicated with claimant's physician and obtained Dr. Nichols's records review after the denial had already issued. For the following reasons, we conclude that penalties and penalty-related attorney fees are not warranted.

Under ORS 656.262(11)(a), if a carrier unreasonable delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amounts then due plus assessed attorney fees. Whether a denial was an unreasonable resistance to the payment of compensation depends on whether, from a legal standpoint, the carrier had a legitimate doubt about its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available at the time of the denial. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

Here, in opening remarks, the parties established that the basis for claimant's penalty/attorney fee request was the substance of Dr. Nichols's opinion, not its timing.<sup>6</sup> (Tr. 2, 3). In closing argument, citing *Damien* and *Fisher*, claimant's

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<sup>5</sup> Dr. Forsythe did not know what caused claimant's cancer. (Ex. 16-2). His further statements that "exposure has not been clearly delineated as a cause of testicular cancer and it is likely [that claimant's] cancer is the result of genetic factors" are inadequately explained and not "clear and convincing evidence" that claimant's testicular cancer "was not caused or contributed to in material part" by his firefighting exposure. (*Id.*)

<sup>6</sup> The employer's counsel offered to "put in evidence that we had the verbal report at the time of the denial from Dr. Nichols, so the information wasn't generated after the denial." (Tr. 3). Claimant's counsel's response ("I do not need you to do that") confirmed that the "unreasonable denial" allegation was based on the substance of the opinion, not its timing. (*Id.*)

counsel asserted that the denial was unreasonable because those claimants had prevailed on testicular cancer claims “and nothing has changed in terms of the science or the arguments that are being made[.]” (Tr. 22). Based on the parties’ positions, as reflected in the hearing and closing argument transcript, this record establishes that the employer relied on Dr. Nichols’s verbal report, which was reduced to writing after the issuance of the denial.

In light of Dr. Nichols’s opinion that firefighting is not contributory to the development of testicular cancer, we find that the employer had a legitimate doubt as to its liability. The employer was entitled to pursue its denial to hearing for the ALJ’s determination regarding the persuasiveness of Dr. Nichols’s opinion. *See Marilyn A. Hodges*, 50 Van Natta 234 (1998) (not unreasonable for a carrier to maintain its denial to await the ALJ’s decision regarding compensability of the claim which involved an assessment of the persuasiveness of medical opinions); *Randy L. Carter*, 48 Van Natta 1271, 1272 (1996) (not unreasonable for a carrier to maintain its denial to await the ALJ’s review of the record and decision on compensability).

Moreover, case law has not determined whether medical evidence that challenges the “firefighter presumption” based on general medical principles, rather than individual risk factors, can be used to rebut the presumption. *See SAIF v. Thompson*, 360 Or 155, 169 n 13 (2016) (court did not decide whether a carrier must rely on medical evidence of individual risk factors unrelated to work to rebut the firefighters’ presumption); *Fisher*, 64 Van Natta at 1237 n 6 (because physician’s opinion was otherwise unpersuasive, no decision was made whether the opinion, which questioned the validity of the firefighters’ presumption, could be used to rebut the presumption).

Under these circumstances, we find that it was not unreasonable for the employer to have denied the claim. Accordingly, we reverse the ALJ’s penalty/penalty-related attorney fee awards.

Claimant’s attorney is entitled to an assessed fee for services on review regarding the compensability issue. 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’s services on review concerning this issue is \$5,500, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to this issue (as represented by claimant’s respondent’s brief), the complexity of the issue, the value of the interest involved, the risk that claimant’s counsel might go uncompensated, and the contingent nature of the practice of workers’ compensation law.

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. ORS 656.386(2); OAR 438-015-0019; *Gary 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 May 18, 2016 is affirmed in part and reversed in part. Those portions of the ALJ's order that awarded a penalty and a \$2,000 penalty-related attorney fee are reversed. The remainder of the ALJ's order is affirmed. For services on review pertaining to the compensability issue, claimant's attorney is awarded an assessed fee of \$5,500, payable 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 February 22, 2017

Member Weddell concurring in part and dissenting in part.

I agree with that portion of the lead opinion that finds claimant's occupational disease claim compensable, but I disagree with the decision to reverse the ALJ's penalty/attorney fee award under ORS 656.262(11)(a). Because I would conclude that the denial was unreasonable, I respectfully dissent in part.

Claimant is entitled to a penalty if the employer unreasonably delayed or refused to pay compensation. ORS 656.262(11)(a). The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the employer had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). "Unreasonableness" and "legitimate doubt" are to be considered in light of the evidence available at the time of the denial. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

Here, the denial was based on the employer's conversation with Dr. Nichols. (Ex. 15-1; Tr. 2, 3). The record does not provide the substance of that conversation. It appears, however, that Dr. Nichols did not review claimant's records until December 14, 2015, approximately two months after the denial. (Ex. 17-1). Therefore, in the absence of further evidence, I would conclude that the conversation preceding the denial did not address claimant's particular circumstances.

Under ORS 656.802(5)(b), claimant's cancer is presumed to result from his firefighting employment. The statute requires a denial to be based on clear and convincing medical evidence that *claimant's* condition was not caused or contributed in material part by his firefighting employment. Because the record does not show that the employer had any medical evidence addressing claimant's particular circumstances when it issued the denial, I would conclude that the employer did not have a legitimate doubt as to its liability. Accordingly, I would affirm the ALJ's penalty/penalty-related attorney fee awards.

Member Johnson dissenting in part and concurring in part.

The majority finds the opinion of Dr. Nichols insufficient to rebut the firefighter presumption. Because I disagree with the majority's evaluation of Dr. Nichols's opinion, I respectfully dissent.

To rebut the presumption under ORS 656.802(5)(b), there must be "clear and convincing medical evidence" that claimant's testicular cancer was not "caused or contributed to in material part by" his employment. "Clear and convincing" means that the truth of the facts asserted is highly probable. *Riley Hill Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 407 (1987); *SAIF v. Brown*, 259 Or App 440, 445 n 2 (1999). The phrase "in material part" means a "fact of consequence," which includes even a minor cause. *Mize v. Comcast Corp-AT&T Broadband*, 208 Or App 563, 571 (2006); *Steven D. Fisher*, 64 Van Natta 1230, 1233 (2012).

Dr. Nichols is a specialist in testicular cancer. During his cross-examination deposition, claimant's counsel asked him if there had been "any fact of consequence, any contribution to the development of [claimant's] testicular cancer." (Ex. 18-19). Dr. Nichols responded that, within a "95 percent plus" confidence interval, there was "*no* contribution of [claimant's] occupation to the development of testis cancer." (Emphasis added.) (Ex. 18-20).

I would find that claimant's counsel provided Dr. Nichols the requisite statutory standard and that Dr. Nichols's response is clear and convincing evidence that claimant's employment as a firefighter was not a "fact of consequence" in causing his cancer. Moreover, Dr. Forsythe, claimant's treating oncologist, acknowledged Dr. Nichols's expertise in testicular cancer and deferred to his opinion regarding causation. (Ex. 19-22). Nothing in this record, other than the presumption, contradicts or otherwise opposes Dr. Nichols's conclusion, which is based on current medical science.

Under these circumstances, I would conclude that the employer successfully rebutted the statutory presumption. Therefore, I would reinstate the employer's denial.

Finally, I agree with the analysis and conclusion of the lead opinion regarding the penalty and penalty-related attorney fee issue.