

FILED: December 03, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Roger J. Thompson, Claimant.

SAIF CORPORATION and CLACKAMAS COUNTY FIRE DISTRICT #1,
Petitioners,

v.

ROGER J. THOMPSON,
Respondent.

Workers' Compensation Board
1006391

A152618

Argued and submitted on May 15, 2014.

Julie Masters argued the cause and filed the briefs for petitioners.

Nelson R. Hall argued the cause and filed the brief for respondent.

Before Sercombe, Presiding Judge, and Tookey, Judge, and Schuman, Senior Judge.

SERCOMBE, P. J.

Reversed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioners

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 SERCOMBE, P. J.

2 In this workers' compensation case, SAIF Corporation and employer
3 Clackamas County Fire District #1 seek judicial review of an order of the Workers'
4 Compensation Board finding that claimant's heart condition was compensable as an
5 occupational disease under ORS 656.802(4), commonly known as the firefighter's
6 presumption.¹ The board concluded that, under that statute, claimant was entitled to a
7 presumption that his heart condition resulted from his work as a firefighter, and SAIF, the
8 insurer of claimant's employer, did not overcome that presumption by presenting "clear
9 and convincing medical evidence that the cause of the condition or impairment is
10 unrelated to [his] employment." On review, SAIF argues that the board erred in applying
11 that standard of proof to the evidence SAIF presented because the board's sole basis for
12 discounting that evidence was its failure to identify an alternative cause for claimant's
13 condition. As we explain below, we agree and, accordingly, reverse.

14 At the outset, we review the undisputed legal principles that govern the
15 firefighter's presumption. Under ORS 656.802(4),² if a firefighter becomes disabled or

¹ For ease of reference, we refer to petitioners collectively as SAIF.

² 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

1 impaired as a result of a "cardiovascular-renal disease" or other specified conditions, then
2 the condition is presumed to have resulted from employment as a firefighter, if (1) the
3 claimant has worked as a firefighter for at least five years, and (2) a medical examination
4 shows that the condition did not preexist the employment. Once the presumption is
5 established, the trier of fact must give it the "value of evidence"; the presumption binds
6 the trier of fact if no contrary evidence is presented. *Wright v. SAIF*, 289 Or 323, 331,
7 613 P2d 755 (1980). The employer or insurer can overcome the presumption, however,
8 by presenting "clear and convincing medical evidence that the cause of the condition or
9 impairment is unrelated to the firefighter's employment." ORS 656.802(4). Proof by
10 "clear and convincing evidence" generally means that "the truth of the facts asserted [is]
11 highly probable." *SAIF v. Brown*, 159 Or App 440, 445, 978 P2d 407 (1999) (internal
12 quotation marks omitted).

13 Here, claimant experienced muscular discomfort in his right chest and neck
14 while he was off duty. He sought medical treatment, and two treating cardiologists
15 diagnosed a myocardial infarction--commonly known as a heart attack--related to
16 coronary artery atherosclerosis. One of those cardiologists successfully treated claimant
17 with angioplasty and stenting of the left anterior descending coronary artery. Claimant,

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."

1 who had been a firefighter for nearly 20 years, later filed a claim for the heart attack as a
2 work-related occupational disease under ORS 656.802(4). SAIF denied the claim,
3 asserting that it had clear and convincing evidence that claimant's condition was
4 unrelated to his employment as a firefighter. Claimant requested a hearing before an
5 administrative law judge (ALJ).

6 Based on evidence presented at the hearing,³ the ALJ found that claimant
7 was entitled to the presumption that his heart condition was work related: He had worked
8 as a firefighter for nearly 20 years, and a prehire physical examination and subsequent
9 examinations did not reveal any evidence of cardiovascular disease or impairment that
10 preexisted that employment.

11 In an effort to rebut the presumption, SAIF presented a medical evaluation
12 and testimony from Dr. Semler, a cardiologist and professor of cardiovascular disease
13 who examined claimant. Semler explained that atherosclerosis is a hardening of the
14 arteries that decreases blood flow to the heart muscle, eventually resulting in a heart
15 attack. According to Semler, "the exact etiology"--the cause or set of causes--of
16 atherosclerosis "is not definitely known," but the consensus among cardiologists is that
17 the condition is related to multiple risk factors, including aging, diabetes, obesity,
18 elevated cholesterol, high blood pressure, tobacco use, sedentary life style, and family

³ The parties do not challenge the ALJ's factual findings, which the board wholly adopted. Accordingly, we take the facts from the ALJ's order (as adopted by the board), supplementing with consistent facts from the record as necessary. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995).

1 history.⁴ Those particular risk factors, Semler explained, are sometimes not present in
2 cases of a heart attack caused by atherosclerosis. He confirmed that those risk factors
3 were not present in claimant's case, though he did state that "[a]therosclerosis is more in
4 keeping with the aging process in [claimant's] case."

5 Semler concluded that claimant's atherosclerosis and heart attack were not
6 related to claimant's work as a firefighter. Specifically, Semler explained that physical
7 and emotional stress related to claimant's work activity as a firefighter did not contribute
8 to the atherosclerosis that caused his heart attack. Comparing atherosclerosis to other
9 types of coronary disease, such as arrhythmias and cardiomyopathy, Semler explained
10 that the medical community recognized physical and emotional stress as contributing
11 factors to some types of arrhythmias and cardiomyopathies, but that there was no valid
12 scientific evidence that physical or emotional stress contributed to atherosclerosis.
13 Semler also referenced claimant's report that the onset of the heart attack did not occur
14 when he was fighting a fire or otherwise under physical or emotional stress. Semler
15 further explained that the literature did not reveal "any scientific evidence that
16 firefighting per se leads to atherosclerosis." Ultimately, when asked if claimant's
17 "employment as a firefighter played a role in his condition," Semler replied that "it has no
18 role whatsoever."

⁴ Semler further explained that "[t]he precise cause for atherosclerosis is still debatable and the current consensus is that it is related to impairment in lipid 'metabolic disorders,' endothelial dysfunction and multiple factors that are being investigated such as genetics and chromosomal abnormalities."

1 Claimant's treating cardiologist, Dr. Dawley, fully endorsed Semler's
2 conclusion that claimant's work as a firefighter did not "play any role in his overall heart
3 condition." Elsewhere in Dawley's testimony, however, he softened that position, stating
4 that it was "unlikely that there was a major contribution" from claimant's work.

5 The ALJ concluded that SAIF had shown, by clear and convincing
6 evidence, that claimant's heart condition was unrelated to his work as a firefighter. While
7 recognizing that Semler "did not definitively identify a non-work cause for claimant's
8 condition," the ALJ determined that he "otherwise explained why physical and emotional
9 stress would not have contributed to claimant's atherosclerosis and myocardial
10 infarction." The ALJ upheld SAIF's denial, noting that no medical expert had rendered a
11 contrary opinion.

12 The board reversed the ALJ's order. The board concluded that Semler's
13 opinion did not satisfy SAIF's burden to overcome the statutory presumption:

14 "Dr. Semler conceded that the cause of atherosclerosis is unknown.
15 Despite that concession, Dr. Semler ruled out any contribution from
16 claimant's employment as a firefighter. Dr. Semler did not persuasively
17 explain, however, how he was able to make such a categorical exclusion,
18 given that the causes of that condition were unknown. The lack of such a
19 persuasive explanation is particularly significant, given that the record does
20 not establish that claimant had any identified 'risk factors' for
21 atherosclerosis."

22 A dissenting member would have affirmed the ALJ's order, echoing the ALJ's reasoning
23 that, although Semler could not identify a precise cause of claimant's heart condition,
24 Semler "presented an unwavering and unequivocal opinion" that the condition was
25 unrelated to claimant's work, and there was "no contrary medical evidence."

1 On review, SAIF argues that the board erred in its application of the
2 standard of proof in ORS 656.802(4). SAIF acknowledges that proof by clear and
3 convincing evidence is proof that a proposition is highly probable, but contends that the
4 board went beyond that standard, requiring an insurer or employer "to prove an
5 alternative cause of the claimed occupational disease, when medical science has not yet
6 been able to pinpoint the ultimate cause." In SAIF's view, the board's order conflicts with
7 our opinion in *Long v. Tualatin Valley Fire*, 163 Or App 397, 987 P2d 1267 (1999).

8 Claimant views the question on review from a different angle. As claimant
9 sees it, SAIF "is asking this court to reweigh the evidence." Claimant contends that the
10 board weighed the evidence, "finding the opinions of Dr. Semler to be internally
11 inconsistent and unpersuasive," and we should therefore review the board's order for
12 substantial evidence. *See SAIF v. Pepperling*, 237 Or App 79, 84-85, 238 P3d 1013
13 (2010) ("In reviewing the board's evaluation of [an expert's] opinion, we do not substitute
14 our judgment for that of the board; rather, we determine whether the board's evaluation of
15 that evidence was reasonable."). According to claimant, the board, in finding an
16 "unexplained inconsistency" in Semler's opinion, did not run afoul of *Long* by requiring
17 "SAIF to affirmatively prove the cause of [claimant's] cardiovascular condition."

18 We start with our decision in *Long*, which underlies the parties' arguments
19 on review. In *Long*, three doctors concluded that the cause of the claimant's atrial
20 fibrillation was "unknown" but was unrelated to his employment as a firefighter. 163 Or
21 App at 399. The board concluded that the employer had established by clear and

1 convincing evidence that the claimant's condition was unrelated to his work as a
2 firefighter. On review, the claimant argued that the employer's evidence was not "the
3 type of evidence legally required to rebut the presumption" in ORS 656.802(4) because
4 that evidence did not establish "an alternative cause of the condition." *Id.* at 400. We
5 rejected that view, reasoning that, even if the doctors' opinions did not "demonstrate an
6 alternative cause of [the] claimant's condition," those opinions nonetheless provided
7 "affirmative evidence that [the] claimant's condition is unrelated to his employment." *Id.*
8 at 401. And we rejected the claimant's additional argument that, "even if the [b]oard was
9 not bound by the presumption, the record [did] not support its finding that [the] employer
10 *overcame* the presumption by clear and convincing evidence." *Id.* (emphasis in original).
11 The employer had put forward medical evidence that "the cause, whatever else it is, is not
12 related to [the] claimant's employment" and nothing, "other than the presumption,"
13 contradicted that evidence. *Id.* In light of that evidence, we determined that "the
14 [b]oard's conclusion that [the] employer overcame the presumption by clear and
15 convincing evidence [was] correct." *Id.*⁵

⁵ The court in *Long* relied on the framework set out in *Wright* as to the operation of the presumption in ORS 656.802. We note that in *Long*, as in this case, ORS 656.802 required the insurer or employer to come forward with "*clear and convincing* medical evidence that the cause of the condition or impairment is unrelated to the firefighter's employment," while at the time of the court's opinion in *Wright*, the statute did not require the insurer or employer to present "clear and convincing" evidence. (Emphasis added.) See ORS 656.802(2) (1979) ("Denial of a claim for any condition or impairment of health arising under paragraph (b) of subsection (1) of this section must be on the basis of medical or other evidence that the cause of the condition or impairment is unrelated to the fireman's employment."); see *Wright*, 289 Or at 328-34 (describing operation of that statute).

1 The question on review is whether the board, in contravention of *Long*,
2 ultimately required SAIF to present evidence of an alternative cause for claimant's
3 condition in order to rebut the presumption. The board's order, of course, did not
4 explicitly require SAIF to present evidence of an alternative cause for claimant's
5 atherosclerosis. Instead, the board described Semler's opinion that claimant's heart
6 condition was unrelated to his employment as lacking "persuasive explanation." What
7 Semler failed to "persuasively explain," in the board's view, was "how he was able to
8 make such a categorical exclusion, given that the causes of that condition were unknown"
9 and "given that the record [did] not establish that claimant had any identified 'risk factors'
10 for atherosclerosis."

11 Claimant suggests that the board simply found that Semler failed to
12 sufficiently explain *how* he reached the conclusion that claimant's condition was
13 unrelated to his work, when Semler could not identify a definite alternative cause. But
14 Semler did explain the basis for his conclusion in detail. Semler explained, based on his
15 experience and review of the extensive literature considering atherosclerosis, that there
16 was no valid scientific evidence that physical or emotional stress, or "firefighting per se,"
17 causes atherosclerosis, though some studies have associated stress with other heart
18 conditions. He further noted that claimant's heart attack did not occur when he was
19 fighting a fire or otherwise under physical or emotional stress. And he related claimant's
20 atherosclerosis to aging, one of the known risk factors for that condition. Because Semler
21 set out the bases for his conclusion that firefighting was not the cause of claimant's

1 condition--and because that explanation was not met with contrary evidence or criticized
2 by the board--we do not understand the board's order to rest on Semler's failure to
3 adequately explain the reasoning supporting his opinion.

4 The better understanding of the order on review, given the record in this
5 case, is that the board viewed Semler's opinion as inadequate to overcome the
6 presumption because it lacked proof of the ultimate cause of claimant's atherosclerosis.
7 As SAIF describes it, "the nub of [the board's] reasoning was that without knowledge of
8 the cause, the doctor's opinion that work was not a cause could not logically hold
9 together." That view is supported by the board's description of Semler's opinion as ruling
10 out claimant's employment as a cause of his atherosclerosis "despite [his] concession"
11 that the cause was unknown. Ultimately, the board concluded that Semler's opinion that
12 claimant's work did not contribute to his condition could not be convincing, as long as he
13 did not identify what did cause claimant's condition.

14 That conclusion cannot be harmonized with our decision in *Long*. ORS
15 656.802(4) does not require "evidence of an alternative cause of the condition" for an
16 insurer to rebut the presumption; all that is required is "affirmative medical evidence that
17 [the] claimant's condition is unrelated to his employment." *Long*, 163 Or App at 400-01.
18 Because the board's only reason for concluding that Semler's opinion did not meet the
19 "clear and convincing medical evidence" standard was that it failed to connect claimant's
20 atherosclerosis to a specific, non-work-related cause, we conclude that the board erred in
21 applying that standard.

1 Claimant contends that there is another reason that Semler's opinion fell
2 short of the "clear and convincing" standard in ORS 656.802(4).⁶ According to claimant,
3 because Semler's opinion was based, in part, on his conclusion that the medical consensus
4 was that firefighting (or physical and emotional stress) did not cause atherosclerosis, it
5 improperly "attack[ed]" the presumption. Claimant argues that, where medical evidence
6 shows that, in general, there is no scientific basis to conclude that firefighting (or physical
7 and emotional stress) causes atherosclerosis, that evidence is insufficient to overcome the
8 presumption.

9 We disagree with claimant's understanding of ORS 656.802(4). We
10 recognize that the firefighter's presumption was "intended to give relief to firefighters
11 because statistical studies indicated that firefighters were much more likely to suffer from
12 heart and lung diseases due to exposure to smoke and gases under strenuous conditions."
13 *Wright*, 289 Or at 328. But here, we are concerned with a *particular* condition's
14 connection to the activities associated with firefighting. And in determining what
15 "medical evidence" effectively rebuts the presumption, our cases have not recognized the
16 categorical limitation that claimant proposes.

17 In *Wright*, for example, although most of the medical evidence in that case
18 showed that the claimant's heart pain was of "unknown origin," the Supreme Court noted

⁶ Claimant raised that argument to the ALJ and to the board. The board did not mention it, and the ALJ specifically rejected it, noting that "[t]he fact that general statistics suggest work as a firefighter can contribute to heart disease in general does not mean that claimant's particular work exposure contributed to his particular atherosclerosis."

1 that "there [was] evidence * * * that the cause of [the] claimant's impairments [was]
2 unrelated to his employment"--a treating doctor had opined that "[t]he disease obviously
3 was not caused by [the claimant's] work." *Id.* at 327, 333 (internal quotation marks
4 omitted). The Supreme Court, after announcing principles relating to overcoming the
5 presumption, remanded the case to the Court of Appeals to determine if that evidence
6 overcame the presumption. On remand, we concluded that the treating doctor's opinion
7 was not sufficient to overcome the presumption because it had been "dilute[d]" by a
8 subsequent opinion. *Wright v. SAIF*, 48 Or App 867, 872, 618 P2d 18 (1980). In that
9 later opinion, the doctor explained that he was still "reviewing all current literature on the
10 subject," so he could not yet say whether the claimant's condition was caused by his work
11 without "further research." *Id.* at 871-72 (internal quotation marks omitted).

12 In contrast, where medical evidence established, as a general matter, that a
13 particular condition was not caused by activities associated with firefighting, that
14 evidence was the type of evidence that overcame the presumption. That was the view
15 that we took in *Long*. In that case, where the cause of the claimant's atrial fibrillation was
16 unknown, we concluded that the doctors' opinions that "the cause, whatever else it is, [is]
17 not related to [the] claimant's employment" constituted clear and convincing evidence to
18 overcome the presumption. *Long*, 163 Or App at 401. Given that there was no evidence
19 to identify an alternative cause for the claimant's condition, those opinions necessarily
20 relied, at least in part, on the current scientific understanding that certain activities (those
21 that the claimant would have engaged in as a firefighter) were *not* the cause of atrial

1 fibrillation.⁷ The claimant, of course, had the opportunity to present contrary medical
2 evidence that atrial fibrillation was linked to firefighting, but did not do so.

3 Ultimately, if we were to agree with claimant that the presumption cannot
4 be rebutted by competent medical evidence showing that a particular condition is not
5 caused by firefighting, then it would be nearly impossible to overcome the presumption
6 in those cases--like this one, *Wright*, and *Long*--where medical science cannot identify a
7 certain cause of that condition. The presumption could be overcome only if medical
8 science could at least identify potential causes unrelated to firefighting (*i.e.*, alternative
9 causes), those potential causes were present in the claimant's case, and those potential
10 causes were significant enough in the claimant's case to establish a causal link to the
11 condition.⁸ That is not what the statute requires, as shown by *Wright* and *Long*.

⁷ Other cases under the presumption have referenced evidence of the general causal relationship between firefighting and a particular condition. *See Johnson v. City of Roseburg*, 86 Or App 344, 348-49, 739 P2d 602 (1987) (referencing a report summarizing the "results of several studies on the relationship between fire fighting and lung disease," noting that only one of those studies actually concluded "that fire fighting is unrelated to lung cancer," but ultimately concluding that, because that single study was criticized by the claimant's experts, there was not clear and convincing evidence that the cause of the claimant's lung cancer was unrelated to his employment).

⁸ We note that some courts take the view, advanced here by claimant, that the presumption cannot be overcome by evidence that a particular condition is generally not causally related to activities associated with firefighting. To overcome the presumption under that approach, the employer or insurer must present evidence that the claimant's condition was the result of some alternative cause or that the claimant's work was considerably less stressful than that of his peers. *See Arthur Larson and Lex K. Larson, 3 Larson's Workers' Compensation Law* § 52.07[2][a][iv] (2014) (contrasting the approach of *Wright* and *Long* with the more stringent requirements to overcome the presumption described by courts in other states, including Minnesota, under comparable statutes). That approach, favored by claimant in this case, is plainly contrary to *Wright* and *Long*.

1 In accord with those cases, we conclude that the board misapplied the
2 standard of proof in ORS 656.802(4). When that standard is properly applied, the record
3 does not support the board's conclusion that SAIF's evidence--an unequivocal opinion
4 from Semler--did not overcome the presumption by clear and convincing evidence. No
5 other evidence, other than the presumption, contradicted that medical evidence, and SAIF
6 therefore met its burden under ORS 656.802(4).

7 Reversed.