Hearing Date: December 9, 2004
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ITEM 7
TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code Section 3212.11

Statutes 2001, Chapter 846 (AB 663)

Lifeguard Skin Cancer Presumption (K-14) (02-TC-16)

Santa Monica Community College District, Claimant

EXECUTIVE SUMMARY

Background

In 2002, the Commission received a local agency test claim filing, *Skin Cancer Presumption for Lifeguards* (01-TC-27, Item 5). On February 27, 2003, the Commission received a second test claim on the same statute alleging a reimbursable state mandate is also imposed on K-14 school districts. The two test claims were not consolidated.

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.

The claimant alleges that the test claim legislation "mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for lifeguards as a result of the new presumption that skin cancer developing or manifesting itself during employment arose out of or in the course of employment and the prohibition from claiming the injury may be attributed to a pre-existing disease or condition." The activities or costs alleged include policies and procedures for handling lifeguard workers' compensation claims alleging skin cancer arising from employment; all of the costs associated with payment of the claims caused by the presumption, *or* payment of the additional costs of insurance premiums to cover such claims; physical examinations to screen lifeguard applicants for pre-existing skin cancer; and training lifeguards to take precautionary measures to prevent skin cancer on the job.

Department of Finance argues the additional duties alleged are not required by the test claim statute.

Staff asserts that although the legal presumption in favor of the lifeguard employee is new law, the claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. Nothing in the statute mandates public employers of lifeguards to develop policies and procedures to handle lifeguard workers' compensation claims. Nothing in

the language of Labor Code section 3212.11 requires a pre-employment physical exam for lifeguards, nor requires the employer to offer training on skin cancer prevention. While all of these "new activities" may be prudent, they are solely undertaken at the discretion of the employing agency, and are not mandated by the state.

The express language of Labor Code section 3212.11 does not impose any state-mandated requirements on school districts. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the school district.

Further, there is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that districts 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.

Accordingly, staff 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 school districts.

Conclusion

Staff 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 school districts.

Staff Recommendation

Staff recommends that the Commission adopt the final staff analysis, denying this test claim as filed on behalf of K-14 school districts.

STAFF ANALYSIS

Claimant

Santa Monica Community College District

Chronology

02/27/03	Commission receives test claim filing
03/12/03	Commission staff determines test claim is complete and requests comments
04/16/03	Department of Finance requests a one-month extension of time for comments
04/17/03	Commission staff grants the extension of time
05/15/03	Department of Finance files response to test claim
06/13/03	Claimant files response to Department of Finance comments
09/28/04	Draft staff analysis issued
10/12/04	Claimant comments on the draft staff analysis received

Background

On July 1, 2002, the Commission received a test claim filing on behalf of claimant, City of Newport Beach, entitled *Skin Cancer Presumption for Lifeguards* (01-TC-27). On February 27, 2003, the Commission received a test claim filing, *Lifeguard Skin Cancer Presumption (K-14)* (02-TC-16), on behalf of claimant Santa Monica Community College District. Although the same statutory provision is involved, these two test claims were not consolidated. Both test claims address 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 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

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[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.

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 for K-14 school districts 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] mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for lifeguards as a result of the new presumption that skin cancer developing or manifesting itself during employment arose out of or in the course of employment and the prohibition from claiming the injury may be attributed to a pre-existing disease or condition.[3]

The claimant further argues that the test claim legislation newly requires the following activities or costs:

- develop and update policies and procedures for handling lifeguard workers' compensation claims alleging skin cancer arising from his or her employment;
- all of the costs associated with payment of the claims caused by the shifting of the burden of proof and by the prohibition of the use of a pre-existing condition defense, *or* payment of the additional costs of insurance premiums to cover such claims.
- physical examinations to screen lifeguard applicants for pre-existing skin cancer;
- training lifeguards to take precautionary measures to prevent skin cancer on the job.

Claimant's comments on the draft staff analysis, dated October 7, 2004, contend that: 1) school districts "are practically compelled" to engage in the activities listed above; 2) "the test claim legislation is for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public;" and 3) failing to follow earlier Commission decisions granting mandate reimbursement for cancer presumption statutes is "arbitrary and unreasonable."

State Agency's Position

The Department of Finance filed comments dated May 12, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program for increased workers' compensation claims for skin cancer in lifeguards. However, the Department of Finance disputes any additional duties identified by the claimant on the grounds that the test claim statute does not expressly require them.

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[3] Test Claim, page 2.

No comments on the draft staff analysis were received.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "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."[6] 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.[7] 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.[8]

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.[9] 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

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[4] 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."

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

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

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

[8] *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*).

[9] *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.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

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.[13] 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."[14]

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

Staff 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 school districts 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.
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> 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

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

[11] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[12] *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.

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

[14] *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.
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> Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.
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> 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:

> Prior to 1975, there was no statute, code section or regulation that created a presumption that skin cancer developing or manifesting itself on lifeguards arose out of or in the course of their employment with the district. Nor was there any statute, code section, or regulation which prohibited such skin cancer from being attributed to a pre-existing disease or condition.[15]

Although it is true that the legal presumption in favor of the lifeguard employee is new law, the claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. Nothing in the statute mandates public employers of lifeguards to develop policies and procedures to handle lifeguard workers' compensation claims. Nothing in the language of Labor Code section 3212.11 requires a pre-employment physical exam for lifeguards, nor requires the employer to offer training on skin cancer prevention. While all of these "new activities" may be prudent, they are solely undertaken at the discretion of the employing agency, and are not mandated by the state.

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.[16] 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 state-mandated requirements on school districts. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the school district. The plain language of Labor Code section 3212.11 states that the "presumption is disputable and *may* be controverted by other evidence ..." [Emphasis added.]

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[15] Test Claim, page 3.

[16] 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.][17]

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.[18] 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.[19]

This is further supported by the California Supreme Court's decision in *Kern High School Dist.*[20] 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."[21] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[22]

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

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

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

[20] *Kern High School Dist., supra*, 30 Cal.4th 727.

[21] *Id.* at page 737.

[22] *Ibid.*

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.[23] 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.)[24]

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.][25]

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."[26]

The claimant, in comments on the draft staff analysis dated October 7, 2004, 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."[27] 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

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[23] *Id.* at page 743.

[24] *Ibid.*

[25] *Id.* at page 731.

[26] *Ibid.*

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

> possessed discretion concerning how many firefighters it would employ--and 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, staff 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."[28] As indicated above, school districts 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 school district. 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.

The claimant wants to analogize the "mandate" being claimed here to the *Carmel Valley* case and the Court's recent discussion in *San Diego Unified School Dist*.: "Here, in this test claim, the test claim legislation is for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public."[29] But Labor Code section 3212.11 does not mandate training as proposed by the claimant, or the purchase of materials as in the *Carmel Valley* case; it states that if skin cancer is diagnosed during and briefly after the employment of the lifeguard, for purposes of workers' compensation lawsuits, the skin cancer is presumed to arise out of the employment. Not every statute that is of benefit to public employees and results in costs to the employer imposes a reimbursable state mandated program.

There is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that school districts 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

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

[29] Claimant comments dated October 7, 2004, page 4.

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.[30]

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

> 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

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.[31] In *Weiss v. State Board of*

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

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

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 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.) [32]

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]."[33] While opinions of the Attorney General are not binding, they are entitled to great weight.[34]

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.[35] 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.[36]

Accordingly, staff 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 school districts.

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[32] *Id*. at page 776.

[33] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

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

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

[36] 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.

CONCLUSION

Staff 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 school districts.

STAFF RECOMMENDATION

Staff recommends that the Commission adopt the final staff analysis, denying this test claim as filed on behalf of K-14 school districts.