

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Labor Code Section 3212.11; Statutes 2001,
Chapter 846;

Filed on July 1, 2002,

By City of Newport Beach, Claimant

No. 01-TC-27

Skin Cancer Presumption for Lifeguards

STATEMENT OF DECISION PURSUANT
TO GOVERNMENT CODE SECTION 17500
ET SEQ.; CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION 2,
CHAPTER 2.5, ARTICLE 7

(Adopted on December 9, 2004)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

PAULA HIGASHI, Executive Director

Date

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The Commission on State Mandates (Commission) heard and decided this consolidated test claim during a regularly scheduled hearing on December 9, 2004. Julianna Gmur and Glen Everroad appeared on behalf of the claimant, City of Newport Beach. Susan Geanacou and Jaci Thomson appeared on behalf of the Department of Finance (DOF).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

This test claim addresses an evidentiary presumption given to state and local lifeguards in workers' compensation cases. Normally, before an employer is liable for payment of workers' compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is usually on the employee to show proximate cause by a preponderance of the evidence.¹

The Legislature eased the burden of proving industrial causation for certain public employees, primarily fire and safety personnel, by establishing a series of presumptions.² The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption ..., the burden of proof shifts to the party, against whom it operates [i.e., the

¹ Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

² See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship.” (*Zipton v. Workers’ Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

In 2001, the Legislature passed Assembly Bill 663, adding section 3212.11 to the Labor Code. For the first time, publicly-employed lifeguards were granted a rebuttable presumption that skin cancer developing or manifesting during or for a defined period immediately following employment “shall be presumed to arise out of and in the course of employment.” Under the statute, the employer may offer evidence disputing the presumption.

Claimant’s Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts the following:

[The test claim legislation] creates a new injury heretofore not compensable and provides a presumption that shifts the burden of proof to the employer.

The effect of a presumption is that the employee does not have to demonstrate that the illness arose out of and in the course of his or her employment. The first effect of a presumption is to encourage the filing of workers’ compensation claims because of the fact that otherwise it would be often difficult, if not impossible, to demonstrate that a particular illness arose out of and in the course of one’s employment. The presumption ... works to the detriment of the employer who must now prove that the illness did not arise out of or in the course of the employee’s employment, which is difficult. ... With this legislation, however, the defense that the employee had skin cancer prior to employment has been eliminated.³

The claimant further argues that the “net effect of this legislation is to cause an increase in workers’ compensation claims for skin cancer and decrease the possibility that any defenses can be raised by the employer to defeat the claims. Thus, the total costs of these claims, from initial presentation to ultimate resolution are reimbursable.”⁴

Claimant’s comments on the draft staff analysis argue: 1) Labor Code section 3212.11 “sets forth a clear mandate;” 2) staff fails to apply statutory construction rules “to the plain language of the statute;” and 3) staff fails to properly apply the recent California Supreme Court decision, *San Diego Unified School District v. Commission on State Mandates*.

State Agency’s Position

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.

On October 18, 2004, the Department of Finance filed comments withdrawing any previous conclusions supporting the test claim allegations, and asserting that the test claim “legislation does not mandate a new program or higher level of service on local agencies.” They also state:

³ Test Claim, page 2.

⁴ *Ibid.*

“A complete estimate of mandated costs was not identified during the deliberation of the test claim legislation.”

Discussion

The courts have found that article XIII B, section 6 of the California Constitution⁵ recognizes the state constitutional restrictions on the powers of local government to tax and spend.⁶ “Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”⁷ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.⁸ In addition, the required activity or task must be new, constituting a “new program,” or it must create a “higher level of service” over the previously required level of service.⁹

The courts have defined a “program” subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.¹⁰ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

⁵ Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: “(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.”

⁶ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

⁷ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

⁸ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

⁹ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

¹⁰ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.)

legislation.¹¹ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”¹²

Finally, the newly required activity or increased level of service must impose costs mandated by the state.¹³

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.¹⁴ In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁵

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

The Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

Labor Code section 3212.11, as added by Statutes 2001, chapter 846, provides:

This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term “injury,” as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

Skin cancer so developing or manifesting itself shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board shall find in accordance with it. This presumption shall be extended to a lifeguard following termination of service for a period of three calendar months for each

¹¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

¹² *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

¹³ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

¹⁴ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

¹⁵ *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.

This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

There was no requirement prior to 1975, nor in any of the intervening years, until the passage of [the test claim legislation in 2001] which mandated the inclusion of skin cancer as a compensable injury for lifeguards, the creation of a presumption in favor of skin cancer on the job, and the elimination of the pre-existing condition defense for employers.¹⁶

In the October 15, 2004 response to the draft staff analysis, the claimant states:

The presumption in the applicant's favor increases the likelihood that his claim will result in money payments from his employer as well as full coverage of his medical costs. The greater the number of successful applicants; the more the employer will pay in workers' compensation benefits. Thus the new program or higher level of service lies in the creation of the presumption.¹⁷

The claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. First, the claimant asserts in the test claim filing that the legislation created a new compensable injury for lifeguards. However, Labor Code section 3208, as last amended in 1971, specifies that for the purposes of workers' compensation, "'Injury' includes *any* injury or disease arising out of the employment." [Emphasis added.] Assembly Bill 663's sponsor, the California Independent Public Employees Legislative Counsel, stated that since 1985, one-third of the 30 City of San Diego lifeguards who received industrial disability did so due to skin cancer.¹⁸ Thus, public lifeguards' ability to make a successful workers' compensation claim for an on-the-job injury from skin cancer predates the 2001 enactment of Labor Code section 3212.11.

The express language of Labor Code section 3212.11 does not impose any other state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the local agency. The plain language of Labor Code section 3212.11 states that the "presumption is disputable and *may* be controverted by other evidence ..." [Emphasis added.]

¹⁶ Test Claim, page 2.

¹⁷ Claimants' response to draft staff analysis, page 2.

¹⁸ Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assembly Bill No. 663 (2001-2002 Reg. Sess.), page 4, September 7, 2001.

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.]¹⁹

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.²⁰ Consistent with this principle, the courts have strictly construed the meaning and effects of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power “are to be construed strictly, and are not to be extended to include matters not covered by the language used.” [Citations omitted.][“Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation.”] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.²¹

This is further supported by the California Supreme Court’s decision in *Kern High School Dist.*²² In *Kern High School Dist.*, the court considered the meaning of the term “state mandate” as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that “a state mandate comprises something that a local government entity is required or forced to do.”²³ The ballot summary by the Legislative Analyst further defined “state mandates” as “requirements imposed on local governments by legislation or executive orders.”²⁴

¹⁹ *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

²⁰ *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

²¹ *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

²² *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

²³ *Id.* at page 737.

²⁴ *Ibid.*

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.²⁵ The court stated the following:

In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)²⁶

Thus, the Supreme Court held as follows:

[W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled*. [Emphasis added.]²⁷

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."²⁸

The claimant, in October 15, 2004 comments on the draft staff analysis argues that the Commission should look to the 2004 decision of the California Supreme Court, *San Diego Unified School Dist., supra*, in which the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."²⁹ In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and

²⁵ *Id.* at page 743.

²⁶ *Ibid.*

²⁷ *Id.* at page 731.

²⁸ *Ibid.*

²⁹ *San Diego Unified School Dist., supra*, 33 Cal.4th at page 887.

hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced*, *supra*, 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse, in this case*, an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

The Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta; however, the Commission recognizes that the Court was giving clear notice that the *City of Merced* “discretionary” rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced*, or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning continues to apply in this case. The Supreme Court explained, “the proper focus under a legal compulsion inquiry is upon the nature of the claimants’ participation in the underlying programs themselves.”³⁰ As indicated above, local agencies are not legally compelled by state law to dispute a presumption in a workers’ compensation case. The decision and the manner in which to litigate such cases is made at the local level and is within the discretion of the local agency. Thus, the employer’s burden to prove that the skin cancer is not arising out of and in the course of employment is also not state-mandated. The evidentiary burden is simply an aspect of having to defend against a workers’ compensation lawsuit, if the employer chooses to do so.

There is no evidence in the law or in the record that local agencies are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that local agencies will incur increased costs from workers’ compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6:

We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.³¹

Returning to the recently decided *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at pages 876-877, the Court held:

³⁰ *Kern High School Dist.*, *supra*, 30 Cal.4th at page 743.

³¹ *County of Los Angeles*, *supra*, 43 Cal.3d at page 54; see also, *Kern High School Dist.*, *supra*, 30 Cal.4th at page 735.

Viewed together, these cases (*County of Los Angeles, supra*, 43 Cal.3d 46, *City of Sacramento, supra*, 50 Cal.3d 51, and *City of Richmond, supra*, 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting “service to the public” under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

Therefore, the potential for increased costs resulting from the statute, without more, does not impose a reimbursable state-mandated program.

Prior Test Claim Decisions on Cancer Presumptions

Finally, the claimant points to two prior test claim decisions approving reimbursement in cancer presumption workers’ compensation cases. In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter’s Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers’ compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee’s survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter’s Cancer Presumption* test claim.

However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, the California the California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.³² In *Weiss v. State Board of Equalization*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs’ contention and found that the board did *not* act arbitrarily. The Court stated, in pertinent part, the following:

[P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs’ application. That problem has been discussed: *Not only does due process permit omission of reasoned*

³² *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

administrative opinions but it probably also permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.)³³

In 1989, the Attorney General’s Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, “[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777].”³⁴ While opinions of the Attorney General are not binding, they are entitled to great weight.³⁵

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 are not arbitrary or unreasonable as long as the decision strictly construes the Constitution and the statutory language of the test claim statute, and does not apply section 6 as an equitable remedy.³⁶ The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow. In addition, the Commission followed this same analysis in its most recent decisions regarding the issue of reimbursement for cancer presumption statutes.³⁷

Accordingly, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on local agencies.

CONCLUSION

The Commission concludes that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies.

³³ *Id.* at page 776.

³⁴ 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

³⁵ *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

³⁶ *City of San Jose, supra*, 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280-1281.

³⁷ Test claim *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) was denied at the May 27, 2004 Commission hearing, and *Cancer Presumption (K-14)* (02-TC-15) was denied at the July 29, 2004 Commission hearing.