BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Labor Code Sections 3212.6, 3212.8, and 3212.9; Statutes 1995, Chapter 683; Statutes 1996, Chapter 802; Statutes 2000, Chapter 883; Statutes 2000, Chapter 490; Statutes 2001, Chapter 833; Filed on February 27, 2003, By County of Tehama and California State Association of Counties-Excess Insurance Authority (CSAC-EIA), Claimants.	**Case Nos.**: 01-TC-20, 01-TC-23, and 01-TC-24 *Presumption of Causation in Workers' Compensation Claims*: *Tuberculosis, Hepatitis and Other Blood-Borne Infectious Diseases, and Meningitis* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on September 27, 2007)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 27, 2007. Ms. Juliana Gmur represented and appeared for the claimant. Ms. Carla Castañeda and Ms. Donna Ferebee appeared for the Department of Finance.

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 7 to 0 to deny this test claim.

Summary of Findings

This consolidated test claim was filed on June 28, 2002, by County of Tehama and California State Association of Counties-Excess Insurance Authority (CSAC-EIA) regarding statutes that address evidentiary presumptions in workers' compensation cases given to certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office that develop tuberculosis, hepatitis and other blood-borne infectious diseases, or meningitis during employment.. The test claim statute is Labor Code sections 3212.6, 3212.8, and 3212.9.

The County of Tehama and CSAC-EIA, a joint powers authority formed by and for California counties for insurance and risk management purposes, filed the consolidated test claims, seeking reimbursement for costs incurred by CSAC-EIA and its member counties.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.

The test claim statutes, Labor Code sections 3212.6, 3212.8, and 3212.9, provide these evidentiary presumptions to certain employees of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office that develop or manifest tuberculosis, hepatitis or other blood-borne infectious disease, or meningitis, during the period of employment. In these situations, the tuberculosis, hepatitis or other blood-borne infectious disease, or meningitis, is presumed to have arisen out of and in the course of the employment. If the local agency employer decides to dispute the claim, the burden of proving that the "injury" did not arise out of and in the course of employment is shifted to the employer.

The Commission finds that CSAC-EIA has standing to pursue the test claim on behalf of its member counties, but does not have standing to claim reimbursement for its own costs. Under the principles of collateral estoppel, the Commission finds that the Second District Court of Appeal's unpublished decision on this issue in *CSAC Excess Insurance Authority v. Commission on State Mandates* (Dec. 22, 2006, B188169) is binding and applies to this test claim.

The Commission further finds that the test claim statutes are not subject to article XIII B, section 6 of the California Constitution because they do not mandate new programs or higher levels of service on local agencies within the meaning of article XIII B, section 6. The express language of Labor Code sections 3212.6, 3212.8, and 3212.9, do not impose any state-mandated requirements on local agencies. Rather, the decision to dispute these types of workers' compensation claims and prove that the injury did not arise out of and in the course of employment remains entirely with the local agency. Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.

The Commission concludes that Labor Code section 3212.6, as amended by Statutes 1995, chapter 683, and Statutes 1996, chapter 802; Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833; and Labor Code section 3212.9, as added by Statutes 2000, chapter 883, are not subject to article XIII B, section 6 of the California Constitution because they do not mandate a new program or higher level of service on local agencies.

BACKGROUND

This consolidated test claim addresses evidentiary presumptions in workers' compensation cases given to certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office that develop tuberculosis, hepatitis and other blood-borne infectious diseases, or meningitis during employment.

The County of Tehama and CSAC-EIA, a joint powers authority formed by and for California counties for insurance and risk management purposes, filed the consolidated test claims, *Hepatitis and Blood-Borne Illnesses Presumption* (01-TC-20), *Tuberculosis Presumption for Firefighters, Jail Guards, and Correctional Officers* (01-TC-23), and *Meningitis Presumption for Law Enforcement and Firefighters* (01-TC-24), seeking reimbursement for costs incurred by CSAC-EIA and its member counties.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.[1] Although the workers' compensation law must be "liberally construed" in favor of the injured employee, the burden is normally on the employee to show proximate cause by a preponderance of the evidence.[2] If liability is established, the employee is entitled to compensation for the full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as defined and calculated by the Labor Code.[3]

As early as 1937, the Legislature began to ease the burden of proof for purposes of liability for certain public employees that provide "vital and hazardous services" by establishing a presumption of industrial causation; that the injury arose out of and in the course of employment.[4] The presumptions have the effect of shifting to the employer the burden of proof as to the nonexistence of the presumed fact. Thus, the employer has the burden to prove that the employee's injury did not arise out of or in the course of employment.[5]

Labor Code section 3208, which was last amended in 1971, defines "injury" for purposes of workers' compensation as "any injury or disease arising out of the employment." As described below, this definition of "injury" includes tuberculosis, hepatitis, and meningitis.

Test Claim Statutes

Labor Code section 3212.6 provides that "injury" includes tuberculosis for purposes of workers' compensation claims brought by certain members of police and sheriff's departments and inspectors or investigators of a district attorney's office, when the tuberculosis develops or manifests itself during a period that the member is in service with his/her department or office. In addition, the tuberculosis shall be presumed to arise out of and in the course of employment, if the tuberculosis develops or manifests itself during a period while these employees are in service of that department or office.[6] This presumption may be rebutted.[7] In 1995, Labor Code section 3212.6 was amended to extend this rebuttable presumption of industrial causation to certain members of fire departments.[8] In 1996, Labor Code section 3212.6, was amended again to extend the rebuttable presumption of industrial causation of tuberculosis to prison and jail guards, and correctional officers employed by a public agency.[9]

Labor Code section 3212.8 was added in 2000, and provides that, for the purposes of workers' compensation, "injury" includes hepatitis for certain members of police, sheriff's, and fire

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[1] Labor Code section 3600, subdivisions (a)(2) and (3).

[2] Labor Code sections 3202, 3202.5.

[3] Labor Code sections 4451, et seq.

[4] *Zipton v. Workers' Comp. Appeals* Bd. (1990) 218 Cal.App.3d 980, 987.

[5] *Id*. at page 988, footnote 4.

[6] Statutes 1976, chapter 466, section 6.

[7] *Ibid*.

[8] Statutes 1995, chapter 683.

[9] Statutes 1996, chapter 802.

departments when any part of the hepatitis develops or manifests itself during the period of employment. In such cases the hepatitis shall be presumed to arise out of and in the course of employment.[10] This presumption may be rebutted, however, the employer cannot attribute the hepatitis to any disease existing prior to its development or manifestation.[11] In 2001, Labor Code section 3212.8 was amended by replacing "hepatitis" with "blood-borne infectious disease," and thus, providing a rebuttable presumption for more blood related "injuries."[12]

Labor Code section 3212.9 was added in 2000, and provides that, for the purposes of workers' compensation, "injury" includes meningitis for certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office, when the meningitis develops or manifests itself during the period of employment.[13] In such cases, the meningitis shall be presumed to arise out of and in the course of employment.[14] As with Labor Code sections 3212.6 and 3212.8, the presumption created by Labor Code section 3212.9 is rebuttable.

All test claim statutes provide that the compensation which is awarded for tuberculosis/hepatitis and blood-borne infectious disease/meningitis shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by California workers' compensation laws.

Related Test Claims and Litigation

In 2006, the Second District Court of Appeal, in an unpublished decision for *CSAC Excess Insurance Authority v. Commission on State Mandates*, Case No. B188169, upheld the Commission's decisions to deny related test claims entitled *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19), *Lower Back Injury Presumption for Law Enforcement* (01-TC-25), and *Skin Cancer Presumption for Lifeguards* (01-TC-27), which addressed issues identical to those raised in the current consolidated test claim.

In the test claim entitled *Cancer Presumption for Law Enforcement and Firefighters*, CSAC-EIA and the County of Tehama alleged that Labor Code section 3212.1, as amended by Statutes 1999, chapter 595, and Statutes 2000, chapter 887, imposed state-mandated costs for which reimbursement is required under article XIII B, section 6. Labor Code section 3212.1 provides a rebuttable presumption of industrial causation to certain law enforcement officers and firefighters that develop cancer, including leukemia, during the course of employment. Under the 1999 amendment to section 3212.1, the employee need only show that he or she was exposed to a known carcinogen while in the service of the employer. The employer still has the right to dispute the employee's claim as it did under prior law. But when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer is shifted to the employer. The 2000 amendment to Labor Code section 3212.1 extended the cancer presumption to peace officers defined in Penal Code section 830.37, subdivisions (a) and (b); peace officers that are

[10] Statutes 2000, chapter 490.

[11] *Ibid*.

[12] Statutes 2001, chapter 833.

[13] Statutes 2000, chapter 883.

[14] *Ibid*.

members of an arson-investigating unit or are otherwise employed to enforce the laws relating to fire prevention or fire suppression.

In the test claim entitled *Lower Back Injury Presumption for Law Enforcement*, CSAC-EIA and the County of Tehama alleged that Labor Code section 3213.2, as added by Statutes 2001, chapter 834, imposes a reimbursable state-mandated program. Labor Code section 3213.2 provides a rebuttable presumption of industrial causation to certain publicly employed peace officers who wear a duty belt as a condition of employment and, either during or within a specified period after termination of service, suffer a lower back injury.

In the test claim entitled *Skin Cancer Presumption for Lifeguards*, the City of Newport Beach alleged that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, imposes a reimbursable state-mandated program. Labor Code section 3212.11 provides a rebuttable presumption of industrial causation to certain publicly employed lifeguards who develop skin cancer during or immediately following their employment.

The Commission denied each test claim finding that pursuant to existing case law interpreting article XIII B, section 6, the statutes do not mandate new programs or higher levels of service on local agencies.[15]

On December 22, 2006, the Second District Court of Appeal issued its unpublished decision in *CSAC Excess Insurance Authority v. Commission on State Mandates*, affirming the Commission's decision that the 1999, 2000, 2001 additions and amendments to Labor Code section 3212.1, 3212.11, and 3213.2, do not constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[16] Final judgment in the case was entered on May 22, 2007.[17] In its decision affirming the Commission's finding that the test claim statutes did not constitute reimbursable state-mandated programs, the Second District Court of Appeal found:

- CSAC EIA does not have standing as a claimant under article XIII B, section 6, in its own right, but does have standing to seek reimbursement on behalf of its member counties.
- Workers' compensation is not a program administered by local governments, as a result, the test claim statutes' presumptions of industrial causation do not mandate a new program or higher level of service within an existing program, even assuming that the test claim statutes' presumptions will impose increased workers' compensation costs solely on local entities.
- Costs alone do not equate to a higher level of service within the meaning of article XIII B, section 6, even if paid only by local entities and not the private sector. The service provided by the counties represented by CSAC-EIA and the city, workers'

[15] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 (*Kern High School Dist.*); *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[16] Exhibit E, Supporting Documentation, *CSAC Excess Insurance Authority v. Commission on State Mandates*, Second District Court of Appeal, Case No. B188169 (Unpubl. Opn.).

[17] Exhibit E, Supporting Documentation, Judgment.

compensation benefits to its employees, is unchanged. The fact that some employees are more likely to receive those benefits does not equate to an increased level of service within the meaning of article XIII B, section 6.

Claimant's Position

Co-claimants, County of Tehama and CSAC-EIA, contend that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Co-claimants assert that Labor Code sections 3212.6, 3212.8, and 3212.9, create and/or expand compensable injuries under workers' compensation, provide presumptions of industrial causation, and restrict arguments to rebut those presumptions.

Co-claimants conclude in each test claim:

> The net effect of this legislation is to cause an increase in workers' compensation claims for [tuberculosis/hepatitis and blood-borne infectious diseases/meningitis], 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.[18]

Department of Finance's (Finance) Position

The Department of Finance filed comments on July 31, 2002, August 1, 2002, and August 2, 2002, concluding that the test claim statutes may create a reimbursable state-mandated program.[19] Finance filed comments on August 27, 2007 concurring with the draft staff analysis.

Department of Industrial Relations (DIR) Position

The DIR contends that the test claim statutes are not reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution. The DIR asserts that the presumption of industrial causation available for certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office does not result in a new program or higher level of service for the following reasons:

1. Local governments are not required to accept all workers' compensation claims. They have the option to rebut any claim before the Workers' Compensation Appeals Board by presenting a preponderance of evidence showing the non-existence of industrial causation.
2. Statutes mandating a higher level of compensation to local government employees, such as workers' compensation benefits, are not "new programs" whose costs would be subject to reimbursement under article XIII B, section 6.
3. There is no shift of a financial burden from the State to local governments because local governments, by statute, have always been solely liable for providing workers' compensation benefits to their employees.[20]

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[18] Exhibit A, p. 105, 126, 142.

[19] Exhibit B.

[20] Exhibit C.

Commission Findings

The courts have found that article XIII B, section 6 of the California Constitution[21] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[22] "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."[23] 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.[24] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[25]

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.[26] 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 legislation.[27] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[28]

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[21] California Constitution, article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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."

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

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

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

[25] *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*).

[26] *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 (*Los Angeles I*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

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

[28] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[29]

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.[30] 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."[31]

Issue 1: Does CSAC-EIA have standing as a claimant in its own right and/or as a representative seeking reimbursement on behalf of its member counties for this consolidated test claim?

In the *CSAC Excess Insurance Authority* case, the Second District Court of Appeal held that CSAC-EIA does not have standing as a claimant in its own right under article XIII B, section 6. The court reasoned that CSAC-EIA, as a joint powers authority, does not constitute a "local agency" or "special district" as defined by Government Code sections 17518 and 17520, and therefore, is not eligible to claim reimbursement of costs under article XIII B, section 6. The court also held that CSAC-EIA does have standing to seek reimbursement on behalf of its member counties. The court noted that the joint powers agreement expressly authorized CSAC-EIA to exercise all of the powers common to counties in California, to do all acts necessary for the exercise of those powers, and to sue and be sued in its own name. As a result, the court reasoned that the joint powers agreement authorized CSAC-EIA to bring test claims on behalf of its member counties, each of which qualifies as a local agency to bring a test claim under Government Code section 17518.

As an unpublished opinion, the *CSAC Excess Insurance Authority* decision of the Second District Court of Appeal may not be cited as a binding precedential decision unless it is relevant under the doctrine of collateral estoppel.[32] Collateral estoppel precludes a party from re-litigating the matters previously litigated and determined in a prior proceeding and makes the decision on the matter in the prior proceeding binding in the subsequent matter. In order for collateral estoppel to apply, the following elements must be satisfied: (1) the issue necessarily decided in the previous proceeding is identical to the one that is currently being decided; (2) the previous proceeding terminated with a final judgment on the merits; (3) the party against whom collateral estoppel is asserted is a party to or in privity with a party in the previous proceeding; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the

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[29] *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.

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

[31] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[32] California Rules of Court, Rule 8.1115.

issue.[33] For the reasons below, the Commission finds that the elements of collateral estoppel are satisfied in this case.

For purposes of collateral estoppel, issues are identical when the factual allegations at issue in the previous and current proceeding are the same.[34] The issue presented here is the same issue in the *CSAC-Excess Insurance Authority* case; whether CSAC-EIA has standing to pursue the claims on its own behalf for the costs it incurred as the insurer of its member counties and/or pursue test claims on behalf of its member counties. On May 22, 2007, the *CSAC Excess Insurance Authority* case terminated with a final judgment on the merits. Furthermore, CSAC-EIA is a party involved in both the *CSAC Excess Insurance Authority* case and the consolidated test claim at issue here. Moreover, the parties in the *CSAC Excess Insurance Authority* case, specifically CSAC-EIA, had a full and fair opportunity to litigate the standing issue before the court. Thus, the court's holding in *CSAC Excess Insurance Authority*, that CSAC-EIA *does not* have standing to pursue the claims on its own behalf for the costs it incurred as the insurer of the member counties *and* that CSAC-EIA *does* have standing to pursue the claims on behalf of its member counties, is binding and applies to this test claim.

The Commission concludes CSAC-EIA does not have standing as a claimant in its own right, however, CSAC-EIA does have standing as a representative seeking reimbursement on behalf of its member counties for this consolidated test claim.

Issue 2: Do Labor Code sections 3212.6, 3212.8, and 3212.9, as added and amended in 1995, 1996, 2000, and 2001, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

The case law is clear that even though a statute is addressed only to local government and imposes new costs on them, the statute may not constitute a reimbursable state-mandated program under article XIII B, section 6.[35] It is well-established that local agencies are not entitled to reimbursement for all increased costs, but only those resulting from a new program or higher level of service mandated by the state.[36] The costs identified by claimant for the test claim statutes are the total costs of tuberculosis, hepatitis and blood-borne infectious diseases, and meningitis claims, from initial presentation to ultimate resolution.

However, Labor Code sections 3212.6, 3212.8, and 3212.9, as added and amended in 1995, 1996, 2000, and 2001,[37] do not mandate local agencies to incur these costs. The statute simply *creates* the presumptions of industrial causation for the employee, but does not require a local

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[33] *Roos v. Red* (2006) 130 Cal.App.4th 870, 879-880.

[34] *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342.

[35] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1190; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[36] *Kern High School Dist., supra,* 30 Cal.4th 727, 735-736.

[37] Labor Code section 3212.6, amended by Statutes 1995, chapter 638, and Statutes 1996, chapter 802, Labor Code section 3212.8, added and amended by Statutes 2000, chapter 490, and Statutes 2001, chapter 833, and Labor code section 3212.9, added by Statutes 2000, chapter 883.

agency to provide a new or additional service to the public. The relevant language in Labor Code sections 3212.6, 3212.8, and 3212.9, as they existed following 1996, 2001, and 2000, respectively, state that:

> The [tuberculosis/blood-borne infectious disease/meningitis] so developing or manifesting itself [in those cases] shall be presumed to arise out of and in the course of the employment [or service]. This presumption is disputable and *may* be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a [person] following termination of service for a period of three calendar months for each 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. (Emphasis added.)

These statutes authorize, but do not require, local agencies to dispute the claims of injured employees. Thus, it is the decision made by the local agency to dispute the claim that triggers any litigation costs incurred. Litigation costs are not mandated by the state.[38]

In addition, the Labor Code sections 3212.6, 3212.8, and 3212.9, on their face, do not mandate local agencies to pay workers' compensation benefits to injured employees. Even if the statute required the payment of increased benefits, the payment of benefits to employees would still have to constitute a new program or higher level of service. Local agencies, however, have had the responsibility to pay workers' compensation benefits for "any injury or disease arising out of employment" since 1971.[39] Labor Code section 4850 has further provided special compensation benefits to injured peace officers and firefighters since 1983, well before the enactment of the test claim statutes. Thus, the payment of employee benefits is not new and has not been shifted to local agencies from the state.

Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.[40] Rather, the California Supreme Court and other courts of appeal have determined that the following programs required under law are not administered by local agencies to provide a service to the public and, thus, reimbursement under article XIII B, section 6 of the California Constitution is not required: providing workers' compensation benefits to public employees; providing unemployment compensation protection to public employees; increasing Public Employment Retirement System (PERS) benefits to retired public employees; and paying death benefits to local safety officers under the PERS and workers' compensation systems.[41]

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[38] *Kern High School Dist., supra,* 30 Cal.4th 727, 742-743. Furthermore, there is no evidence that counties and cities are practically compelled to dispute the claims. The statutes do not impose a substantial penalty for not disputing the claim. (*Kern High School Dist., supra,* 30 Cal.4th at p. 751.)

[39] Labor Code section 3208, as last amended in 1971.

[40] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 877.

[41] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57; *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484; *City of Sacramento v. State of California*

More specifically within the context of workers' compensation, the Supreme Court decided *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, and, for the first time, defined a "new program or higher level of service" pursuant to article XIII B, section 6. Counties were seeking the costs incurred as a result of legislation that required local agencies to provide the same increased level of workers' compensation benefits to their employees as private individuals or organizations. The Supreme Court recognized that workers' compensation is not a new program and, thus, determined whether the legislation imposed a higher level of service on local agencies.[42] Although the Court defined a "program" to include "laws which, to implement a state policy, impose unique requirements on local governments," the Court emphasized that a new program or higher level of service requires "state mandated increases in the services provided by local agencies in existing programs."

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. *Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."*[43]

The Court continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility *for providing services which the state believed should be extended to the public*.[44]

Applying these principles, the Court held that reimbursement for the increased costs of providing workers' compensation benefits to employees was not required by the California Constitution. The Court stated the following:

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers … In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the

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(1990) 50 Cal.3d 51, 67; and *City of Richmond v. Commission on State Mandates, supra,* 64 Cal.App.4th 1190, 1195.

[42] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[43] *Ibid,* emphasis added.

[44] *Id*. at pages 56-57, emphasis added.

> cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[45]

In 2004, the California Supreme Court, in *San Diego Unified School Dist*., reaffirmed the conclusion that simply because a statute, which establishes a public employee benefit program, may increase the costs to the employer, the statute does not "in any tangible manner increase the level of service provided by those employers to the public" within the meaning of article XIII B, section 6.[46]

These principles apply even though the presumption is granted uniquely to public safety employees. In the Second District Court of Appeal case of *City of Anaheim*, the city sought reimbursement for costs incurred as a result of a statute that temporarily increased retirement benefits to public employees. The city argued that since the statute "dealt with pensions for *public* employees, it imposed unique requirements on local governments that did not apply to all state residents and entities."[47] The court held that reimbursement was not required because the statute did not impose any state-mandated activities on the city and the PERS program is not a program administered by local agencies as a service to the public.[48] The court reasoned as follows:

> Moreover, the goals of article XIII B of the California Constitution "were to protect residents from excessive taxation and government spending … and preclude a shift of financial responsibility for carrying out governmental functions from the state to local agencies. … Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*County of Los Angeles v. State of California*, *supra*, 43 Cal.3d at p. 61.) Similarly, City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public.[49]

The reasoning in *City of Anaheim* applies here. Simply because a statute applies uniquely to local government does not mean that reimbursement is required under article XIII B, section 6.[50]

Accordingly, the Commission finds that Labor Code section 3212.6, as amended in 1995 and 1996; Labor Code section 3212.8, as added and amended in 2000 and 2001; and Labor Code section 3212.9, as added in 2000, do not mandate new programs or higher levels of service and, thus, do not constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.

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[45] *Id.* at pages 57-58, fn. omitted.

[46] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 875.

[47] *City of Anaheim, supra*, 189 Cal.App.3d at pp. 1483-1484.

[48] *Id*. at page 1484.

[49] *Ibid*.

[50] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 877, fn. 12; *County of Los Angeles, supra*, 110 Cal.App.4th at page 1190; *City of Richmond, supra*, 64 Cal.App.4th at page 1197.

CONCLUSION

The Commission concludes California State Association of Counties-Excess Insurance Authority does not have standing to claim reimbursement under article XIII B, section 6 of the California Constitution, on its own behalf for the costs it incurred as the insurer of its member counties. However, California State Association of Counties-Excess Insurance Authority does have standing to pursue test claims for reimbursement on behalf of its member counties.

The Commission further concludes that Labor Code section 3212.6, as amended by Statutes 1995, chapter 683, and Statutes 1996, chapter 802; Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833; and Labor Code section 3212.9, as added by Statutes 2000, chapter 883, are not subject to article XIII B, section 6 of the California Constitution because they do not mandate a new program or higher level of service on local agencies.