J:/mandates/2001/01-TC-19/DSA
Hearing Date:

ITEM 5
TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code Section 3212.1

Statutes 1999, Chapter 595 (AB 539)
Statutes 2000, Chapter 887 (SB 1820)

Cancer Presumption for Law Enforcement and Firefighters

(01-TC-19)

Filed by California State Association of Counties – Excess Insurance Authority (CSAC-EIA)
and County of Tehama, Claimants

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California State Association of Counties – Excess Insurance Authority (CSAC-EIA)
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EXECUTIVE SUMMARY

Background

This case addresses an evidentiary presumption in workers compensation cases given to certain firefighters and peace officers that develop cancer during employment.

Generally, 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 normally on the employee to show proximate cause by a preponderance of the evidence.

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of evidentiary presumptions. In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during the period of employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that he or she was exposed, while in the service of the department or unit, to a known carcinogen and that the carcinogen was reasonably linked to the cancer.

The test claim statute eliminates the employee's burden of proving that the carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the presumption is given to the employee when the employee simply shows that he or she was exposed to a known carcinogen during employment. If the local agency employer decides to dispute the claim, the burden of proving that the carcinogen is *not* reasonably linked to the cancer is shifted to the employer.

Staff Analysis

Pursuant to the courts' interpretation of article XIII B, section 6, staff finds that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim. CSAC-EIA is a joint powers authority established pursuant to the Joint Exercise of Powers Act in Government Code section 6500 et seq. and is formed for insurance and risk management purposes. CSAC-EIA, as a separate entity from the contracting counties, is not directly affected by the test claim legislation. CSAC-EIA does not employ peace officers specified in the test claim legislation. Thus, while CSAC-EIA may have an interest in this claim as the insurer, its interest is indirect.

Staff further 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. The express language of Labor Code section 3212.1 does not impose any 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, as it has since Labor Code section 3212.1 was enacted in 1982.

Conclusion

Staff concludes that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim. Staff further concludes that Labor Code section 3212.1, as amended by 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.

Staff Recommendation

Staff recommends that the Commission deny this test claim.

STAFF ANALYSIS

Claimants

California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and the County of Tehama

Chronology

06/27/02	Claimants file test claim with Commission
07/05/02	Commission staff determines test claim is complete
08/06/02	Department of Finance files response to test claim
08/07/02	Department of Industrial Relations files response to test claim
08/30/02	Claimants file rebuttal to Department of Finance and Department of Industrial Relations' comments
01/21/04	Letter issued to claimants requesting additional information about CSAC-EIC
02/04/04	CSAC-EIA submits letter in response to staff request
03/23/04	Draft staff analysis issued
04/13/04	Claimants file response to draft staff analysis
04/14/04	Department of Finance files response to draft staff analysis
05/06/04	Final staff analysis issued

Background

This case addresses an evidentiary presumption given to certain firefighters and peace officers 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 normally 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 that provide vital and hazardous services by establishing a series of presumptions.[2] In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during the period of employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical

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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.

treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that:

- He or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director; and that
- The carcinogen is reasonably linked to the disabling cancer.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[3]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[4], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[5] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded.
>
> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.[6]

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level of presumption enumerated in other presumption statutes.

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[3] 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.)

[4] *Zipton, supra,* 218 Cal.App.3d 980.

[5] *Id.* at page 991.

[6] *Id.* at page 990.

Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[7] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.[8]

Test Claim Legislation

In 1999, the Legislature enacted the test claim statute (Stats. 1999, ch. 595), which amended Labor Code section 3212.1 to address the court's criticism of the reasonable link standard in *Zipton*.[9] The test claim statute eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the employee need only show that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 3212.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

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[7] *Riverview Fire Protection District v. Workers' Compensation Appeals Board* (1994) 23 Cal.App.4th 1120, 1124.

[8] *Id.* at page 1128.

[9] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

In 2000, the Legislature enacted the second test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers "primarily engaged in law enforcement activities" as defined below in Penal Code section 830.37, subdivisions (a) and (b):

> (a) Members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district, or the state, if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud.
>
> (b) Members other than members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district or the state, if the primary duty of these peace officers, when acting in that capacity, is the enforcement of law relating to fire prevention or fire suppression.

Prior Test Claim Decisions on Labor Code Section 3212.1

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.[10]

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.[11]

Claimants' Position

The claimants contend 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 claimants assert the following:

> [The test claim legislation takes] an element that once had to be proved by the employee – that the disabling cancer is reasonably related to the carcinogen – and shifts that element so the employer must now show that the disabling cancer is not reasonably related to the carcinogen. Further, the employer is only allowed to address the reasonably-related element if the employer can establish the primary site of the cancer. The employer must establish both to make use of this

[10] Exhibit J.

[11] Exhibit J.

defense. And this defense is now the one and only way to defeat the presumption.

The net effect of this legislation is to further encourage the filing of workers' compensation claims for cancer and markedly increase the probability that the claims will be successful. Thus, the total costs of these claims, from initial prosecution to ultimate resolution are reimbursable.[12]

The claimants further argue that the "only way to rebut the presumptions [in the test claim statute] is by tracking the employee's non-work hour movements and contacts for a several month period."[13]

Position of the Department of Finance

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.[14]

On April 14, 2004, the Department of Finance filed comments on the draft staff analysis, withdrawing their original comments and agreeing that the test claim legislation does not constitute a reimbursable state-mandated program.[15]

Position of the Department of Industrial Relations

The Department of Industrial Relations contends that the test claim legislation is not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The Department asserts that the presumption in favor of safety officers 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.[16]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[17] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[18] "Its

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[12] Test Claim, page 3 (Exhibit A).

[13] Claimants' Response to State Agency Comments, page 3 (Exhibit D).

[14] Exhibit B.

[15] Exhibit I.

[16] Exhibit C.

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."[19] 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.[20] 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.[21]

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.[22] 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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[17] Article XIII B, section 6 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 such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[18] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[20] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[21] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[22] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

legislation.[23] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[24]

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.[25] 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."[26]

Issue 1: Does CSAC-EIA have standing as a claimant for this test claim?

Staff finds that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim.

Government Code sections 17550 and 17551 authorize local agencies and school districts to file test claims seeking reimbursement pursuant to article XIII B, section 6. Government Code section 17518 defines "local agencies" to mean "any city, county, special district, authority, or other political subdivision of the state." Government Code section 17520 defines "special district" to include a "joint powers agency."

CSAC-EIA is a joint powers authority established pursuant to the Joint Exercise of Powers Act ("Act") in Government Code section 6500 et seq. and is formed for insurance and risk management purposes.[27] Under the Act, school districts and local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[28] The entity provided to administer or execute the agreement (in this case CSAC-EIA) may be a firm or corporation, including a nonprofit corporation, designated in the agreement.[29] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.[30] CSAC-EIA contends that, as a joint powers agency, it

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[23] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[24] *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; Government Code sections 17514 and 17556.

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

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

[27] Letter dated February 4, 2004, by Gina C. Dean, Assistant General Manager for CSAC-EIA (Exhibit F).

[28] Government Code section 6502.

[29] Government Code section 6506.

[30] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

is a type of local agency that can file a test claim based on the plain language of Government Code section 17520.[31]

Based on the facts of this case, staff disagrees.

In 1991, the California Supreme Court decided *Kinlaw v. State of California, supra,* a case that is relevant here. In *Kinlaw*, medically indigent adults and taxpayers brought an action against the state alleging that the state violated article XIII B, section 6 by enacting legislation that shifted financial responsibility for the funding of health care for medically indigent adults to the counties. The Supreme Court denied the claim, holding that the medically indigent adults and taxpayers lacked standing to prosecute the action and that the plaintiffs have no right to reimbursement under article XIII B, section 6.[32] The court stated the following:

> Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. *Plaintiffs' interest,* although pressing, *is indirect* and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind.[33] (Emphasis added.)

Like the plaintiffs in *Kinlaw*, CSAC-EIA, as a separate entity from the contracting counties, is not directly affected by the test claim legislation. The Legislature, in Labor Code section 3212.1, gave specified peace officers a presumption of industrial causation that the cancer arose out of and in the course of their employment. The counties, as employers of peace officers, argue that the presumption creates a reimbursable state-mandated program and that the increased costs are reimbursable.

But, CSAC-EIA does not employ peace officers specified in the test claim legislation.[34] Thus, while CSAC-EIA may have an interest in this claim as the insurer, its interest is indirect. As expressed in an opinion of the California Attorney General, a joint powers authority "is simply not a city, a county, or the state as those terms are normally used."[35] Thus, under the *Kinlaw* decision, CSAC-EIA lacks standing in this case to act as a claimant.

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[31] Claimants' response to draft staff analysis (Exhibit H).

[32] *Kinlaw, supra*, 54 Cal.3d at pages 334-335.

[33] *Ibid.*

[34] In response to the draft staff analysis, CSAC-EIA states the following: "Indeed, CSAC-EIA is a separate entity comprised of counties to act as a mechanism to protect the counties' fisc. Although CSAC-EIA does not employ peace officers, when it comes to their workers' compensation, the buck stops at CSAC-EIA." (Exhibit H, p. 2.)

[35] 65 Opinions of the California Attorney General 618, 623 (1982).

This conclusion is further supported by the decision of the Third District Court of Appeal in *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976. Although Government Code section 17520 expressly includes redevelopment agencies in the definition of "special districts" that are eligible to file test claims with the Commission, the court found that redevelopment agencies are not subject to article XIII B, section 6 since they are not bound by the spending limitations in article XIII B, and are not required to expend any "proceeds of taxes." The court stated the following:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity."[36]

The Third District Court of Appeal affirmed the *Redevelopment Agency* decision in *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281, again finding that redevelopment agencies are not entitled to claim reimbursement for state-mandated costs because they are not required to expend "proceeds of taxes."

In the present case, CSAC-EIA is also not subject to the appropriations limitation of article XIII B and does not expend any "proceeds of taxes" within the meaning of article XIII B. According to the letter dated February 4, 2004, from CSAC-EIA, "CSAC-EIA has no authority to tax" and instead receives proceeds of taxes from its member counties in the form of premium payments.[37] Therefore, staff concludes CSAC-EIA is not an eligible claimant for this test claim.

Issue 2: 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 local agencies within the meaning of article XIII B, section 6.

Labor Code section 3212.1, subdivision (d), as amended by the test claim legislation, states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and ***may*** be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. (Emphasis added.)

The test claim legislation also extends the presumption of industrial causation to peace officers "primarily engaged in law enforcement activities" as defined in Penal Code section 830.37, subdivisions (a) and (b). Finally, the legislation specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

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[36] *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986.

[37] Exhibit F.

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

> 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 is the creation of the presumption.[38]

The claimant further argues that local agencies are now required to track the employee's non-work hour movements and contacts for a several month period in order to rebut the presumption that the cancer is an industrial injury.

The express language of Labor Code section 3212.1 does not impose any 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, as it has since Labor Code section 3212.1 was enacted in 1982.[39] The plain language of Labor Code section 3212.1 states that the "presumption is disputable and *may* be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer."

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.][40]

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.[41] Consistent with this principle, the courts have strictly construed the meaning and effect 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

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[38] Claimants' response to draft staff analysis (Exhibit H, p. 4).

[39] See also, *Zipton, supra*, 218 Cal.App.3d 980, 988.

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

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

> 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.[42]

In the present case, the claimant reads requirements into Labor Code section 3212.1, which, by the plain meaning of the statute, are not there.

This conclusion is further supported by the California Supreme Court's recent decision in *Department of Finance v. Commission on State Mandates*.[43] In *Department of Finance*, 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."[44] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[45]

The court also reviewed and affirmed the holding of the *City of Merced* case.[46, 47] 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.)[48]

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

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

[43] *Department of Finance, supra*, 30 Cal.4th 727.

[44] *Id.* at page 737.

[45] *Ibid.*

[46] *Id.* at page 743.

[47] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[48] *Ibid.*

participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][49]

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."[50]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[51] Thus, based on the Supreme Court's decision, the Commission must determine if the underlying program (in this case, the decision to rebut the presumption that the cancer is an industrial injury) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not legally compelled by state law to dispute a workers compensation case. The decision 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 carcinogen is not reasonably linked to the cancer is also not state-mandated.

Further, 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 in insurance premiums as a result of the test claim legislation, as alleged by 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 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.[52]

Finally, the claimant argues that this claim is just like two prior test claim decisions approving reimbursement in cancer presumption workers compensation cases and, thus, this test claim should likewise be approved. 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.[53] In *Weiss v. State Board of*

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[49] *Id.* at page 731.

[50] *Ibid.*

[51] *Id.* at page 743.

[52] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th at page 735.

[53] *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.) [54]

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]."[55] While opinions of the Attorney General are not binding, they are entitled to great weight.[56]

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.[57] 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.

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 local agencies.[58]

CONCLUSION

Based on the foregoing, staff concludes that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim. Staff further concludes that Labor Code section 3212.1, as amended by the test claim

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[54] *Id.* at page 776.

[55] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

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

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

[58] Because this conclusion is dispositive of the case, staff need not reach the other issues raised by the Department of Industrial Relations.

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.

Staff Recommendation

Staff recommends that the Commission deny this test claim.

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State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

TEST CLAIM FORM

For Official Use Only

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Claim No. CSM 01-TC-19

Local Agency or School District Submitting Claim

CSAC-EIA and County of Tehama

Contact Person — Telephone No.

Allan P. Burdick/Juliana F. Gmur (MAXIMUS, INC.) — **(916) 485-8102**
Fax (916) 485-0111

Address

4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Representative Organization to be Notified

California State Association of Counties

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative — Telephone No.

GINA C. DEAN, Management Analyst — **(916) 631-7363**

Signature of Authorized Representative — Date

Gina Dean — 6.25.02

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

TEST CLAIM FORM

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Claim No. CSM 01-TC-19

Local Agency or School District Submitting Claim

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Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative | Telephone No.

RICHARD ROBINSON, County Administrative Officer

Signature of Authorized Representative | Date 6/25/02

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
CSAC-EIA
and
The County of Tehama

Cancer Presumption for Law Enforcement and Firefighters

Chapter 595, Statutes of 1999
and
Chapter 887, Statutes of 2000

STATEMENT OF THE CLAIM

A. MANDATE SUMMARY

Pre-existing workers' compensation law included cancer as an "injury" for which firefighters and law enforcement personnel could be compensated and provided a presumption in favor of the employee that the exposure to the carcinogen had occurred on the job. Chapter 595, Statutes of 1999, extended the definition of cancer to specifically include leukemia, removed the requirement that the employee prove that the cancer was reasonably related to the carcinogen and limited the defenses that could be raised by the employer to one — that the employee's cancer was not reasonably related to his or her cancer. This Chapter also made the application of the law retroactive to include claims filed or pending on January 1, 1997. Chapter 887, Statutes of 2000, expanded the population of employee who could make use of this presumption to include members of arson investigating units, members of fire departments involved in fire suppression an prevention, voluntary fire marshals and firefighters of the Military Department.

These Chapters amended Section 3212.1 of the Labor Code, to state:

> (a) This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, or other public or municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire

Protection, and (4) a county forestry or firefighting department or unit. This section also applies to peace officers , as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code who are primarily engaged in active law enforcement activities.

(b) The term "injury," as used in this division, includes cancer, including leukemia that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.

(c) The compensation that is awarded for cancer shall include, full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member 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.

(e) The amendments to this section enacted during the 2999 portion of the 1999-2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have been previously denied, or that are being appealed following denial.

These Chapters create a new injury heretofore not compensable for arson investigators, fire prevention or suppression units and fire marshals, extends to them a presumption that shifts the burden of proof to the employer to disprove that the illness was work related, removes from all classes of covered employees the requirement to prove that the cancer was reasonably linked to the workplace carcinogen, places substantial restrictions upon the employer as to the proof necessary to defeat the claim by limiting the employer to a single defense and makes the application of the law retroactive.

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 otherwise it would be difficult, if not impossible, to demonstrate that a particular illness arose out of and in the course of one's employment. The presumption not only works in the favor of the employee, but 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.

But these chapters go beyond merely extending the presumption and making the employer's defense more difficult. They take an element that once had to be proved by the employee — that the disabling cancer is reasonably related to the carcinogen — and shift that element so the employer must now show that the disabling cancer is not reasonably related to the carcinogen. Further, the employer is only allowed to address the reasonably-related element if the employer can establish the primary site of the cancer. The employer must establish both to make use of this defense. And this defense is now the one and only way to defeat the presumption.

The net effect of this legislation is to further encourage the filing of workers' compensation claims for cancer and markedly increase the probability that the claims will be successful. Thus, the total costs of these claims, from initial presentation to ultimate resolution are reimbursable.

The California State Association of Counties - Excess Insurance Authority (CSAC-EIA) is a special district, being a joint powers authority which processes workers' compensation claims for member counties. CSAC-EIA does not have full estimates on the costs of this program, but same are substantially in excess of $200 per year. Similarly, the County of Tehama does not have complete estimates on the cost of discharging this program, but estimates that the costs for just one case will exceed $200.00 per year.

B. LEGISLATIVE HISTORY PRIOR TO 1975

There was no requirement prior to 1975 which mandated the inclusion of cancer as a compensable injury for law enforcement and firefighters and the creation of a presumption in favor of cancer exposure on the job. The passage of Chapter 1568, Statutes of 1982 added Labor Code §3212.1 creating a presumption of cancer in favor of firefighters only. A claim was filed with this Commission. *See* Firefighter's Cancer Presumption, SB 90-4081. The matter was resolved with a reimbursement rate of fifty per cent. After some minor amendments, the passage of Chapter 1171, Statutes of 1989, extended the presumption to peace officers. *See* Cancer Presumption, Peace Officers, CSM-4416. That matter resolved at the same reimbursement rate.

Now, the passage of Chapter 595, Statutes of 1999, filed on October 10, 1999, mandated the limitation of the employer's defenses against the presumption to a single defense, removed the requirement that the employee show the cancer was reasonably related to the carcinogen and applied this retroactively back to 1997. Then, the passage of Chapter

887, Statutes of 2000, filed on September 29, 2000, mandated the expansion of the presumption to arson investigators, fire prevention or suppression units and fire marshals.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

As related above, the mandated activities are contained in Labor Code §3212.1. These sections directly relate to the reimbursable provisions of this test claim.

D. COST ESTIMATES

The CSAC-EIA is a special district, being a joint powers authority which processes workers' compensation claims for member counties. CSAC-EIA does not have full estimates on the costs of this program, but same are substantially in excess of $200 per year. Similarly, the County of Tehama does not have complete estimates on the cost of discharging this program, but estimates that the costs for just one case will exceed $200.00 per year.

E. REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by CSAC-EIA and the County of Tehama as a result of the statute on which this test claim is based are all reimbursable costs as such costs are "costs mandated by the State" under Article XIII B (6) of the California Constitution, and Government Code §17500 *et seq.* of the Government Code. Section 17514 of the Government Code defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975."

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

F. MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by this statute clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate

exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

Only local government employs law enforcement and firefighters. Thus, this requirement is unique to government.

Mandate Carries Out a State Policy

From the legislation, it is clear that the Legislature wishes to expand compensability for injury for those who, through employment as law enforcement officers or firefighters, place themselves at higher risk of such injury for the protection of the public. Additionally, this legislation is to encourage individuals to pursue careers with law enforcement and firefighting, which pose hazards to those so employed not found in other career paths.

In summary, the statute mandates that CSAC-EIA and the County of Tehama bear the burden of proof to show that injury due to cancer was not reasonably related to the carcinogen to which the employee was exposed. CSAC-EIA and the County of Tehama believe that the strengthening of the presumption for on the job exposure to carcinogens satisfies the constitutional requirements for a mandate.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code §17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code §17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the above disclaimers have any application to the test claim herein stated by CSAC-EIA and the County of Tehama.

CONCLUSION

The enactment of Chapter 595, Statutes of 1999, and Chapter 887, Statutes of 2000 imposed a new state mandated program and cost on CSAC-EIA and the County of Tehama by establishing a presumption that could only be rebutted by a showing that the primary site for the cancer was established and the carcinogen to which the employee was exposed was not reasonably linked to that cancer. The mandated program meets all of the criteria and tests for the Commission on State Mandates to find a reimbursable state mandated program. None of the so-called disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement have any application to this claim.

G. CLAIM REQUIREMENTS

The following elements of this test claim are provided pursuant to Section 1183, Title 2, of the California Code of Regulations:

Exhibit 1: Chapter 595, Statutes of 1999
Exhibit 2: Chapter 887, Statutes of 2000

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 25th day of June, 2002, at Sacramento, California, by:

Gina C. Dean
Management Analyst
CSAC Excess Insurance Authority

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 25 day of June, 2002, at Red Bluff, California, by:

Richard Robinson
County Administrative Officer
County of Tehama

DECLARATION OF GINA C. DEAN

I, Gina C. Dean, make the following declaration under oath:

I am a management Analyst for CSAC Excess Insurance Authority. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

I declare that I have examined the CSAC-EIA's State mandated duties and resulting costs, in implementing the subject law, and find that such costs are, in my opinion, "costs mandated by the State", as defined in Government Code, Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 25th day of June, 2002 at Sacramento, California.

Gina C. Dean
Management Analyst
CSAC Excess Insurance Authority

DECLARATION OF RICHARD ROBINSON

I, Richard Robinson, make the following declaration under oath:

I am the County Administrative Officer for the County of Tehama. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs are, in my opinion, "costs mandated by the State", as defined in Government Code, Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 25 day of June, 2002 at Red Bluff, California.

Richard Robinson
County Administrative Officer
County of Tehama

Assembly Bill No. 539

CHAPTER 595

An act to amend Section 3212.1 of the Labor Code, relating to workers' compensation.

[Approved by Governor October 5, 1999. Filed with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 539, Papan. Workers' compensation: cancer: firefighters and peace officers.

Existing workers' compensation law provides that in the case of active firefighting members of certain state and local fire departments and in the case of certain peace officers, a compensable injury includes cancer that develops or manifests itself during the period while the firefighter or peace officer demonstrates that he or she was exposed, while in the service of the public agency, to a known carcinogen, as defined, and that the carcinogen is reasonably linked to the disabling cancer. Existing law establishes a presumption that the cancer in these cases is presumed to arise out of and in the course of employment, unless controverted by other evidence.

This bill would delete the requirement for the affected firefighter or peace officer to demonstrate that the carcinogen is reasonably linked to the disabling cancer. The bill instead would provide that the presumption may only be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. This bill would also define cancer to include leukemia for these purposes. These changes would apply to claims for benefits filed or pending on or after January 1, 1997.

The people of the State of California do enact as follows:

SECTION 1. Section 3212.1 of the Labor Code is amended to read:

3212.1. (a) This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) a county forestry or firefighting department or unit. This section also applies to peace officers, as defined in

Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code, who are primarily engaged in active law enforcement activities.

(b) The term "injury," as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.

(c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member 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.

(e) The amendments to this section enacted during the 1999–2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

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Senate Bill No. 1820

CHAPTER 887

An act to amend Section 3212.1 of the Labor Code, relating to workers' compensation.

[Approved by Governor September 28, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1820, Burton. Workers' compensation: cancer: peace officers and safety officers.

Existing workers' compensation law provides that in the case of active firefighting members of certain state and local fire departments and in the case of certain peace officers, a compensable injury includes cancer that develops or manifests itself during the period while the firefighter or peace officer demonstrates that he or she was exposed, while in the service of the public agency, to a known carcinogen, as defined, and that the carcinogen is reasonably linked to the disabling cancer. Existing law establishes a presumption that the cancer in these cases is presumed to arise out of and in the course of employment, unless the presumption is controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer.

This bill would extend the application of these provisions to additional categories of peace officers, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 3212.1 of the Labor Code is amended to read:

3212.1. (a) This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) a county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities.

(b) The term "injury," as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period

in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.

(c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member 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.

(e) The amendments to this section enacted during the 1999 portion of the 1999–2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

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EXHIBIT B

DEPARTMENT OF FINANCE

GRAY DAVIS, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

August 6, 2002

RECEIVED

AUG 0 8 2002

COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of July 5, 2002, the Department of Finance has reviewed the test claim submitted by the California State Association of Counties - Excess Insurance Authority (CSAC-EIA) and the County of Tehama (both hereafter refereed to as claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 595, Statutes of 1999, (AB 539, Papan) and Chapter No. 887, Statutes of 2000, (SB 1820, Burton) are reimbursable state mandated costs (Claim No. CSM-01-TC-19 "Cancer Presumption for Law Enforcement and Firefighters"). Commencing with page 2, of the test claim, claimant has identified the following new duty, which it asserts is a reimbursable state mandate:

- Increases in workers' compensation claims for firefighters.

As the result of our review, we have concluded that the statute may have resulted a new state mandated program and cost on the claimant by expanding the presumption that cancer occurring during the employee's service period arose out of or in the course of employment. If the Commission reaches the same conclusion at its hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines which will then have to be developed for the program.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your July 5, 2002 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Jennifer Osborn, Principal Program Budget Analyst or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF JENNIFER OSBORN
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-19

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 595, Statutes of 1999, (AB 539, Papan) and Chapter No. 887, Statutes of 2000 (SB 1820, Burton) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

August 6, 2002
at Sacramento, CA

Jennifer Osborn
Jennifer Osborn

PROOF OF SERVICE

Test Claim Name: Cancer Presumption for Law Enforcement and Firefighters
Test Claim Number: CSM-01-TC-19

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On August 6, 2002, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

California State Association of Counties
Excess Insurance Authority
3017 Gold Canal Drive, Suite 300
Rancho Cordova, CA 95670

Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

Executive Director
California Peace Officers' Association
1455 Response Road, Suite 190
Sacramento, CA 95815

Allan Burdick
Maximus
4320 Auburn Blvd, Suite 2000
Sacramento, CA 95841

Glenn Haas, Bureau Chief
State Controller's Office
Division of Assounting and Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Gina Dean, Management Analyst
California State Association of Counties
1100 K Street
Sacramento, CA 95814

Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

Director
Department of Industrial Relations
455 Golden Gate Avenue
San Francisco, CA 94102

Executive Director
California State Firefighters' Association
2701 K Street, Suite 201
Sacramento, CA 95816

Leslie McGill
California Peace Officers' Association
1455 Response Road, Suite 190
Sacramento, CA 95815

Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Mark Sigman, Accountant
Riverside County Sheriff's Office
4095 Lemon Street
P.O. Box 512
Riverside, CA 92502

Keith B. Petersen, President
Six Ten & Associates
5252 Balboa Avenue, Suite 807
Sand Diego, CA 92117

Steve Smith, CEO
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Barbara Redding
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018

B-08
Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Richard Robinson
County Administrative Officer
County of Tehama
County Clerk's Office
P.O. Box 250
Red Bluff, CA 96080

David Wellhouse
David Wellhouse and Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

James Wright
Assistant Deputy Director
Department of Forestry and Fire Protection
1416 9th Street, Room 1646-9
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 6, 2002 at Sacramento, California.

Mary Latorre

EXHIBIT C

STATE OF CALIFORNIA
Gray Davis, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
Telephone: (415) 703-4600
Facsimile: (415) 703-4720

MAILING ADDRESS:
P. O. Box 420603
San Francisco, CA 94142-0603

August 7, 2002

RECEIVED
AUG 0 8 2002
COMMISSION ON
STATE MANDATES

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: **Cancer Presumption for Law Enforcement and Firefighters, 01-TC-19**

Hepatitis and Blood-Borne Illness Presumption for Law Enforcement and Firefighters, 01-TC-20

Tuberculosis Presumption for Firefighters, Jail Guards, and Correctional Officers, 01-TC-23

Meningitis Presumption for Law Enforcement and Firefighters, 01-TC-24

Lower Back Injury Presumption for Law Enforcement, 01-TC-25

Dear Ms. Higashi:

Pursuant to Title 2, California Code of Regulations ("C.C.R.") section 1183.02, The following is the consolidated response by the Department of Industrial Relations, Division of Workers' Compensation ("DWC" or "Agency"), to the above-named test claims. This response is consolidated because the Agency's comments to the key issues are identical for all five claims.

Article XIII B, section 6 of the California Constitution ("Section 6") provides in pertinent part that 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 the local government for the costs of such program or increased level of service.

Pursuant to Government Code § 17553 and 2 C.C.R. § 1183.02, the California State Association of Counties – Excess Insurance Authority ("CSAC") and the County of Tehama have filed test claims asserting that the following statutes, which establish rebuttable presumptions of compensation for specific injuries suffered by law

enforcement officers and firefighters, create reimbursable state mandates under Section 6:

1. Labor Code 3212.1 (Cancer Presumption for Law Enforcement and Firefighters)
2. Labor Code 3212.6 (Tuberculosis Presumption for Firefighters, Jail Guards, and Correctional Officers)
3. Labor Code 3212.8 (Hepatitis and Blood-Borne Illness Presumption for Law Enforcement and Firefighters)
4. Labor Code 3212.9 (Meningitis Presumption for Law Enforcement and Firefighters)
5 Labor Code 3213.2 (Lower Back Injury Presumption for Law Enforcement)

The above-cited statutes are all Legislative enactments. Neither DWC nor any division of the Department of Industrial Relations has promulgated regulations to implement these statutes. In this regard, the California Constitution confers "plenary power" to the Legislature to develop California's workers' compensation laws. Article XIV, section 4 of the Constitution provides in pertinent part (emphasis added):

> The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party.

DWC's position is that the Labor Code presumptions do not impose a new program or higher level of service within an existing program upon local entities within the meaning of Section 6. The statutes at issue are evidentiary burdens of proof affecting the entitlement of a defined classification of employees to workers' compensation benefits for specific injuries. Increased costs for local governments associated with the payment workers' compensation benefits should not be considered reimbursable mandates.

1. The Presumptions Do Not Create "New Programs" Requiring Reimbursement.

Local governments are not entitled to reimbursement for all increased costs mandated by state law. Instead, they are only entitled to recover costs resulting from a new program or an increased level of service of an existing program imposed on them by the State. Government Code § 17514; Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal.3d 830, 835. The terms "new program" or "increased costs" are defined using "the commonly understood meanings of the term[s]--programs that carry out the governmental function of providing services to the public, or laws which, to implement state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.

The statutes at issue, Labor Code §§ 3212.1 (cancer), 3212.6 (tuberculosis), 3212.8 (hepatitis), 3212.9 (meningitis), and 3213.2 (lower back) all establish "presumptions of industrial causation" for the specific injury set forth in the respective statute. Assuming an injured worker meets the threshold requirements (generally, the injury or onset of the disease must occur while employed in the defined occupation group), the burden of proof in any subsequently litigated case is shifted to the employer who must provide controverting evidence in order to defeat the claim.[1] The purpose of these presumptions "*is to provide additional compensation benefits* to certain public employees who provide vital and hazardous services by easing the burden of proof of industrial causation." Zipton v. Workers' Compensation Appeals Board (1990) 218 Cal.App.3d 980, 987 (emphasis added). They "are a reflection of public policy, ... implemented by shifting the burden of proof in an industrial injury case." Id., at 988, n. 4.

As indicated above, the presumptions are not irrefutable; local governments are not mandated by these statutes to accept all workers' compensation claims falling within the ambit of the applicable presumption. 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] Reeves v. Workers' Compensation Appeals Board (2000) 80 Cal.App.4th 22, 30, 95 Cal.Rptr.2d 74.

Appellate cases have found that state statues 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 Section 6. In County of Los Angeles, supra, 43 Cal.3d 46, the Supreme Court decided that local governments were not entitled to reimbursement for costs incurred in complying with legislation increasing workers' compensation benefit payments. According to the court, "programs" were reimbursable under Section 6 only if they were "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." Id. at p. 56. The court found that Section 6 "has no application to, and the State need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive." Id. at p. 57- 58.

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[1] For example, under Labor Code § 3212.1 (cancer), the presumption "may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer."

[2] Labor Code § 3202.5 provides that parties, regardless of the liberal construction of workers' compensation laws towards extending benefits to injured workers, must meet their evidentiary burden of proof by a preponderance of the evidence. According to the statute, preponderance of the evidence means "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth."

Similarly, in City of Richmond v. Commission on State Mandates (1998) 64 Cal.App.4th 1190, the Court of Appeal held that a statute entitling the survivors of local safety officers killed in the line of duty to death benefits under both the Public Employees' Retirement System and the workers' compensation laws was not a state mandate requiring reimbursement. The court first found that the statute, which specifically removed an exemption from receiving workers' compensation death benefits, did not constitute a mandated new program or higher level of service. According to the court, the higher cost of compensating its employees could not be considered a requirement to provide a new program or higher level of service to the public (emphasis added):

> Increasing the cost of providing services cannot be equated with requiring an increased level of service under a section 6 analysis. *A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.* [Citation.]

Id. at 1196. See also City of Sacramento v. State of California (1990) 50 Cal.3d 51 (Statute extending mandatory unemployment insurance coverage to local government employees, an increase in the cost of providing service, was not a "new program" or "higher level of service and imposed no "unique" obligation on local governments).

The State does not have a responsibility to provide workers' compensation benefits to employees of local governments, regardless of the employees' duties or job titles. Such responsibility lies solely with the local government, who must either obtain workers' compensation insurance from insurer authorized to write such insurance in the State of California (such as the State Compensation Insurance Fund), or become self-insured. See Insurance Code § 11870; Labor Code § 3700. In this regard, the Labor Code presumptions do not create "new programs" or shift a financial burden from the State to local governments, because local governments by statute have been and are solely liable for providing workers' compensation benefits.

2. The Provision of Worker's Compensation Benefits Are Not Unique to Local Government.

   A. The Presumptions Do Not Create a New Injuries That Were Not Otherwise Compensable.

The presumptions of causation created by Labor Code §§ 3212.1, 3212.6, 3212.8, 3212.9, and 3212.2 do not create new workers' compensation benefits (either indemnity or medical), but instead shifts the burden of proof in cases involving the specific injuries and occupations from the injured worker to the local government.

CSAC's and the County of Tehama's suggestion that the presumptions create a "new injury heretofore not compensable" is inaccurate. Regardless of the existence of the presumptions, all of the injuries defined in the statutes, if arising out of employment or in the course of employment, are compensable under the workers' compensation laws and

require local governments (or private employers, for that matter) to pay benefits, whether medical or indemnity. For example, a hepatitis infection contracted in the course of employment by a law enforcement officer is a compensable injury under the workers' compensation laws, regardless of Labor Code § 3212.8's presumption. City of Fresno v. Workers' Compensation Appeals Board (1992) 57 Cal.Comp.Cases 375 (writ denied); see also City of Santa Cruz v. Workers' Compensation Appeals Board (1980) 45 Cal.Comp.Cases 315 (writ denied) (meningitis infection contracted by police officer a compensable injury).[3] There is nothing about the injuries subject to the presumptions, or the workers' compensation benefits that must be provided as a result of the injuries, that is "unique" to local government such that reimbursement is required under Section 6.

B. The Presumptions Are Incidental To The Cost Of Providing Workers' Compensation Benefits.

The requirement that local governments pay workers' compensation benefits is not unique to local governments and therefore does not constitute a reimbursable state mandate. Statutes that establish such benefits are laws of general application that apply to both private and public employers alike.[4] As expressly stated by the Supreme Court in County of Los Angeles, 43 Cal.3d at 58 (emphasis added):

> 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. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See Lab. Code, §3201 et seq.) Therefore, *although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the 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.*

As noted above, the Constitution grants the Legislature "plenary power" to establish a system of workers' compensation. The ability of the Legislature to address medical

[3] See also Labor Code § 3208.05, which provides that "injury" includes a reaction to or a side effect arising from health care provided by an employer to a health care worker, if such health care is intended to prevent the development or manifestation any bloodborne disease, illness, or syndrome, including hepatitis.

[4] For example, Labor Code § 4600 provides that an employer must provide medical treatment that is reasonably required to cure or relieve the effects of an occupational injury. See also Labor Code § 4635, et seq. (vocational rehabilitation); Labor Code § 4650, et seq. (disability payments); Labor Code § 4700 et seq. (death benefits).

doubts over the compensability of specific injuries and preexisting diseases by means of statutory presumptions in favor of injured employees is well established. San Francisco v. Workers' Compensation Appeals Board (1978) 22 Cal.3d 103, 116-117 (addressing the validity of Labor Code § 3212.5, which created a presumption of compensability for heart trouble and pneumonia suffered by peace officers). The creation of presumptions of compensability for a specific class of employees as applied to workers' compensation laws, laws of general application, are beyond the scope of programs or services to the public that Section 6 seeks to address. Although the presumptions *may* increase of the cost of providing benefits, they do not impose a reimbursable mandate.

3. Assuming The Presumptions Are Reimbursable Mandates, The Actual "Cost" Of The Presumptions Must Be Determined.

Essentially, CSAC and the County of Tehama assert that the statutory presumptions will force them to incur higher costs on the administration of workers' compensation claims for specific injuries suffered by firefighters and law enforcement officers. Under Section 6, local governments 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. Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal.3d 830, 835. For this purpose, "costs" mean actual costs incurred. County of Sonoma v. Commission on State Mandates (2000) 84 Cal.App.4th 1264, 1285.

It will be difficult to ascertain fixed, actual costs in the statutory presumptions found in Labor Code §§ 3212.1, 3212.6, 3212.8, 3212.9, and 3212.2. Unlike the tangible cost of updated fire equipment (see Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d 521) the "cost" of a presumption may vary widely depending on how a local government decides to administers its claims. Certainly, with any number of workers' compensation claims filed, a proportion will be readily accepted by an employer as valid. Likewise, a proportion will be denied and litigated. As to these claims, a statutory presumption will have no material affect.[5] However, it is assumed that the claims in the middle, where it cannot be said with a measure of assurance that the claim is valid, is where a presumption will have its greatest influence over whether the claim is ultimately accepted.

CSAC and the County of Tehama did not provide a basis for their estimation that the legislatively-imposed presumptions will cost at least $200.00 per claim. It is hoped that as

[5] In litigated claims, the claims administer will bear the burden of proof. This will likely result in an increase of litigation expenses in order to produce the requisite preponderance of evidence necessary to defend against the claim. CSEA and the County of Tehama offer no costs estimates of this evidentiary shifting.

the record develops further in these test claims, the Commission will require a reasonable estimation as to the "cost" of statutory presumptions.[6]

Based on the foregoing, the Division of Workers' Compensation does not find the presumptions set forth in Labor Code §§ 3232.1 (cancer), 3212.6 (tuberculosis), 3212.8 (hepatitis), 3212.9 (meningitis), and 3212.2 (lower back), to be reimbursable state mandates under Article XIII B, section 6 of the California Constitution.

I am an Industrial Relations Counsel with the Department of Industrial Relations, Division of Workers' Compensation. I declare under penalty of perjury that the foregoing response is true and correct of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Dated: 8/7/02

George P. Parisotto
Industrial Relations Counsel
Telephone: (415) 703-4600
Fax: (415) 703-4720

[6] Other costs considerations should be considered. For example, would workers' compensation benefits provided for injuries defined under the Labor Code sections at issue offset other payments, such as state disability and/or retirement benefits.

Appendix – Labor Code Statutes

1. Labor Code 3212.1
Cancer Presumption for Law Enforcement and Firefighters

(a) This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) a county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities.

(b) The term "injury," as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.

(c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member 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.

(e) The amendments to this section enacted during the 1999 portion of the 1999-2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.

2. Labor Code 3212.6
Tuberculosis Presumption for Firefighters, Jail Guards, and Correctional Officers

In the case of a member of a police department of a city or county, or a member of the sheriff's office of a county, or a member of the California Highway Patrol, or an inspector or investigator in a district attorney's office of any county whose principal duties consist of active law enforcement service, or a prison or jail guard or correctional officer who is employed by a public agency, when that person is employed upon a regular, full-time salary, or in the case of members of fire departments of any city, county, or district, or other public or municipal corporations or political subdivisions, when those members are employed on a regular fully paid basis, and in the case of active firefighting members of the Department of Forestry and Fire Protection whose duties require firefighting and first-aid response services, or of any county forestry or firefighting department or unit, where those members are employed on a regular fully paid basis, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement, firefighting, or emergency first-aid response service such as stenographers, telephone operators, and other officeworkers, the term "injury" includes tuberculosis that develops or manifests itself during a period while that member is in the service of that department or office. The compensation that is awarded for the tuberculosis shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.

The tuberculosis 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 is bound to find in accordance with it. This presumption shall be extended to a member 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. A public entity may require applicants for employment in firefighting positions who would be entitled to the benefits granted by this section to be tested for infection for tuberculosis.

3. Labor Code 3212.8
Hepatitis and Blood-Borne Illness Presumption for Law Enforcement and Firefighters

(a) In the case of members of a sheriff's office, of police or fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, or individuals described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, whether those persons are volunteer, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit, whether voluntary, fully paid, or partly paid, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service or active firefighting services, such as stenographers, telephone operators, and other office workers, the term "injury" as used in this division, includes a blood-borne infectious disease when any part of the blood-borne infectious disease develops or manifests itself during a period while that person is in the service of that office, staff, division, department, or unit. The compensation that is awarded for a blood-borne infectious disease shall include, but not be limited to, full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workers' compensation laws of this state.

(b) The blood-borne infectious disease 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. That presumption shall be extended to a person covered by subdivision (a) following termination of service for a period of three calendar months for each full year of service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(c) The blood-borne infectious disease so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.

(d) For the purposes of this section, "blood-borne infectious disease" means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations.

4. Labor Code 3212.9
Meningitis Presumption for Law Enforcement and Firefighters

In the case of a member of a police department of a city, county, or city and county, or a member of the sheriff's office of a county, or a member of the California Highway Patrol, or a county probation officer, or an inspector or investigator in a district attorney's office of any county whose principal duties consist of active law enforcement service, when that person is employed on a regular, full-time salary, or in the case of a member of a fire department of any city, county, or district, or other public or municipal corporation or political subdivision, or any county forestry or firefighting department or unit, when those members are employed on a regular full-time salary, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement or firefighting, such as stenographers, telephone operators, and other officeworkers, the term "injury" includes meningitis that develops or manifests itself during a period while that person is in the service of that department, office, or unit. The compensation that is awarded for the meningitis shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.

The meningitis 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 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.

5. Labor Code 3213.2
Lower Back Injury Presumption for Law Enforcement

(a) In the case of a member of a police department of a city, county, or city and county, or a member of the sheriff's office of a county, or a peace officer employed by the Department of the California Highway Patrol, or a peace officer employed by the University of California, who has been employed for at least five years as a peace officer on a regular, full-time salary and has been required to wear a duty belt as a condition of employment, the term "injury," as used in this division, includes lower back impairments. The compensation that is awarded for lower back impairments shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.

(b) The lower back impairment so developing or manifesting itself in the peace officer 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 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.

(c) For purposes of this section, "duty belt" means a belt used for the purpose of holding a gun, handcuffs, baton, and other items related to law enforcement.

PROOF OF SERVICE BY MAIL

(FED.R.CIV.PROC., RULE 5; CAL. CODE CIV. PROC., §§ 1013A, 2015.5)

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

I declare that I am a citizen of the United States and that I am employed in the City and County of San Francisco of the State of California. I am over the age of 18 years and not a party to the within entitled action. My business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, California 94102. On August 7, 2002 I served the attached:

Response to Test Claims Nos. 01-TC-19, 01-TC-20, 01-TC-23, 01-TC-24 and 01-TC-25

on all interested parties by placing true copies thereof in sealed envelopes with postage thereon fully prepaid in the United States mail in San Francisco, California addressed as stated below:

Jennifer Osborn, Principal
Program Budget Analyst
Department of Finance
915 "L" Street
Sacramento, CA 95813-3706

Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Gina Dean, Management Analyst
California State Assn. of Counties
1100 "K" Street
Sacramento, CA 95814

Chuck Cake, Acting Director
Dept. of Industrial Relations
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I am readily familiar with this office's practice of collection and processing of correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on the motion of the party served, service is presumed invalid if the postal cancellation date or postage meter is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct, that I am employed in the office of a member of the bar of this court at whose direction this service was made, and that this declaration was executed at San Francisco, California on August 7, 2002.

Laura M. Zarry

RESPONSE TO DEPARTMENT OF FINANCE AND DEPARTMENT OF INDUSTRIAL RELATIONS

On Original Test Claim
Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000
Labor Code Section 3212.1
Claim no. CSM-01-TC-19

RECEIVED
AUG 3 0 2002
COMMISSION ON STATE MANDATES

Cancer Presumption for Law Enforcement and Firefighters

The following are comments and responses to the letters of the Department of Finance, dated August 2, 2002, and the Department of Industrial Relations, dated August 7, 2002, regarding the original test claim as submitted by CSAC-EIA and the County of Tehama.

A. Department of Finance's Comments

"As the result of our review, we have concluded that the statute may have resulted in a new state mandated program and cost on the claimant by expanding the presumption that cancer occurring during the employee's service period arose out of or in the course of employment. If the Commission reaches the same conclusion at its hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines which will then have to be developed for the program."

The Department of Finance has taken the position that a new state-mandated program may exist and thus is not in opposition to the position of the claimants.

B. Department of Industrial Relations Comments

1. The Department of Industrial Relations, in its consolidated response, makes a number of points to support its position that the cancer presumption is not a new program:

a. Public entities can only recover costs from a new program or increased service in an existing program.

b. The statute in question creates a rebuttable presumption in furtherance of the public policy "to provide additional compensation benefits to certain public employees who provide vital and hazardous services." (Citing Zipton v. WCAB (1990) 218 Cal.App.3d 980, 987.)

c. Workers' Compensation benefits are not reimbursable state mandates unless they are "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the land." (Citing County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56.)

d. An increased cost in employee compensation is not an increased cost in providing services to the public. (Citing City of Richmond v. Commission on

State Mandates (1998) 64 Cal.App.4th 1190, 1196 and City of Sacramento v. State of California (1990) 50 Cal.3d 51.)

e. The state does not have to provide workers' compensation benefits to employees of local government. By law, that responsibility lies with the employer. Thus the state did not shift a financial burden onto local government nor is the new presumption, a new program.

The Department properly stated the law regarding when a mandate is compensable and when it is not. Its application of law to the facts, however, is faulty. The change in the burden of proof as set forth in Labor Code section 3212.1 is not a new program but is, instead, a higher level of service within an existing program.

The Department relies on several cases wherein a change in law created changes and increased costs to local government. In each case, the courts found against the existence of a reimbursable state mandate. Yet, these cases had something in common and can be distinguished from the statute in question. In County of Los Angeles, the challenge was made to a statute that increased workers' compensation benefits to all workers regardless of whether the employer was a public or private entity. Clearly, this is not a statute that imposes a unique requirement on local government. City of Sacramento also concerned changes made due to a federal law that extended mandatory unemployment insurance to state and local government and non-profit entities. Again, not a requirement unique to local government. Finally, City of Richmond eliminated an exception available only to local governments whereby safety members' surviving spouses would not be able to obtain double death benefits. Although this elimination of the exception created new costs for the city, it essentially placed the city in the same position as other employers. Therefore there was no reimbursable state mandate. In the instant case, however, the shift in the burden of proof is not a law of general application, applies uniquely to local government and does not place local government on equal footing with other employers.

The Department' reliance on County of Los Angeles for support of its proposition against reimbursement is misplaced. Indeed, the Department actually succeeds in supporting the claimant's position in favor of reimbursement through the analysis of County of Los Angeles read in combination with the prior case, Zipton. The Department states that workers' compensation benefits are only reimbursable if they involve "laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the land." Looking to Zipton we find that state policy, which is "to provide additional compensation benefits to certain public employees who provide vital and hazardous services." This is a unique requirement on local governments who must now provide a higher level of service, in the form of absorbing with increased workers compensation claims, for a unique group of employees that are not on par with all residents and entities in the land.

Moreover, this Commission has already found nearly identical presumptions reimbursable. Chapter 1568, Statutes of 1982 added Labor Code §3212.1 creating a presumption of cancer in favor of firefighters only. A claim was filed with this

Commission. *See* Firefighter's Cancer Presumption, SB 90-4081. The matter was resolved with a reimbursement rate of fifty per cent. Chapter 1171, Statutes of 1989, extended the presumption to peace officers. *See* Cancer Presumption, Peace Officers, CSM-4416. That matter resolved at the same reimbursement rate. This current claim involves a nearly identical presumption as applied to the same class of employees and should be found just as reimbursable.

2. The Department explains that the presumption only shifts the burden of proof and does not create new injuries that were not otherwise compensable. The example to illustrate the point is "a hepatitis infection contracted in the course of employment by a law enforcement officer is a compensable injury under the workers' compensation laws, regardless of Labor Code section 3212.8's presumption."

To paraphrase an old philosophical debate: If a man chops down a protected tree in a forest, and there is no one around to hear, will he be charged with a crime? What the Department has failed to understand is: The issue is one of proof. The disease is compensable if it arose during or in the course of employment. The whole question of compensability revolves around the issue of how the disease was contracted. Before the presumption, the employee had to prove the infection happened on the job. Now, the presumption created by Labor Code section 3212.1 places the employer in the position of having to prove that the infection did not happen on the job. This shift is monumental as it places the employer is the position of disproving a fact. The only way to rebut the presumptions is by tracking the employee's non-work hour movements and contacts for a several month period. This onerous burden creates compensable injuries that were not heretofore compensable.

3. The Department argues that employers in general have to pay workers' compensation benefits, not just local governments. Thus higher costs, if any, involved with a law of general application is not reimbursable.

Although some of the body of law that is workers' compensation are laws of general application, the presumption created by Labor Code section 3212.1 is not. It applies to a unique class of employees who are unique to local government. As explained above, the California Supreme Court in County of Los Angeles found an exception for reimbursement of certain workers' compensation programs. The statute in question fits squarely within that exception.

4. Finally, that Department states that if this program is reimbursable, the costs will be difficult to ascertain as they will not involve tangible costs like the purchase of new equipment.

The claimants are aware of the difficulties involved with ascertaining the amount of the reimbursable claim but are confident that such a number can and will be established. Indeed, there is precedence for establishing a reimbursement rate as noted above regarding the prior claims of the cancer presumptions.

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 26th day of August, 2002, at Sacramento, California, by:

Gina Dean

Gina C. Dean,
Management Analyst
CSAC Excess Insurance Authority

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 26th day of August, 2002, at Red Bluff, California, by:

Richard Robinson,
County Administrative Officer
County of Tehama

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On August 30, 2002, I served:

RESPONSE TO DEPARTMENT OF FINANCE AND DEPARTMENT OF INDUSTRIAL RELATIONS
On Original Test Claim
Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000
Labor Code Section 3212.1
Claim no. CSM-01-TC-19

Cancer Presumption for Law Enforcement and Firefighters

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 30th day of August, 2002, at Sacramento, California.

Declarant

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EXHIBIT E

STATE OF CALIFORNIA ARNOLD SCHWARZEN

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January 21, 2004

Mr. Allan P. Burdick
Ms. Juliana F. Gmur
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

RE: **Request for Additional Information From CSAC-EIA**
Cancer Presumption for Law Enforcement and Firefighters (01-TC-19)
Labor Code section 3212.1
Statutes 1999, Chapter 595 (AB 539)
Statutes 2000, Chapter 887 (SB 1820)
CSAC-EIA and County of Tehama, Co-Claimants

Dear Mr. Burdick and Ms. Gmur:

In June 2002, the California State Association of Counties – Excess Insurance Authority (CSAC-EIA) filed the above-referenced test claim as a co-claimant with the County of Tehama. In order to complete the draft staff analysis, staff requests responses to the following questions about CSAC-EIA.

- What type of entity is CSAC-EIA?
- Under what laws is CSAC-EIA formed?
- Does CSAC-EIA have the authority to tax and spend within the meaning of article XIII of the California Constitution for the program at issue in this case?
- What facts support your position that CSAC-EIA is an eligible claimant for this program.

When submitting your responses, please refer to section §1183.02(c)(1) of the Commission's regulations, which requires that all assertions or representations of fact must be supported by documentary evidence authenticated by a declaration signed under penalty of perjury by a person who is authorized and competent to do so. The declaration must be based on the declarant's personal knowledge, information, or belief.

Please submit your response by **Wednesday, February 4, 2004.**

Please contact Camille Shelton, Senior Commission Counsel, if you have any questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

c. Mailing list

Original List Date: 7/5/2002
Last Updated: 3/26/2003
List Print Date: 01/21/2004
Claim Number: 01-TC-19
Issue: Cancer Presumption for Law Enforcement and Firefighters

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	**Claimant Representative** Tel: (916) 485-8102 Fax: (916) 485-0111
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Mr. Jim Jaggers Centration, Inc. 12150 Tributary Point Drive, Suite 140 Gold River, CA 95670	Tel: (916) 351-1050 Fax: (916) 351-1020

RESPONSE TO COMMISSION ON STATE MANDATES

Request for Additional Information

RECEIVED
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COMMISSION ON
STATE MANDATES

Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000
Labor Code Section 3212.1
Claim no. CSM-01-TC-19

Cancer Presumption for Law Enforcement and Firefighters

The following are questions and responses to the letter of the Commission on State Mandates, dated January 21, 2004, regarding the original test claim as submitted by CSAC-EIA and the County of Tehama.

- What type of entity is CSAC-EIA?

The California State Association of Counties - Excess Insurance Authority (CSAC-EIA) is a joint powers authority (JPA) formed by and for California counties for insurance and risk management purposes. It is one of an estimated 150 joint powers insurance pools currently operating in California. The EIA was established as a JPA and became operational in October 1979.

- Under what laws is CSAC-EIA formed?

CSAC-EIA was formed pursuant to Article I, Chapter 5, Division 7, Title 1, of the California Government Code (Section 6500 et seq.).

- Does CSAC-EIA have the authority to tax and spend within the meaning of article XIII of the California Constitution for the program at issue in this case?

No. CSAC-EIA has no authority to tax — its member counties, however, do have the authority to tax. The proceeds from taxes are received by CSAC-EIA in the form of premium payments by its members. Prior to the formation of the EIA and in light of a dearth of insurance carriers willing to contract with counties, each county was left to manage these proceeds to handle that individual county's workers' compensation claims. Realizing the financial risk to individual counties facing a large claim, the EIA was established. The EIA now manages those tax proceeds once the sole responsibility of the counties. The EIA through management of workers' compensation claims provides both security and cost saving to its members. The members benefit though pooled risk and through cost-saving centralized administration and claims processing.

- What facts support your position that CSAC-EIA is an eligible claimant for this program?

CSAC-EIA, being a joint powers authority which provides workers' compensation coverage for its member counties, is an able claimant pursuant to Government Code section 17518 which defines a local agency as "any city, county, special district, authority, or other political subdivision of the state." Moreover, the CSAC-EIA is also a special district under Government Code section 17520, which states, in pertinent part: " 'Special district' includes a redevelopment agency, a joint powers agency or entity, a county service area, a maintenance district or area, an improvement district or improvement zone, or any zone or area.

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 3rd day of February, 2004, at Sacramento, California, by:

Gina C. Dean,
Assistant General Manager
CSAC Excess Insurance Authority

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On February 4, 2004, I served:

RESPONSE TO COMMISSION ON STATE MANDATES

Request for Additional Information

Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000
Labor Code Section 3212.1
Claim no. CSM-01-TC-19

Cancer Presumption for Law Enforcement and Firefighters

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 4th day of Frebruary, 2004, at Sacramento, California.

Declarant

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EXHIBIT G

STATE OF CALIFORNIA ARNOLD SCHWARZE

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March 23, 2004

Mr. Allan P. Burdick
Ms. Juliana F. Gmur
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

RE: **Draft Staff Analysis/Hearing Date**
Cancer Presumption for Law Enforcement and Firefighters (01-TC-19)
Labor Code section 3212.1
Statutes 1999, Chapter 595 (AB 539)
Statutes 2000, Chapter 887 (SB 1820)
CSAC-EIA and County of Tehama, Co-Claimants

Dear Mr. Burdick and Ms. Gmur:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **April 13, 2004**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing **May 27, 2004,** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about May 6, 2004. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Camille Shelton, Senior Commission Counsel, if you have any questions regarding the above.

Sincerely,

Paula Higashi

Paula Higashi
Executive Director

c. Mailing list

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Hearing Date:

ITEM ___
TEST CLAIM
DRAFT STAFF ANALYSIS

Labor Code Section 3212.1

Statutes 1999, Chapter 595 (AB 539)
Statutes 2000, Chapter 887 (SB 1820)

Cancer Presumption for Law Enforcement and Firefighters

(01-TC-19)

Filed by California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and County of Tehama, Claimants

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EXECUTIVE SUMMARY

The Executive Summary will be included with the Final Staff Analysis.

STAFF ANALYSIS

Claimants

California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and the County of Tehama

Chronology

06/27/02	Claimants file test claim with Commission
07/05/02	Commission staff determines test claim is complete
08/06/02	Department of Finance files response to test claim
08/07/02	Department of Industrial Relations files response to test claim
08/30/02	Claimants file rebuttal to Department of Finance and Department of Industrial Relations' comments
01/21/04	Letter issued to claimants requesting additional information about CSAC-EIC
02/04/04	CSAC-EIA submits letter in response to staff request

Background

This case addresses an evidentiary presumption given to certain firefighters and peace officers 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 normally 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 that provide vital and hazardous services by establishing a series of presumptions.[2] In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during the period of employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that:

- He or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director; and that

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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.

- The carcinogen is reasonably linked to the disabling cancer.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[3]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[4], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[5] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded.
>
> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.[6]

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level of presumption enumerated in other presumption statutes. Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[7] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

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[3] 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.)

[4] *Zipton, supra,* 218 Cal.App.3d 980.

[5] *Id.* at page 991.

[6] *Id.* at page 990.

[7] *Riverview Fire Protection District v. Workers' Compensation Appeals Board* (1994) 23 Cal.App.4th 1120, 1124.

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.[8]

Test Claim Legislation

In 1999, the Legislature enacted the test claim statute (Stats. 1999, ch. 595), which amended Labor Code section 3212.1 to address the court's criticism of the reasonable link standard in *Zipton*.[9] The test claim statute eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the employee need only show that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 3212.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

In 2000, the Legislature enacted the second test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers "primarily engaged in law enforcement activities" as defined below in Penal Code section 830.37, subdivisions (a) and (b):

> (a) Members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district, or the state, if the primary duty of these peace officers is

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[8] *Id.* at page 1128.

[9] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

the detection and apprehension of persons who have violated any fire law or committed insurance fraud.

(b) Members other than members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district or the state, if the primary duty of these peace officers, when acting in that capacity, is the enforcement of law relating to fire prevention or fire suppression.

Prior Test Claim Decisions on Labor Code Section 3212.1

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.[10]

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.[11]

Claimants' Position

The claimants contend 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 claimants assert the following:

> [The test claim legislation takes] an element that once had to be proved by the employee – that the disabling cancer is reasonably related to the carcinogen – and shifts that element so the employer must now show that the disabling cancer is not reasonably related to the carcinogen. Further, the employer is only allowed to address the reasonably-related element if the employer can establish the primary site of the cancer. The employer must establish both to make use of this defense. And this defense is now the one and only way to defeat the presumption
>
> The net effect of this legislation is to further encourage the filing of workers' compensation claims for cancer and markedly increase the probability that the

[10] Exhibit __.

[11] Exhibit __.

claims will be successful. Thus, the total costs of these claims, from initial prosecution to ultimate resolution are reimbursable.[12]

The claimants further argue that the "only way to rebut the presumptions [in the test claim statute] is by tracking the employee's non-work hour movements and contacts for a several month period."[13]

Position of the Department of Finance

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.[14]

Position of the Department of Industrial Relations

The Department of Industrial Relations contends that the test claim legislation is not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The Department asserts that the presumption in favor of safety officers 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.[15]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[16] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[17] "Its

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[12] Test Claim, page 3. (Exhibit A.)

[13] Claimants' Response to State Agency Comments, page 3. (Exhibit D.)

[14] Exhibit B.

[15] Exhibit C.

[16] Article XIII B, section 6 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 such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[17] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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."[18] 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.[19] 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.[20]

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.[21] 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.[22] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[23]

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.[24] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an

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

[19] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[20] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[21] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[22] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[23] *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; Government Code sections 17514 and 17556.

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

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[25]

Issue 1: Does CSAC-EIA have standing as a claimant for this test claim?

Staff finds that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim.

Government Code sections 17550 and 17551 authorize local agencies and school districts to file test claims seeking reimbursement pursuant to article XIII B, section 6. Government Code section 17518 defines "local agencies" to mean "any city, county, special district, authority, or other political subdivision of the state." Government Code section 17520 defines "special district" to include a "joint powers agency."

CSAC-EIA is a joint powers authority established pursuant to the Joint Exercise of Powers Act ("Act") in Government Code section 6500 et seq. formed for insurance and risk management purposes.[26] Under the Act, school districts and local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[27] The entity provided to administer or execute the agreement (in this case CSAC-EIA) may be a firm or corporation, including a nonprofit corporation, designated in the agreement.[28] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.[29]

In 1991, the California Supreme Court decided *Kinlaw v. State of California, supra.* In *Kinlaw*, medically indigent adults and taxpayers brought an action against the state alleging that the state violated article XIII B, section 6 by enacting legislation that shifted financial responsibility for the funding of health care for medically indigent adults to the counties. The Supreme Court denied the claim, holding that the medically indigent adults and taxpayers lacked standing to prosecute the action and that the plaintiffs have no right to reimbursement under article XIII B, section 6.[30] The court stated the following:

> Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. *Plaintiffs' interest,* although pressing, *is indirect* and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the

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

[26] Letter dated February 4, 2004, by Gina C. Dean, Assistant General Manager for CSAC-EIA (Exhibit ___).

[27] Government Code section 6502.

[28] Government Code section 6506.

[29] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

[30] *Kinlaw, supra,* 54 Cal.3d at pages 334-335.

> claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind.[31] (Emphasis added.)

The Supreme Court's ruling in *Kinlaw* is relevant here. Like the plaintiffs in *Kinlaw*, CSAC-EIA, as a separate entity from the contracting counties, is not directly affected by the test claim legislation. The Legislature, in Labor Code section 3212.1, gave specified peace officers a presumption of industrial causation that the cancer arose out of and in the course of their employment. The counties, as employers of peace officers, argue that the presumption creates a reimbursable state-mandated program and that the increased costs are reimbursable.

But, CSAC-EIA does not employ peace officers specified in the test claim legislation. Thus, while CSAC-EIA may have an interest in this claim as the insurer, its interest is indirect. As expressed in an opinion of the California Attorney General, a joint powers authority "is simply not a city, a county, or the state as those terms are normally used."[32] Thus, under the *Kinlaw* decision, CSAC-EIA lacks standing in this case to act as a claimant.

This conclusion is further supported by the decision of the Third District Court of Appeal in *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976. Although Government Code section 17520 expressly includes redevelopment agencies in the definition of "special districts" that are eligible to file test claims with the Commission, the court found that redevelopment agencies are not subject to article XIII B, section 6 since they are not bound by the spending limitations in article XIII B, and are not required to expend any "proceeds of taxes." The court stated the following:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity."[33]

The Third District Court of Appeal affirmed the *Redevelopment Agency* decision in *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281, again finding that redevelopment agencies are not entitled to claim reimbursement for state-mandated costs because they are not required to expend "proceeds of taxes."

In the present case, CSAC-EIA is also not subject to the appropriations limitation of article XIII B and does not expend any "proceeds of taxes" within the meaning of article XIII B. According to the letter dated February 4, 2004, from CSAC-EIA, "CSAC-EIA has no authority to tax" and instead receives proceeds of taxes from its member counties in the form of premium payments.[34] Therefore, staff concludes CSAC-EIA is not an eligible claimant for this test claim.

The remaining analysis will address the merits of the claim with regard to local agencies only.

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[31] *Ibid.*

[32] 65 Opinions of the California Attorney General 618, 623 (1982).

[33] *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986.

[34] Exhibit ___.

Issue 2: 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 local agencies within the meaning of article XIII B, section 6.

Labor Code section 3212.1, subdivision (d), as amended by the test claim legislation, states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and ***may*** be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. (Emphasis added.)

The test claim legislation also extends the presumption of industrial causation to peace officers "primarily engaged in law enforcement activities" as defined in Penal Code section 830.37, subdivisions (a) and (b). Finally, the legislation specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

The claimant contends that the test claim legislation now requires local agencies to track the employee's non-work hour movements and contacts for a several month period in order to rebut the presumption that the cancer is an industrial injury.

The express language of Labor Code section 3212.1 does not impose any 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, as it has since Labor Code section 3212.1 was enacted in 1982.[35] The plain language of Labor Code section 3212.1 states that the "presumption is disputable and *may* be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer."

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.][36]

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[35] See also, *Zipton, supra*, 218 Cal.App.3d 980, 988.

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

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.[37] Consistent with this principle, the courts have strictly construed the meaning and effect 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.[38]

In the present case, the claimant reads requirements into Labor Code section 3212.1, which, by the plain meaning of the statute, are not there.

This conclusion is further supported by the California Supreme Court's recent decision in *Department of Finance v. Commission on State Mandates*.[39] In *Department of Finance*, 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."[40] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[41]

The court also reviewed and affirmed the holding of the *City of Merced* case.[42, 43] 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 require to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue

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

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

[39] *Department of Finance, supra*, 30 Cal.4th 727.

[40] *Id.* at page 737.

[41] *Ibid.*

[42] *Id.* at page 743.

[43] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

> 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.)[44]

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.][45]

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."[46]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[47] Thus, based on the Supreme Court's decision, the Commission must determine if the underlying program (in this case, the decision to rebut the presumption that the cancer is an industrial injury) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not legally compelled by state law to dispute a workers compensation case. The decision 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 carcinogen is not reasonably linked to the cancer is also not state-mandated.

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 local agencies will incur increased costs in insurance premiums as a result of the test claim legislation, as alleged by 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 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

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[44] *Ibid.*

[45] *Id.* at page 731.

[46] *Ibid.*

[47] *Id.* at page 743.

> 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.[48]

Finally, the claimant argues that this claim is just like two prior test claim decisions approving reimbursement in cancer presumption workers compensation cases and, thus, this test claim should likewise be approved. 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.[49] 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 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.) [50]

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]."[51] While opinions of the Attorney General are not binding, they are entitled to great weight.[52]

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.[53] The analysis in this case complies with these principles, particularly

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[48] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th at page 735.

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

[50] *Id.* at page 776.

[51] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

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

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

when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow.

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 local agencies.[54]

CONCLUSION

Based on the foregoing, staff concludes that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim. Staff further concludes that Labor Code section 3212.1, as amended by 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.

Staff Recommendation

Staff recommends that the Commission deny this test claim.

[54] Because this conclusion is dispositive of the case, staff need not reach the other issues raised by the Department of Industrial Relations.

CONNIE ZIPTON et al., Petitioners,
v.
WORKERS' COMPENSATION APPEALS BOARD, CITY OF SAN LEANDRO et al., Respondents.

No. A044870.

Court of Appeal, First District, Division 3, California.

Mar 14, 1990.

SUMMARY

The surviving spouse of a firefighter who died of cancer initiated workers' compensation proceedings, alleging that the cancer was caused by the firefighter's exposure to known carcinogens during employment. Although it was conceded that the firefighter had been exposed to known carcinogens on the job, the workers' compensation judge ruled that petitioner failed to establish the evidentiary foundation necessary to trigger the statutory presumption of industrial causation set forth in Lab. Code, § 3212.1. The firefighter's cancer was a metastatic undifferentiated carcinoma, and the primary tumor site could not be medically identified. The Workers' Compensation Appeals Board denied reconsideration of the decision of the workers' compensation judge.

On the surviving spouse's petition for review, the Court of Appeal affirmed the board's order denying reconsideration. It held that the spouse had the burden of establishing a reasonable link between the cancer and the exposure to carcinogens before Lab. Code, § 3212.1, could be applied to shift the burden of proof to the public employer on the issue of industrial causation. Since all the medical evidence established that the primary tumor site could not be identified, other than by sheer speculation, it held that petitioner failed to meet that burden of proof. (Opinion by Barry-Deal, Acting P. J., with Merrill and Strankman, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 21--Construction--Legislative Intent.
When a court endeavors to construe a statute, it must ascertain the intent of the Legislature in order to accomplish the purpose of the statute. *981

(2) Workers' Compensation § 76--Presumption of Industrial Causation-- Purpose.
The foremost purpose of the presumptions of industrial causation found in Lab. Code, § 3212 et seq., is to provide additional compensation benefits to certain public employees who provide vital and hazardous services, by easing the burden of proof of industrial causation.

(3) Workers' Compensation § 75--Burden of Proof--Shifting of Burden-- Statutory Presumption of Industrial Causation.
The presumptions of industrial causation found in Lab. Code, § 3212 et seq., are a reflection of public policy, and are implemented by shifting the burden of proof in an industrial injury case. Where proven facts give rise to a presumption under one of the statutes, the burden of proof shifts to the party against whom it operates, to prove the nonexistence of the presumed fact, namely, an industrial relationship.

(4) Workers' Compensation § 76--Presumptions--Industrial Causation--Cancer of Firefighters and Peace Officers.
The presumption of industrial causation of cancer suffered by firefighters and peace officers, set forth in Lab. Code, § 3212.1, differs in application from the other statutory presumptions of industrial causation in Lab. Code, § 3212 et seq. Unlike the other statutory presumptions, Lab. Code, § 3212.1, additionally requires a showing of exposure to a known carcinogen as defined in published standards, and a showing that the carcinogen is reasonably linked to the disabling cancer, before the presumption can be invoked.

(5) Workers' Compensation § 75--Burden of Proof--Reasonable Link Between Cancer and Industrial Exposure to Carcinogen--Public Firefighter.
In workers' compensation proceedings initiated by the surviving spouse of a firefighter who died of cancer, the surviving spouse had the initial burden of proving by a preponderance of the evidence that the firefighter's cancer was reasonably linked to industrial exposure to a known carcinogen, before the burden of proof on the issue of industrial causation could be shifted to the public employer under Lab. Code, § 3212.1.

(6) Workers' Compensation § 75--Burden of Proof--Reasonable Link Between Cancer and Industrial

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Exposure to Carcinogen--Public Firefighter--Undifferentiated Carcinoma.

The surviving spouse of a firefighter who died from cancer failed to establish a reasonable link between the cancer and the firefighter's industrial exposure to known carcinogens, for purposes of shifting to the public employer the burden of proof on the issue of industrial causation under *982Lab. Code, § 3212.1, notwithstanding proof that the firefighter had in fact been exposed on the job to known carcinogens, where the cancer was a metastatic undifferentiated carcinoma, and all the medical evidence established that the primary tumor site could not be identified other than by sheer speculation.

[See **Cal.Jur.3d**, Work Injury Compensation, § § 128, 293; **Am.Jur.2d**, Workmen's Compensation, § § 304, 515.]

COUNSEL

Davis, Cowell & Bowe, J. Thomas Bowen and Leslie A. Eberhardt for Petitioners.

William B. Donohoe, Thomas, Hall, Salter & Lyding, William R. Thomas, Mark A. Cartier and Don E. Clark for Respondents.

Goshkin, Pollatsek, Meredith & Lee and Samuel E. Meredith as Amici Curiae for Respondents.

BARRY-DEAL, Acting P. J.

Petitioner Connie Zipton (hereafter petitioner), individually and as guardian ad litem for her two minor sons, seeks review of the order of respondent Workers' Compensation Appeals Board (hereafter Board) denying reconsideration of the decision of the workers' compensation judge (hereafter WCJ) who held that petitioner failed to establish the evidentiary foundation necessary to trigger the statutory presumption of industrial causation pursuant to Labor Code section 3212.1. [FN1] *983 Petitioner contends that the Board erred by not invoking the presumption in her behalf, thereby shifting the burden to respondent City of San Leandro (hereafter respondent) to prove that the cancer suffered by her husband, Michael Zipton, deceased, did not arise out of and occur in the course of his employment as a firefighter for respondent.

FN1 All further statutory references are to the Labor Code unless otherwise specified.

Section 3212.1 provides in pertinent part: "In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California and the California State University ..., and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit ..., and peace officers as defined in Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code who are primarily engaged in active law enforcement activities, the term 'injury' as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, *if the member demonstrates that he or she was exposed ... to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.* [¶] The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, ... [¶] The cancer so developing or manifesting itself in these cases 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 is bound to find in accordance with it. ..." (Italics added.)

At issue is the construction of section 3212.1, and specifically, the definition of the phrase "reasonably linked." For the reasons discussed below, we affirm the Board's order, and hold that petitioner has failed to prove by a preponderance of the evidence that Zipton's fatal cancer was reasonably linked to his industrial exposure to carcinogens.

Factual and Procedural Background

Michael Zipton was employed as a firefighter for respondent from October 1, 1970, until April 12, 1987. His duties included the active suppression of fires. During this period, he was exposed to various

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carcinogens, as defined by the International Agency for Research on Cancer (IARC), [FN2] while fighting fires. The specific number of carcinogens to which Zipton actually was exposed cannot be ascertained from this record. The parties do agree that he was exposed to the following carcinogens known to cause cancer in humans according to the IARC studies: arsenic, asbestos, certain polyaromatic hydrocarbons, vinylchloride, chromium, and acrylonitrile.

FN2 In 1971, the IARC initiated a program to evaluate the carcinogenic risk of chemicals to humans by producing critically evaluated monographs on individual chemicals. The term "carcinogenic risk" in the IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans, World Health Organization, International Agency for Research on Cancer, volumes 1 to 29 (Oct. 1982 supp. 4) is defined as the probability that exposure to a chemical or complex mixture, or employment in a particular occupation, will lead to cancer in humans. The criteria developed by the IARC is categorized in terms of sufficient evidence, limited evidence, and inadequate evidence of carcinogenicity. "Sufficient evidence" indicates that there is a causal relationship between the agent and human cancer. In the case of chemicals for which there is "sufficient evidence" of carcinogenicity in experimental animals, the IARC considers such chemicals to pose a carcinogenic risk to humans. The IARC classifies 23 chemicals and groups of chemicals that are causally associated with cancer in humans, and 61 chemicals, groups of chemicals, or industrial processes, that are probably carcinogenic to humans.

In April 1987, Zipton became seriously ill and stopped work. In May 1987, [illegible] suffering from widespread undifferentiated carcinoma of unknown origin." 984

On May 19, 1987, Zipton filed a claim for workers' compensation benefits, alleging that his cancer was occupationally related.

On February 29, 1988, Zipton died, at age 39, from the effects of the cancer. On March 1, 1988, an autopsy revealed the following: "metastatic undifferentiated carcinoma involving liver, hepatic, pancreatic and periaortic lymph nodes, left adrenal, right and left lung."

On March 11, 1988, petitioner filed an application for death benefits, and petitioned the Board for a finding of industrial causation of the disability and death of Zipton pursuant to Government Code section 21026, and for an award of the special death benefit pursuant to Government Code section 21363. [FN3] On April 5, 1988, petitioner was appointed guardian ad litem and trustee for her minor sons, Jeremy and Casey Zipton.

FN3 The Board found that Zipton did not sustain an industrially related disability within the meaning of Government Code section 21026. Therefore, petitioner was not entitled to the special death benefit under Government Code section 21363.

Respondent denied liability. Numerous medical opinions were obtained regarding the industrial relationship of Zipton's cancer. The parties filed trial briefs and the matter was submitted to the WCJ on the documentary record, regarding the application of the presumption of industrial causation set forth in section 3212.1.

On October 27, 1988, the WCJ issued his decision. As pertinent, he held that because a primary entry site for the cancer could not be identified, petitioner failed to establish a reasonable link between Zipton's cancer and the industrial exposure to carcinogens, as required by section 3212.1. Therefore, she was not entitled to the presumption of industrial causation. Absent the presumption, the WCJ further held that petitioner did not meet her burden of proving that Zipton's cancer was industrially related.

On November 21, 1988, petitioner sought reconsideration, contending that requirement of a primary tumor site as a prerequisite to establishing a reasonable link resulted in a strict, technical evidentiary hurdle, defeating the intended expansive purpose of section 3212.1. On December 21, 1988, the Board denied reconsideration, and adopted the WCJ's report and recommendation on reconsideration (hereafter Board opinion) dated December 5, 1988.

On December 28, 1989, we granted review.

Medical Evidence

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The medical evidence before the Board consisted primarily of the reports and testimony of four well-qualified doctors: Michael Jensen-Akula, M.D., *985 Internal Medicine (Zipton's treating physician at Kaiser Permanente); Selina Bendix, Ph.D., Bendix Environmental Research, Inc. (a consulting toxicologist engaged by petitioner's attorney); Phillip L. Polakoff, M.D., M.P.H., M.Env.Sc., Occupational/Environmental Medicine, Toxicology and Epidemiology (engaged by petitioner's attorney); and Piero Mustacchi, M.D., Clinical Professor of Medicine and Preventive Medicine, Occupational Epidemiology, University of California, San Francisco (engaged by respondent's attorney).

Dr. Jensen-Akula diagnosed Zipton's condition as metastatic undifferentiated carcinoma and stated that he was unaware of any known association between Zipton's cancer and his exposure to toxic chemicals on the job. He noted: "Since the specific type of epithelial carcinoma is not clear in this case, it would be very difficult to associate this with any specific toxin or poison, although I would be interested in having a list of toxic chemicals that you feel he has been exposed to. At this point, I cannot specifically state any definite relationship between any toxic exposure and aggravation cause or acceleration of his tumor." After reviewing the toxicology report, Dr. Jensen- Akula concluded that he was unable to specifically comment on any direct cause and effect relationship between Zipton's exposure to industrial carcinogens and his cancer.

Dr. Polakoff stated in his comprehensive report of February 6, 1988, that cancer due to occupational exposure is indistinguishable from cancer due to other causes. Carcinogens may produce cancer at organs distant from the site of contact, and the potency of a particular carcinogen is not uniform for all tissues. Dr. Polakoff continued: "Cancer is generally regarded as a disease of old age. There are 2 factors that generally draw our attention to chemically- induced cancers as opposed to natural occurrence. One is the appearance of cancer earlier in life than expected, the second is simply looking for a higher than normal incidence rate in the worker cohort or population being evaluated."

Specifically regarding Zipton's situation, Dr. Polakoff noted that Zipton was in excellent health prior to 1987; his life-style was relatively free of other risk factors, e.g., he did not smoke, drink, or use drugs; he had not traveled to exotic locales; he had no previous occupational exposure nor any unique hobbies; there was no history of cancer in his immediate family; and he contracted cancer at a relatively young age. Furthermore, Zipton had direct and continuous exposure to a host of known occupational carcinogens. Moreover, epidemiological studies documented excess cancer in various organ sites, as well as total cancer rates, among firefighters.

Based on all of the factors, Dr. Polakoff concluded that Zipton's 17 years as a firefighter for respondent contributed to the "genesis of his cancer and *986 his markedly depleted lifespan. ... [¶] Although the definitive genesis of his cancer will never be completely known, I believe that his history of serving as a firefighter for over 17 years definitely contributed to its onset."

Dr. Bendix examined Zipton prior to his death, and initially reported on November 16, 1987. At the time of her examination, Dr. Bendix was unaware that the cancer had been diagnosed as a metastatic undifferentiated carcinoma with the primary tumor site unknown. At that time, the preliminary evidence indicated that the primary site was either the lungs or liver, and therefore, Dr. Bendix initially concentrated on these organs, insomuch as the original biopsy involved liver cells.

Dr. Bendix outlined Zipton's exposure history to numerous chemical carcinogens in the course of his employment as a firefighter. With references to scientific and epidemiological studies, she documented many liver and lung carcinogens found in smoke, and discussed their relevant latency periods in reference to Zipton's 17 years of exposure. Dr. Bendix concluded that it was probable that Zipton's employment "caused or materially contributed to his cancer which had a liver or lung primary site."

In a subsequent report dated April 14, 1988, upon reviewing the final pathology report and learning that the primary tumor site was not the liver or lungs, but unknown, Dr. Bendix emphasized: "Consideration of an unknown primary cancer metastatic to the liver broadens, rather than restricts the range of carcinogens to which firefighters are exposed which may be relevant to this case. Most of the chemicals listed as liver carcinogens in my first report also affect other sites."

Dr. Bendix acknowledged in her final report that it was impossible to ascertain the usual age of occurrence of Zipton's cancer since the primary site was unknown. However, she noted that death from metastatic cancer is not common at the age of 40. Dr.

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Bendix concluded that Zipton's cancer was probably caused by exposure to chemical carcinogens in the smoke which he inhaled as a firefighter.

Dr. Mustacchi, in his report of March 18, 1988, concluded that work exposure played no role in Zipton's development of cancer, but did not give any indication as to what he thought might have caused the cancer. He did not discuss possible risk factors, other than eliminating chemical exposure on the job as a possible cause of Zipton's cancer. The major thrust of Dr. Mustacchi's report was directed to taking exception to the conclusions reached by Dr. Bendix regarding Zipton's industrial exposure to specific carcinogens, an issue rendered moot by the subsequent Board finding. *987.

Board Opinion

Addressing whether Zipton's fatal cancer came within the ambit of section 3212.1, the WCJ initially determined that petitioner proved the requisite exposure by a preponderance of the evidence. The WCJ stated: "This conclusion is reached after close study of the reports of Drs. Mustacchi and Bendix; although Dr. Mustacchi disagrees with Dr. Bendix as to the status of some of the borderline substances or those not definitely shown to be related to cancer in humans, it is still evident that at least several of them meet the criteria."

Turning to the second requirement of section 3212.1-proof of a "reasonable link" between Zipton's cancer and his industrial carcinogenic exposure-the WCJ emphasized: "[T]o apply the presumption it must then be demonstrated by a preponderance of the evidence that the carcinogen is reasonably linked to the disabling cancer, and therein lies the major difficulty in this case. ... [¶] Unfortunately, the very nature of the diagnosis is such that the burden of proof of industriality ... was impossible to meet regardless of the effort involved." Without scientific evidence as to the nature of the primary cancer, the WCJ concluded that petitioner failed to prove that Zipton's cancer was reasonably linked to his industrial exposure.

Legislative History

(1) It is fundamental that when a court endeavors to construe a statute, it must ascertain the intent of the Legislature in order to accomplish the purpose of the statute. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].)

In the matter before us, the legislative history does not change the outcome. We are concerned, however, that neither the parties to this action, nor amicus California Compensation Defense Attorneys' Association demonstrate an awareness of the specific legislative history. Because this case presents such a troublesome set of circumstances and a difficult issue to resolve, the pertinent legislative history is consequential and should be discussed.

(2) The foremost purpose of the presumptions of industrial causation found in the Labor Code (§ § 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3213) is to provide additional compensation benefits to certain public employees who provide vital and hazardous services by easing the burden of proof of industrial causation. ((3)(See fn. 4.) *Saal v. Workmen's Comp. Appeals Bd.* (1975) 50 Cal.App.3d 291, 297 [*988123 Cal.Rptr. 506]; *Smith v. Workmen's Comp. Appeals Bd.* (1975) 45 Cal.App.3d 162, 166 [119 Cal.Rptr. 120].) [FN4]

FN4 The presumptions, which are a reflection of public policy, are implemented by shifting the burden of proof in an industrial injury case. Where facts are proven giving rise to a presumption under one of these statutes, the burden of proof shifts to the party, against whom it operates, to prove the nonexistence of the presumed fact, to wit, an industrial relationship. (Cf. *Gillette v. Workmen's Comp. Appeals Bd.* 320(1971) 20 Cal.App.3d 312, [97 Cal.Rptr. 542]; Evid. Code, § 606.)

Section 1 of Assembly Bill No. 3011, 1981-1982 Regular Session, added section 3212.1 to the Labor Code, thereby extending the presumption of industrial causation to encompass cancer suffered by certain active firefighters. (Stats. 1982, ch. 1568, § 1, p. 6178.) [FN5] Section 3212.1 defines the applicable condition as "cancer which develops or manifests itself" during the employment period. (4) Unlike the other presumptions, however, it additionally requires a showing (1) of *exposure* to a known carcinogen as defined by the IARC, and (2) *that the carcinogen is reasonably linked to the disabling cancer* before the presumption can be invoked.

FN5 Effective January 1, 1990, the presumption also was extended to peace officers as defined in Penal Code sections

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830.1 and 830.2, subdivision (a). (Stats. 1989, ch. 1171, § 2, No. 6 Deering's Cal. Legis. Service, pp. 4498-4499.)

In its original form, section 3212.1 only required, in conformity with the other presumption statutes, that the cancer develop or manifest itself during the employment. (Assem. Bill No. 3011 (1981-1982 Reg. Sess.) § 1.) The bill underwent several amendments, apparently in response to considerable opposition from state and local agencies concerned with its potentially excessive financial impact. There was also some skepticism regarding whether cancer was actually an occupational disease encountered by firefighters. (See Senate Report to the Chairman of the Joint Committee on Fire, Police, Emergency and Disaster Services in California (1987) Firefighters: A Battle With Cancer [hereafter cited as 1987 Joint Committee Report]; letter to Senator Campbell dated Aug. 17, 1987.)

Additionally, the Assembly added a sunset clause to effect the repeal of section 3212.1 on January 1, 1989. However, following receipt of the 1987 Joint Committee Report demonstrating that cancer was in fact an occupational hazard of firefighters and that the financial cost of the presumption had been much less than anticipated, apparently in spite of the fact that the mortality rate from cancer among firefighters had increased, the Legislature repealed the sunset date. [FN6] (See 1987 J. Com. Rep., *supra*, pp. 3-5, 15-17, 31.)

FN6 Section 3212.8, which would have repealed section 3212.1, was repealed effective January 1, 1988. (Stats. 1987, ch. 1501, § 1.)

The most cogent statement of legislative intent regarding section 3212.1 is found in a letter dated August 26, 1982, from legislative counsel to ***989** Senator Newton Russell. As pertinent, counsel stated: "The workers' compensation law ..., generally speaking, requires every employer ... to secure the payment of workers' compensation for injuries to employees acting within the course of their employment. Before an employee is entitled to workers' compensation benefits, it must be shown that the injury was proximately caused by the employment (subd. (c), Sec. 3600, Lab. C.). ... [¶] If A.B. 3011 is chaptered, the specified firefighters could use this presumption and be entitled to workers' compensation benefits *without showing that the injury was proximately caused by the employment*, unless the local public agencies could provide otherwise." (10 Assem. J. (1981-1982 Reg. Sess.) pp. 17852-17853, italics added.)

We glean from the legislative history that the initial draft of section 3212.1 (Assem. Bill No. 3011, *supra*) was met by stiff resistance from selfinsured state and local agencies which were predicting economic catastrophe. (See 1987 J. Com. Rep., *supra*, p. iii.) Because of this initial panic and the resulting pressure placed on the Legislature, it is evident that the reasonable link requirement was added to appease public entities in order to assure that the bill would be passed. (See 1987 J. Com. Rep., *supra*, p. iii.)

Ironically, the information provided in the 1987 Joint Committee Report indicates that local public entities may be faring better economically under the cancer presumption law. [FN7] If correct, it appears that the original reason ***990** for adding the reasonable link requirement-to curb a potentially disastrous financial impact-may be nonexistent, and public entities may be saving money with the implementation of section 3212.1.

FN7 The 1987 Joint Committee Report reads, as pertinent: "An argument frequently heard in opposition to the firefighter cancer presumption law is the high fiscal costs of that presumption for public employers. [¶] In response to the financial concerns, the *estimated* cost of workers compensation and related benefits attributable to the cancer presumption law appear to be minor. Much higher costs were anticipated when the Legislature passed the original cancer presumption bill in 1982. Those costs were deemed reasonable for the compensation of firefighters who had contracted cancer as a result of their occupation. However, according to recent estimates, the law will not be as costly as originally thought. [¶] Based on a random survey of fire agencies, the Commission on State Mandates estimated the average annual State cost of the firefighter cancer presumption law for the 5-year period covering the fiscal year 1982/83 through fiscal year 1986/87 was approximately $250,000. Furthermore, those costs attributed to the fifth year the law was in effect were roughly 1/3 of the highest cost fiscal year. Therefore, those who argued that

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costs for firefighter cancer presumption claims *would continue* to escalate were incorrect. The Commission's estimate of the average annual costs of the cancer presumption law are well below the $500,000 ceiling on reimbursements from the States Mandates Claims. [¶] Furthermore, local jurisdictions stand to fare far better under a cancer presumption law. Before the law was enacted, local agencies were responsible for the full cost of workers' compensation benefits, or for the increased premiums resulting from successful claims for firefighters job-related cancer. In addition to the full hospital, surgical, medical disability, indemnity and death benefits costs, local agencies also had to bear the legal, administrative and other overhead expenses associated with handling a firefighter's claim. [¶] However, under the cancer presumption law-when the Legislature adopts the recommendations of the Commission on State Mandates- local entities insured by the State Compensation Insurance Fund (SCIF) may be reimbursed for any increases in workers' compensation premium costs attributable to the cancer presumption. Thus, no additional cost will accrue to the local agency. On the other hand, local self-insured agencies may be reimbursed 50 percent of the actual costs attributable to the cancer presumption law; including but not limited to staff, benefit and overhead costs. Thus, self-insured local agencies can expect a minimum of 50 percent savings on claims for job-related firefighter cancer. [¶] While the financial impact on the State and local agencies cannot be identified precisely, there is no supporting data to assume that the cost would be excessive." (At pp. 15-17, fns. omitted.)

While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by the fear of financial doom, but that this fear may be unfounded.

In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement. [FN8] However, this is clearly a legislative task. Our task is to interpret the reasonable link requirement in light of the facts before us.

FN8 At oral argument, the attorneys were asked to advise the court whether the situation faced by petitioner-a burden of proof made impossible by the current state of medical knowledge-is a common one. They were unable to cite any other similar cases.

Reasonable Link Requirement

The determination of what minimum factual elements must be established in order to invoke the presumption under section 3212.1 is a question of law that is reviewable by the courts. (1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d rev. ed. 1989) § 10.08[5], p. 1042.4; cf. *Dimmig v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 860, 864 [101 Cal.Rptr. 105, 495 P.2d 433]; *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 115 [251 P.2d 955].)

(5) Petitioner had the initial burden of proving by a preponderance of the evidence that Zipton's developing cancer was reasonably linked to his industrial exposure to carcinogens. (§ 3202.5; *Wehr v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 188, 193 [211 Cal.Rptr. 321]; *California State Polytechnic University v. Workers' Comp. Appeals Bd.* (1982) 127 Cal.App.3d 514, 520 [179 Cal.Rptr. 605].) "'Preponderance of the evidence' **991** means such evidence as, 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." (§ 3202.5.)

Although we recognize that the Legislature intended to ease the burden of proof of industrial causation faced by firefighters in cancer cases, as emphasized by petitioner, it was incumbent on petitioner to produce prima facie evidence that Zipton's cancer

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and ultimately his death were reasonably linked to the industrial exposure.

(6) Here, there was no evidence whatsoever that the cancer was reasonably linked to the industrial exposure. All of the medical evidence, including the autopsy report, established that a primary tumor site could not be identified. Without this information it was impossible for petitioner to prove a reasonable link. The WCJ stated: "There is no scientific evidence as to the nature of the primary cancer, and apart from sheer speculation it is impossible based upon the record herein to pinpoint within reasonable medical probability the carcinogen or carcinogens that caused the malignancy. ... [T]he essential missing element, i.e., the nature of the carcinogen and its relationship to the carcinoma that developed and metastasized ... leaves an evidentiary gap. It may be true, as applicant argues, that the presumption's purpose is to fill in gaps and insufficiencies in the evidence *once it has been established that an applicable condition exists* ..., but here we cannot reach that point since insufficient evidence exists to activate the presumption *ab initio*."

Petitioner argues that a reasonable link is established by virtue of the exposure to carcinogens, known to cause lung and liver cancer, and the existence of cancer in the lung and liver organs. We disagree. Petitioner ignores the fact that the cancer found in these organs had metastasized. By definition, a metastasis is a secondary cancer growth which has migrated from the primary site of the disease to another part of the body. Here, the medical evidence establishes, without dispute, that the cancer found in Zipton's liver and lungs did not originate in either of these organs, but migrated from an unknown primary site.

Without identification of the underlying factual linkage, i.e., the primary tumor site, the opinions of Drs. Bendix and Polakoff are highly speculative and conclusionary. Dr. Polakoff's opinion regarding the lack of other recognized nonindustrial risk factors is well taken. Nevertheless, it is pure conjecture to conclude that a reasonable link exists between the industrial exposure and an undifferentiated cancer when the primary site is unknown, and **992** by virtue of this fact the cancer cannot be attributed to any particular carcinogen.

It is not our intention to imply that in every cancer case a primary site must be established in order to invoke the presumption of industrial causation under section 3212.1. In determining whether a reasonable link exists, sufficient to invoke the presumption, the proper inquiry should be whether it is more probable than not that a cancer is linked to the industrial exposure. "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 403 [209 Cal.Rptr. 456].)

In the matter before us, however, without the identification of a primary tumor site, there is *no* evidence from which to *reasonably* infer that Zipton's cancer, in the absence of other reasonable causal explanations, was more likely the result of industrial exposure than nonindustrial exposure. To make that leap, as petitioner urges, would require that we simply ignore the legislative directive that a reasonable link must be established by a preponderance of the evidence before the presumption can be invoked.

While the legislative mandate that the workers' compensation laws are to be liberally construed applies to the construction of section 3212.1 (§ 3202; see *Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622, 633 [124 Cal.Rptr. 407]), it does not authorize the creation of nonexistent evidence. (*Wehr v. Workers' Comp. Appeals Bd., supra*, 165 Cal.App.3d 188, 195; *Sully-Miller Contracting Co. v. Workers' Comp. Appeals Bd.* (1980) 107 Cal.App.3d 916, 926 [166 Cal.Rptr. 111].) Furthermore, the Legislature expressly provided that "[n]othing contained in Section 3202 shall be construed as relieving a party from meeting the evidentiary burden of proof by a preponderance of the evidence." (§ 3202.5.)

Petitioner's reliance on *Muznik v. Workers' Comp. Appeals Bd., supra*, 51 Cal.App.3d 622, is misplaced. *Muznik* concerned the construction of the statutory heart presumption embodied in section 3212 and the meaning of its phrase "heart trouble." [FN9] Given the liberal mandate of section 3202 and the general rule that statutory language is to be given its commonly understood meaning, the *Muznik* court held that the phrase "heart trouble" in section 3212 "assumes a rather expansive meaning." (*Id.*, at p. 635.) However, unlike the heart presumption statute, section 3212.1 requires an additional showing that the industrial exposure is reasonably linked to the **993** disabling cancer. Establishment of this linkage is a question of fact, which must be shown by a preponderance of the evidence. (§ 3202.5.) This additional criterion distinguishes the instant case

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from *Muznik* and its construction of section 3212, which is much less specific regarding the requisite elements of proof, and, therefore, subject to considerably more flexibility in its interpretation. As noted by the WCJ herein, the gap created by the absence of facts necessary to establish a reasonable link simply cannot be bridged by the rule of liberal construction.

> FN9 In order for an eligible employee to be entitled to the presumption in section 3212, it must be shown that "heart trouble" has developed or manifested itself during a period while such employee is employed by a relevant agency.

In conclusion, petitioner has failed to establish by a preponderance of the evidence that her deceased husband's cancer was reasonably linked to his industrial exposure to carcinogens while he was employed as a firefighter by respondent.

The Board's order denying reconsideration is affirmed.

Merrill, J., and Strankman, J., concurred.

A petition for a rehearing was denied April 4, 1990, and petitioners' application for review by the Supreme Court was denied June 6, 1990. *994

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RIVERVIEW FIRE PROTECTION DISTRICT,
Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD
and WALTER SMITH, Respondents.

No. A062192.

Court of Appeal, First District, Division 2, California.

Mar 25, 1994.

SUMMARY

A firefighter whose stomach cancer manifested itself after he had been on the job for 10 years filed a workers' compensation claim. He testified that he had been exposed to asbestos, soots, tars, and other substances that are known to cause stomach cancer. The workers' compensation judge found that the cancer was presumed to be industrially caused under Lab. Code, § 3212.1 ("injury" includes cancer contracted by active firefighter if firefighter demonstrates exposure to known carcinogen and reasonable link between carcinogen and the cancer), and awarded the firefighter permanent disability of 7.5 percent plus further medical treatment. The Workers' Compensation Appeals Board denied reconsideration, and the employer petitioned for review.

The Court of Appeal reversed the decision of the Workers' Compensation Appeals Board denying reconsideration. The court held that the firefighter presented sufficient evidence to support the finding of industrial exposure required by Lab. Code, § 3212.1. The court further held that, as to the requirement of the statute that the carcinogen and the cancer be reasonably linked, a firefighter need not show that industrial exposure to a carcinogen proximately caused the cancer, but must show something more than a mere coincidence of exposure and cancer-the firefighter must show a logical connection between the two. The court held that the firefighter in this case did not present sufficient medical evidence to support the finding of a reasonable link, and thus the presumption of the statute was not activated. A doctor testified that an occupational etiology of the firefighter's cancer was unlikely. The firefighter's own expert stated he did not believe that the firefighter's employment contributed to his cancer. He also stated that the significant majority of cancers occur after 15 or more years from the date of initial exposure to asbestos. He said it was possible that a latency period could be less than 10 years, but that this was not medically reasonable or probable. (Opinion by Phelan, J., with Kline, P. J., and Smith, J., concurring.) ***1121**

HEADNOTES

Classified to California Digest of Official Reports

(1) Workers' Compensation § 76--Proceedings Before Workers' Compensation Appeals Board--Hearing and Evidence--Presumptions--Cancer Contracted by Firefighter--Finding of Industrial Exposure.
In a workers' compensation proceeding, a firefighter who contracted stomach cancer presented sufficient evidence to support the finding of industrial exposure required by Lab. Code, § 3212.1 ("injury" includes cancer contracted by active firefighter if firefighter demonstrates exposure to known carcinogen and reasonable link between carcinogen and the cancer). The firefighter introduced a monograph showing that asbestos, soots, tars, and mineral oils cause cancer in the gastrointestinal tract. He also testified that he had been trained to recognize materials encountered in firefighting, that he was able to identify asbestos, and that, during his years as a firefighter, he inhaled asbestos dust and smoke. Expert testimony was not required to prove that he was exposed to asbestos. He also testified to having been exposed to soots and tars, and that he had not always worn a breathing apparatus, since such an apparatus was a recent phenomenon.

(2) Workers' Compensation § 76--Proceedings Before Workers' Compensation Appeals Board--Hearing and Evidence--Presumptions--Cancer Contracted by Firefighter--Finding of Reasonable Link Between Carcinogen and Cancer:Words, Phrases, and Maxims--Reasonable Link.
The term "reasonable link" in Lab. Code, § 3212.1 ("injury" includes cancer contracted by active firefighter if firefighter demonstrates exposure to known carcinogen and reasonable link between carcinogen and the cancer), has a plain meaning that is clear on its face. Two things are reasonably linked if there is a logical connection between them. Thus, firefighters need not show that industrial exposure to carcinogens proximately caused their cancer, but they must show something more than a mere coincidence of exposure and cancer-they must show a logical

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connection between the two. The legislative history shows that the purpose of the workers' compensation presumption statutes is to ease the burden of proof for certain safety workers. If the Legislature had intended "reasonable link" to be the equivalent of "proximate cause," § 3212.1 would be mere surplusage and would not have been enacted. Accordingly, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a reasonable link has been shown, and the disputable presumption of industrial causation may be invoked.

[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Workers' Compensation, § 231.] *1122

(3) Workers' Compensation § 76--Proceedings Before Workers' Compensation Appeals Board--Hearing and Evidence--Presumptions--Cancer Contracted by Firefighter--Finding of Reasonable Link Between Carcinogen and Cancer-- Sufficiency of Medical Evidence.

In a workers' compensation proceeding, a firefighter whose stomach cancer manifested itself after he had been on the job for 10 years did not present sufficient medical evidence to support the finding of "reasonable link" required by Lab. Code, § 3212.1 ("injury" includes cancer contracted by active firefighter if firefighter demonstrates exposure to known carcinogen and reasonable link between carcinogen and the cancer), and thus the presumption of that statute was not activated. The firefighter testified regarding his exposure to asbestos, soot, tars, and other carcinogens. However, a doctor testified that an occupational etiology of the firefighter's cancer was unlikely. The firefighter's own expert stated he did not believe that the firefighter's employment contributed to his cancer. He also stated that the significant majority of cancers occur after 15 or more years from the date of initial exposure to asbestos. He said it was possible that a latency period could be less than 10 years, but that this was not medically reasonable or probable.

COUNSEL

Thomas, Hall, Salter & Lyding and Douglas E. Starns for Petitioner.

McLaughlin & Pegnim and Thomas M. Pegnim for Respondents.

PHELAN, J.

We hold that firefighters who develop cancer after being exposed to carcinogens in the course of employment need not show that their cancer was proximately caused by those carcinogens in order to benefit from the presumption of industrial causation established in Labor Code section 3212.1. [FN1]

FN1 Unless otherwise indicated, all further statutory references are to the Labor Code.

Background

Walter Smith (applicant), born September 10, 1947, was a firefighter for Riverview Fire Protection District (employer) from September 1980 on. During his employment he developed stomach cancer which became manifest in September 1990. Applicant had surgery that month and returned to *1123 work in November 1990, with residual symptoms of tiredness at work and occasional stomach pain. Statistically applicant was given a probability of survival after five years of about 25 to 30 percent. He died on October 16, 1993.

Applicant testified, and it was not seriously disputed, that while he was working for employer he was exposed to asbestos, soots, tars and other substances which are known to cause stomach cancer. Workers' Compensation Judge (WCJ) Philip Miyamoto found that the cancer was presumed to be industrially caused under Labor Code section 3212.1 and awarded applicant permanent disability of 7.5 percent plus further medical treatment. The Workers' Compensation Appeals Board (Board) denied reconsideration, with one commissioner dissenting. We denied employer's petition for writ of review. The Supreme Court granted review and remanded the case to us with directions to grant the writ.

We hold that under section 3212.1 applicant was not required to prove that his cancer was proximately caused by industrial exposure to carcinogens. Nevertheless the Board's application of the section 3212.1 presumption of industrial causation was erroneous because applicant did not present substantial evidence of a reasonable link between the industrial exposure and the cancer.

Burden of Proof and Section 3212.1

In the usual workers' compensation case, before an employer can be held liable, the worker must show

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not only that the injury arose out of and in the course of employment (AOE-COE) but also that "... the injury is proximately caused by the employment ...." (§ 3600, subd. (a)(2) & (3).) Although workers' compensation law must be "liberally construed" in favor of the injured worker (§ 3202), the burden is normally on the worker to show proximate cause by a preponderance of the evidence. (§ 3202.5.) [FN2]

> FN2 Section 3202 provides that the workers' compensation laws "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."
>
> Section 3202.5 provides in relevant part: "Nothing contained in Section 3202 shall be construed as relieving a party ... from meeting the evidentiary burden of proof by a preponderance of the evidence. 'Preponderance of the evidence' means such evidence as, 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."

The Legislature eased this burden for certain public employees who provide vital and hazardous services by establishing a series of presumptions ***1124** of industrial causation. (*Zipton v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 980, 987 [267 Cal.Rptr. 431] [hereafter *Zipton*].) For example, for certain peace officers compensable injury is defined to include a hernia, heart trouble or pneumonia developed during employment. AOE-COE and proximate cause are presumed and need not be shown. (§ § 3212, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3213; see generally, 2 Witkin, Summary of Cal. Law (9th ed. 1987) Workers' Compensation, § 231 et seq., p. 802 et seq.)

The WCJ and the Board found that the presumption of industrial causation in section 3212.1 applied in this case. That statute does not provide the level of presumption enumerated in the other statutes listed in the preceding paragraph. Rather, it confers a limited, hard-to-rebut presumption. Section 3212.1 provides as follows in relevant part: "In the case of active firefighting members of fire departments ..., the term 'injury' as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, if the member demonstrates that he or she was *exposed*, while in the service of the department or unit, *to a known carcinogen* as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is *reasonably linked* to the disabling cancer.

"The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

"The cancer so developing or manifesting itself in these cases 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 is bound to find in accordance with it...." (§ 3212.1, italics added.)

Standard of Review

Employer contends that the Board's finding of industrial injury using the section 3212.1 presumption was not supported by substantial evidence. Under section 5952, our function is not to hold a trial de novo or to exercise independent judgment, but to review the entire record to determine whether the Board's conclusions are reasonable and are supported by substantial evidence. (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [90 Cal.Rptr. 424, 475 P.2d 656]; *Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 921 [126 Cal.Rptr. 182].) ***1125**

Discussion

In order to bring his case within the presumption of section 3212.1, applicant was required to present substantial evidence showing exposure to carcinogens and a "reasonable link" between the carcinogens and the cancer. (§ 3212.1; *Zipton, supra*, 218 Cal.App.3d 980, 988; 1 Herlick, Cal. Workers' Compensation Law Practice (4th ed. 1990) § 10.33, p. 10-60.)

Exposure to Carcinogens

(1) In the statement of facts in its petition, employer stresses evidence, or lack thereof, from which the Board could have inferred that applicant was not exposed to carcinogens on the job. For example, employer cites evidence that applicant wore breathing apparatus during fires. However, in the argument and authorities portion of its petition

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employer does not argue that applicant failed to prove the requisite exposure. Employer could not reasonably make that argument because applicant presented ample substantial evidence of exposure, which the WCJ and the Board believed and which we must accept.

For example, applicant introduced in evidence an International Agency for Research on Cancer monograph which showed that asbestos, soots, tars and mineral oils cause cancer in the gastrointestinal tract. Applicant testified that he had been trained to recognize materials encountered in fire fighting. He was able to identify asbestos. During his years as a firefighter, he inhaled asbestos dust and smoke from roof shingles and from insulation around pipes, hot water heaters and furnaces. Expert testimony was not required to prove that applicant was exposed to asbestos. (See, e.g., *Todd Shipyards Corp. v. Black* (9th Cir. 1983) 717 F.2d 1280, 1283, 1284; *Port of Oakland v. Workmen's Comp. Appeals Bd. (Cochran)* (1993) 58 Cal.Comp.Cases 521, 527.) Applicant also testified to having been exposed to and having inhaled soots and tars from fires. He stated that the wearing of a breathing apparatus was a relatively recent phenomenon and that he had not always worn one.

This and other evidence of exposure was not seriously controverted. It provided sufficient evidence to support the finding of industrial exposure required by section 3212.1. As stated above, employer does not contend otherwise in this proceeding.

Reasonable Link

Whether applicant showed the requisite reasonable link between exposure and cancer is contested here as it was below. Before we address the question **1126** of sufficiency of the evidence, we must examine the meaning of "reasonable link" as it is used in the statutory provision, "... the carcinogen is reasonably linked to the disabling cancer." (§ 3212.1.) The term appears in no other California statute and has been discussed in only one reported California decision, the *Zipton* case. [FN3]

FN3 The idea of cancer and numerous other diseases being "linked" or not to toxic waste is mentioned a number of times in *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1373, 1374, 1375, 1382, 1384, 1400, footnote 2, 1401 [5 Cal.Rptr.2d 882]. But the concept of "reasonably linked" is not mentioned.

Zipton traces the legislative history of section 3212.1 in some detail. (*Zipton, supra*, 218 Cal.App.3d at pp. 987-990.) Briefly stated, the original version of the statute contained a usual presumption, triggered by coincidence of employment and disease, similar to those provided for other illnesses of other public safety workers in the above listed statutes. There followed a "panic" among self-insured state and local agencies that feared economic catastrophe. The reasonable link provision was added in response to these fears. (*Zipton*, *supra*, at pp. 989-990.) (In fact the fears proved unfounded. [*Id.*, at p. 989, fn. 7.])

Zipton does not explain the origin or meaning of "reasonable link," but it does contain this statement about how the court perceived the apparent effect of the reasonable link requirement: "While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause." (218 Cal.App.3d at p. 990.)

Research reveals no subsequent discussion or analysis of this statement. Larson paraphrases the statement, and Witkin quotes it without discussion. (1B Larson, The Law of Workmen's Compensation (1993) § 41.72, pp. 7-654 to 7-655, fn. 3.1; 2 Witkin, Summary of Cal. Law, *op. cit. supra* (1993 supp.) § 232, p. 272.) Herlick and Hanna do not comment on it at all. (1 Herlick, Cal. Workers' Compensation Law Practice, *op. cit. supra*, § 10.33, p. 10-60; 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed. 1993), § 3.113[4] [b], pp. 3-87 to 3-88.) No case has cited *Zipton* or discussed the meaning of "reasonable link." [FN4]

FN4 A writ was denied on similar facts a few months after the *Zipton* decision. (*Gann v. Workers' Comp. Appeals Bd.* (1990) 55 Cal.Comp.Cases 393, 394.)

The standard rules of statutory construction require that we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction. (See generally, *1127 *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239 [8

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Cal.Rptr.2d 298]; 7 Witkin, Summary of Cal. Law *op. cit., supra,* Constitutional Law, § 94, p. 146.) (2) Each of these tools leads us to conclude that *Zipton* erred in its interpretation of section 3212.1.

Although there is no published discussion of the term "reasonable link," we think it has a plain meaning which is clear on its face. If two things are reasonably linked, there is a logical connection between them. Thus, firefighters need not show that industrial exposure, now carcinogens, proximately caused their cancer, but they must show something more than a mere coincidence of exposure and cancer; they must show a logical connection between the two.

Even if the meaning of reasonable link is not deemed clear on its face, the legislative history, which we discussed above, supports our definition of the term. The legislative history shows that the purpose of the workers' compensation presumption statutes is to ease the burden of proof for certain safety workers. If the Legislature had intended "reasonable link" to be the equivalent of "proximate cause," section 3212.1 would be mere surplusage and would not have been enacted. Keeping in mind the purpose of the presumption statutes, tempered with the fear of excessive financial impact, we think it is clear that the Legislature intended that "reasonable link" requires less of a showing than proximate cause, but more than mere coincidence of exposure and cancer; there is a logical connection.

Turning to the third tool of statutory construction, we apply practicality and common sense to the language under consideration, interpreting the words in a workable and reasonable manner. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc., supra,* 6 Cal.App.4th at p. 1239.) Although we have found no discussion of the concept of reasonable link in any source, the term is used in a few published decisions from which we draw support for the idea that our interpretation of the Legislature's intent makes sense.

In *Tinelli v. Ken Duncan Ltd.* (1993) 199 A.D.2d 567 [604 N.Y.S.2d 641], the court affirmed rulings of the Workers' Compensation Board that the death of a worker was caused by an occupational disease. Decedent had been exposed to chemicals in his 30 years of work as a darkroom technician. There were no statistical studies demonstrating a correlation between the industrial chemical exposure and the worker's death from cancer of the pancreas, gall bladder and liver. But New York case law required only that the worker show that work conditions produced his illness as a natural incident of his employment. It was not necessary that this connection be ***1128** proven by means of statistical studies; all that was required was a "recognizable link" between the disease and some distinctive feature of the claimant's job.

In light of expert testimony that the photographic chemicals probably caused the cancer, the court held that a " 'reasonable link' " had been established between the exposure and the development of cancer. (*Tinelli v. Ken Duncan Ltd., supra,* 604 N.Y.S.2d at p. 644.)

In *Silcox v. Hillman Co.* (1990) 3 Mich. Workers' Comp. Law Rptr. 3138, the board noted that in all workers' compensation cases the worker must show "a relationship between the injury and the workplace." The board found that the requisite connection existed between events at work and the worker's heart attack which he suffered at home on a Sunday. Michigan evidentiary guidelines required that proof of damage to the heart be "linked" to the employment by sufficient detail about what precipitated the damage to establish a "legal connection" by a preponderance of the evidence. Compensability would be negated by a failure to establish this "reasonable causal linkage." Mere presence of symptoms at work was not sufficient. The worker was required to and did prove "that his physical or emotional stresses were combined with specific cardiac incidents that were reasonably associated with his employment environment or activities."

Although the *Tinelli* and *Silcox* opinions do not deal with a statutory presumption like section 3212.1, they demonstrate commonsense application of the notion of "reasonable link" in the context of workers' compensation.

We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.

Sufficiency of Evidence

(3) Employer contends that the medical evidence was insufficient to support the finding of reasonable link in this case. We agree.

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Employer's expert, Dr. Mustacchi, reported on January 22, 1991, as follows. "I do not know of any human stomach carcinogen described as being prevalent in a firefighter's environment. [¶ ...] Independent of this consideration, one notes that occupationally-incurred cancer as a rule acknowledges a latency period of a couple of decades. Because of this, the 10 or 11 *1129 years of work [applicant] had for [employer] seems much too short to be incriminated as having contributed to his stomach cancer."

Dr. Mustacchi expressed his willingness to consider further evidence on the point and concluded, "In the meanwhile, I believe that the chronology of the events ... renders extremely unlikely an occupational etiology of [applicant's] stomach cancer."

Applicant's expert, Dr. Polakoff, discussed at length principles applicable to occupational cancer and gastric carcinoma generally. He stated that "The time from exposure to a chemical carcinogen to the appearance of a clinically- detectable cancer ranges from approximately 15 years to 30 years, depending on the type of carcinogen and the magnitude of exposure and the type of cancer."

He quoted one study which showed that occupational risk factors for stomach cancer "appear to be asbestos and general dust exposure." He found no studies showing an increased risk of stomach cancer in firefighters. He noted, however, that applicant's "life style history did not present any specific risk factors that would have led him to an increased risk for developing adenocarcinoma of the stomach."

Dr. Polakoff stated that because applicant was employed as a firefighter less than 10 years and based on the lack of any showing in the medical literature of correlation between firefighter work and stomach cancer, "It does not appear to be medically reasonable and probable that [applicant's] employment history as a fire fighter contributed to the genesis of his adenocarcinoma of the stomach at this time."

In conclusion Dr. Polakoff stated, "At the present time there is not enough information in the scientific and medical literature to implicate serving as a fire fighter with any increased risk of gastric cancer. To date asbestos exposure has been shown to be a possible etiological factor for increased gastric cancer. However, there is no evidence that [applicant] has any asbestos-related disease per se. Furthermore [applicant] was diagnosed as having gastric cancer within 10 years of onset of his employment as a fire fighter. Generally the latency period for a solid tumor from the time of initial exposure to onset of cancer is in the range of 15 to 30 years. As such, I do not believe based on existing information that [applicant's] gastric cancer was contributed to by his period of employment as a fire fighter for [employer]."

In a letter to applicant's counsel dated June 4, 1991, in answer to counsel's questions, Dr. Polakoff stated that in all likelihood applicant was *1130 exposed to asbestos during the course of his employment; that asbestos is a carcinogen which has an "identifiable link" to stomach cancer ("[n]umerous epidemiological studies have confirmed this link"); and that applicant was also exposed to other carcinogens which play a role in stomach cancer, including general dust, acrylonitrile, soot and tar.

In a letter to applicant's counsel dated October 18, 1991, Dr. Polakoff answered counsel's further questions as follows. "It is uncommon, but possible that the latency period can be less than ten years. Statistically, the significan[t] majority of cancers occur after 15 or more years from date of initial exposure to asbestos. Nevertheless, one can not deny that asbestos may have played a contributory role in the genesis of [applicant's] stomach cancer. Asbestos is a known gastrointestinal carcinogen.

"Soots and tars are known human carcinogens as defined by the International Agency for Research on Cancer. Acrylonitrile is a known animal carcinogen and suspected human carcinogen. The epidemiological data that presently exists suggests that these agents may contribute to the genesis of stomach cancer; how [e]ver, the data is most limited and additional epidemiological studies must be carried out prior to rendering a more definitive medical opinion."

In his deposition of January 23, 1992, Dr. Polakoff reiterated that it is "possible" to have a latency period of less than 10 years with an asbestos- related gastrointestinal tumor.

The WCJ held that there was no showing of "proximate cause" but found that "[w]ith a preponderance of evidence the applicant has invoked the presumption" of section 3212.1. The WCJ cited evidence that applicant had been exposed to carcinogens which are known to cause stomach cancer, and he found that, unlike the *Zipton* facts, applicant had shown a link to a specific site, citing

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Dr. Polakoff's statements about the possibility of a less than 10-year latency and the possible role of soots, tars and other carcinogens which could have contributed to applicant's stomach cancer.

The WCJ held as follows: "the expert opinion of Dr. Polakoff standing alone does not constitute a preponderance of evidence upon which to 'proximately' find under ... § 3600(3) that the applicant's stomach cancer is employment related. [¶] But Dr. Polakoff's expert opinion nevertheless is determined herein to constitute a preponderance of evidence upon which to find under ... § 3212.1 that applicant's carcinogenic exposure at work 'is reasonably linked' to his stomach cancer."

The WCJ went on to explain that he was finding a lessened burden of proof in order to allow Dr. Polakoff's opinion to support the reasonable link *1131 presumption because it was clear that the Legislature intended to ease the burden of proof in these cases, citing *Zipton*. He stated that his interpretation was consistent with the requirement of section 3202 that workers' compensation laws be liberally construed and with the idea that enactment of section 3212.1 was not an idle act. In conclusion he emphasized that in this case, unlike *Zipton*, there was "actual evidence presented to meet the burden of proof of a reasonable link ...."

The Board agreed with the WCJ's views when it denied reconsideration. Commissioner Wiegand dissented, stating he was not satisfied that the reasonable link requirement had been satisfied. He cited evidence including Dr. Polakoff's statements that he did not believe applicant's cancer was industrial and that causation was possible but not probable.

As we stated above, it is clear that the Legislature intended to ease the burden of proof for safety officers. But it is equally clear that the WCJ and majority of the Board went too far in that respect. "Reasonable link" requires some evidence logically connecting industrial exposure to the applicant's cancer. We agree with Commissioner Wiegand that no substantial evidence of that nature is present here.

Dr. Mustacchi found an occupational etiology of applicant's cancer "unlikely." Applicant's own expert, Dr. Polakoff, stated he did not believe that applicant's employment contributed to his cancer. He said it was "possible" that a latency period could be less than 10 years, but that this was not medically reasonable or probable.

Upon our review of the entire record we find insufficient evidence to support the Board's holding that applicant showed a reasonable link between his industrial exposure to carcinogens and his cancer and thereby made a showing sufficient to activate the section 3212.1 presumption.

The Board's decision denying reconsideration is reversed.

Kline, P. J., and Smith, J., concurred.

A petition for a rehearing was denied April 18, 1994, and respondents' petition for review by the Supreme Court was denied June 16, 1994. Kennard, J., was of the opinion that the petition should be granted. *1132

Cal.App.1.Dist.,1994.

Riverview Fire Protection Dist. v. W.C.A.B.

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CONCURRENCE IN SENATE AMENDMENTS
AB 539 (Papan)
As Amended September 2, 1999
Majority vote

ASSEMBLY: 72-5 (June 1, 1999) SENATE: 24-5 (September 7, 1999)

Original Committee Reference: INS.

SUMMARY : Deletes the requirement that a firefighter or peace officer prove a reasonable link between a carcinogen and the disabling cancer before the cancer is presumed compensable under the workers' compensation system.

The Senate amendments make grammatical changes to the provisions enacting the presumption.

EXISTING LAW :

1) Presumes that, in the case of active firefighters and peace officers, an injury is compensable under the workers' compensation system if:

   a) The injury is cancer that develops or manifests itself during the time the worker is in service;

   b) The injured worker demonstrates actual exposure to a known carcinogen; and,

   c) The carcinogen is reasonably linked to the disabling cancer.

2) Provides that, once the presumption is established, unless controverted by other evidence, the Workers' Compensation Appeals Board is bound to find in accordance with the cancer presumption. The presumption applies during employment and extends following termination of service for a period of three months for each year of service, up to a maximum of 60 months after the last day worked in the capacity of a firefighter or peace officer.

3) Defines "injury" for purposes of workers' compensation benefit eligibility to include cancer that develops or manifests itself during a period that a firefighter or peace officer is in service, if the person can demonstrate that he or she was

exposed to a known carcinogen while in service, and the carcinogen is reasonably linked to the disabling cancer.

AS PASSED BY THE ASSEMBLY , this bill eliminated the burden of proving that a carcinogen to which a firefighter or peace officer was exposed is reasonably linked to the cancer, which triggers the existing statutory presumption of industrial injury. In addition, the bill added leukemia as a specific type of cancer that is compensable pursuant to the firefighter and peace officer cancer presumption law.

FISCAL EFFECT : Costs of over $150,000. During 1997, the state paid out $1.6 million in workers' compensation benefits for state employees who took advantage of the existing cancer presumption. Eliminating the requirement that the employee show a link between the exposure to a known carcinogen and the employee's cancer will increase the number of cases qualifying for benefits.

COMMENTS : The author and proponents of this bill contend that existing law places an unreasonable burden on the employee, who must establish the "reasonable link" to trigger the presumption that a cancer arose out of, and in the course of, employment. In particular, proponents cite Zipton v. Workers' Compensation Appeals Board (1990) 218 Cal.App.3d 980, in which survivors of a firefighter who died, at age 39, of metastatic undifferentiated epithelial cancer were held ineligible for workers' compensation benefits because the primary site of the cancer could not be established, despite the fact that the nature of the diagnosis made it impossible to reasonably link between the carcinogens and the cancer. Similarly, a firefighter in the author's district recently contracted angiosarcoma, a rare heart cancer, but has been unable to link the cancer to the smoke in which he worked.

The court in Zipton criticized the "reasonable link" requirement, gleaning from the legislative history that the reasonable link, or proximate cause, language was inserted into the original bill after it had encountered resistance from self-insured state and local agencies who were predicting economic catastrophe. As noted by the court, however, this prediction was not borne out in the years following enactment of the law. The legislative intent in passing the cancer presumption bill was to ease the burden of proof of industrial causation, yet the reasonable linkage requirement in effect

serves to negate the presumption by re-establishing proximate

cause as an element to be proved before the cancer is considered industrial. As noted in Zipton : "[I]t may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof that is impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement." [218 Cal.App.3d, at 990].

Supporters believe that the dilemma facing firefighters and peace officers stricken with cancer is that identifying a single carcinogen as a cause for a specific type of cancer has become extremely difficult, taking into account both the synergistic effects of multiple compound exposure, and the fact that there are new chemicals and industrial compounds. They also contend that by the time the cancer is diagnosed, it has become difficult to pinpoint the primary site of the cancer or the exact carcinogen to which a firefighter or peace officer has been exposed.

Analysis Prepared by : Paul Donahue / INS. / (916) 319-2086

FN: 0003437

C

Office of the Attorney General
State of California

*1 Opinion No. 82-301
December 23, 1982

THE HONORABLE NEWTON R. RUSSELL
MEMBER OF THE CALIFORNIA STATE ASSEMBLY

THE HONORABLE NEWTON R. RUSSELL, MEMBER OF THE CALIFORNIA STATE ASSEMBLY, has requested an opinion on the following questions:

1. Do the provisions of Penal Code section 1463 govern the distribution of fines resulting from the issuance of parking citations and the making of arrests by airport security officers at the Burbank-Glendale-Pasadena Airport?

2. Would the fines be distributable pursuant to the provisions of Penal Code section 1463 if the Chief of the Burbank Police Department 'deputized' the security officers?

3. Do the airport security officers have peace officer status while off duty and not involved in law enforcement activities relating to the Burbank- Glendale-Pasadena Airport?

CONCLUSIONS

1. The provisions of Penal Code section 1463 do not govern the distribution of fines resulting from the issuance of parking citations and the making of arrests by airport security officers at the Burbank-Glendale-Pasadena Airport except where the airport authority itself processes the parking violation fines or contracts for such services.

2. The fines would not be distributable pursuant to the provisions of Penal Code section 1463 (except where the airport authority itself processes the parking violation fines or contracts for such services) even if the Chief of the Burbank Police Department 'deputized' the security officers.

3. The airport security officers do not have peace officer status while off duty and not involved in law enforcement activities relating to the Burbank- Glendale-Pasadena Airport.

ANALYSIS

The Burbank-Blendale-Pasadena Airport is located in the City of Burbank and is operated under a 'joint powers' agreement [FN1] between the cities of Burbank, Glendale, and Pasadena. An agency (hereafter 'airport authority') exercises the

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powers of the cities under the agreement, including the employment of security officers for law enforcement activities.

The questions presented for analysis concern certain consequences resulting from the employment of the security officers by the airport authority.

1. Distribution of Fines

The first question to be resolved is whether the distribution of fines resulting from the issuance of parking citations and the making of arrests by the airport security officers are governed by the provisions of Penal Code section 1463. [FN2] We conclude that only the limited provisions of subdivision (3) of the statute would be applicable to the facts presented.

Section 1463 provides:

'Except as otherwise specifically provided by law:

'(1) All fines and forfeitures including Vehicle Code fines and forfeitures collected upon conviction or upon the forfeiture of bail, together with moneys deposited as bail, in any municipal court or justice court, shall, as soon as practicable after the receipt thereof, be deposited with the county treasurer of the county in which such court is situated. The moneys so deposited shall be distributed as follows:

*2 '(a) Once a month there shall be transferred into the proper funds of the county an amount equal to the fines and forfeitures collected during the preceding month upon the conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by the state or by the county in which such court is situated, exclusive of fines or forfeitures or forfeitures of bail collected from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code within the limits of a city within the county.

'(b) Except as otherwise provided in this subdivision, once a month there shall be transferred into the traffic safety fund of each city in the county an amount equal to 50 percent of all fines and forfeitures collected during the preceding month upon the conviction or upon the forfeiture of bail from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code within that city, and an amount equal to the remaining 50 percent shall be transferred to the special road fund of the county; provided, however, that the board of supervisors of the county may, by resolution, provide that not more than 50 percent of the amount to be transferred to the special road fund of the county, be transferred into the general fund of the county.

'Once a month there shall be transferred into the general fund of the county an amount equal to that percentage of the fines and forfeitures collected during the preceding month upon the conviction or upon the forefeiture of bail from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code on state highways constructed as freeways whereon city police officers enforced the provisions of the Vehicle Code on April 1, 1965, within the limits of a city within the county which is set forth in the schedule appearing in subparagraph (c) of this paragraph (1). If this paragraph is applicable within a city, it shall apply uniformly throughout the city to all freeways regardless of the date of freeway construction or completion.

'(c) Once a month there shall be transferred into the general fund of the

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county an amount equal to that percentage of the fines and forfeitures collected during the preceding month upon conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by each city in the county which is set forth in the following schedule:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

County percentage 11

'. . . .

'In any county for which a county percentage is set forth in the above schedule and which contains a city which is not listed or which is hereafter created, there shall be transferred to the county general fund the county percentage. In any county for which no county percentage is set forth, and in which a city is hereafter created, there shall be transferred to the county general fund 15 percent.

*3 'A county and city therein may, by mutual agreement, adjust the percentages herein.

'(d) Once a month there shall be transferred to each city in the county an amount equal to the total sum remaining after the transfers provided for in subparagraphs (b) and (c) above have been made of the fines and forfeitures collected during the preceding month upon conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by such city or arrests made by state officers for misdemeanor violations of the Vehicle Code.

'. . . .

'(3) Notwithstanding any other provision of law, in the event that a county or court elects to discontinue processing the posting of bail for an issuing agency, the city, district or other issuing agency may elect to receive, deposit, accept forfeitures and otherwise process the posting of bail for parking violations for which such city, district, or other issuing agency has issued a written notice of parking violation pursuant to Section 41103 of the Vehicle Code. Notwithstanding paragraph (1), if the city, district, or other issuing agency processes such posting of bail, the issuing agency may retain the forfeited bail collected.

'For the purposes of this subdivision, neither the California Highway Patrol, nor a sheriff's office when acting on a contract basis for a city, shall be deemed an 'issuing agency'.

'The issuing agency may elect to contract with the county, a municipal or justice court, or another issuing agency within the county to provide for the processing of the posting of bail for such parking violations.

'No provision of this section shall be construed to require any county or municipal or justice court to process the posting of bail for a city, district or other issuing agency prior to the filing of a complaint. If a county or court has been processing the posting of bail for an issuing agency, and if the county or court elects to terminate the processing of the posting of bail the issuing agency and the county or court shall reach agreement for the transfer of the processing activity. The agreement shall permit the county or court to phase out, and the issuing agency to phase in, personnel, equipment, and facilities that may have been acquired or need to be acquired in contemplation of a long-term commitment to process the posting of bail for the issuing agency's parking violations.' (Emphases added.) [FN3]

Besides the comprehensive language of section 1463, the Legislature has made particular provision for the California State University and Colleges (§ 1463.5a), the University of California (§ 1463.6), community service districts (§ 1463.10),

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transit districts (§ 1463.11), school districts (§ 1463.12), port districts (§ 1463.13), and the San Diego Metropolitan Transit District (§ 1463.19). While these specific provisions would govern over the more general provisions of section 1463 where both would otherwise be applicable, an airport operated under a joint powers agreement would not come within their express terms. Hence, if any statutory language concerning fine distributions is applicable to a joint powers airport, it must be section 1463.

*4 As can readily be observed, the provisions of section 1463 are complex and interrelated. They have been examined numerous times by the judiciary (see County of Los Angeles v. City of Alhambra (1980) 27 Cal.3d 184; City of Dan Diego v. Municipal Court (1980) 102 Cal.App.3d 775; Board of Trustees v. Municipal Court, supra, 95 Cal.App.3d 322) and this office (see 63 Ops.Cal.Atty.Gen. 888 (1980); 55 Ops.Cal.Atty.Gen. 256 (1972); 53 Ops.Cal.Atty.Gen. 29 (1970); 34 Ops.Cal.Atty.Gen. 283 (1959); 25 Ops.Cal.Atty.Gen. 122 (1955)). The Legislature, however, has often amended the statute, and none of the above-cited authorities have considered the language and question now at issue.

The critical aspects of section 1463 are: (1) where did the arrest or notification [FN4] take place, (2) who is the employer of the person who made the arrest or notification, and (3) what public entity is processing the fine payment.

In the factual situation presented for analysis, the arrest or notification occurs in the City of Burbank, and the employer of the person who makes the arrest or notification is the airport authority.

The easiest situation to dispose of is where the airport authority processes the parking violation fines under section 1463, subdivision (3). [FN5] It 'may retain the forfeited bail collected' without distribution to any other agency in such situation. Subdivision (3) also authorizes the issuing agency to contract with some other agency to process the parking violation fines; the contract provisions would then govern the distribution of fines collected.

Where subdivision (3) is inapplicable (e.g., in all nonparking violation situations), we look to the provisions of subdivision (1). Here, we find an apparent hiatus. Subdivision (1) initially places the fines 'with the county treasurer of the county' but not into any particular county fund. Distribution to a specific county fund (or city fund) depends upon whether the person is arrested or notified by an employee of the state (subds. (1)(a), (1)(b), (1)(d)), an employee of the county (subd. (1)(a)), or an employee of a city (subds. (1)(c), (1)(d)). [FN6]

Is a person hired by an airport authority under a joint powers agreement an employee of the state, a county, or a city? We believe not.

First, Government Code section 6507 states that an agency created to exercise joint powers on behalf of public agencies 'is a public entity separate from the parties to the agreement.' Accordingly, even though here the airport authority was initially created by three cities, it is not legally considered to be the same entity as its contracting parties. [FN7]

Second, the Legislature has found it necessary to provide special statutes, as previously mentioned, for such entities as community service districts, transit

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districts, and port districts. (See § § 1463.10, 1463.11, 1463.13, 1463.13.) The functions of these public agencies would appear to be more analogous to that of the airport authority herein than the operations of the state, counties, and cities specified in subdivision (1) of section 1463. Community service districts, for example, may by formed '[t]o provide and maintain public airports and landing places for aerial traffic,' as well as 'maintenance of a police department or other public protection to protect and safeguard life and property.' (Gov. Code, § 61600.) If the Legislature believed such entities required their own statutes rather than be characterized as the state, a county, or a city under subdivision (1) of section 1463, a joint powers agreement airport should likewise not be characterized as one of the three latter types of public entities.

*5 In interpreting statutory enactments, we "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (People v. Davis (1981) 29 Cal.3d 814, 828.) "An equally basic rule of statutory constructing is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." (California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698.)

A joint powers airport authority is simply not a city, a county, or the state as those terms are normally used. We do not believe that the Legislature intended to cover joint powers agencies under the provisions of subdivision (1) of section 1463. Subdivision (3) of section 1463, on the other hand, would be available for the disposition of fines under the conditions expressed therein.

In answer to the first question, therefore, we conclude that the provisions of section 1463 do not govern the distribution of fines resulting from the issuance of parking citations and the making of arrests by airport security officers at the Burbank-Glendale-Pasadena Airport except where the airport authority itself processes the parking violation fines or contracts for such services.

2. 'Deputized' Airport Security Officers

The second question presented is the same as the first, except an additional premise is provided: the Chief of the Burbank Police Department 'deputizes' the airport security officers. Would such action render applicable the provisions of subdivision (1) of section 1463 in that the security officers would be 'employees of a city'? We conclude that it would not.

Preliminarily, we note that the proper term to be used in the inquiry is 'appoint' rather than 'deputize.' Section 830.6, subdivision (a) states:

'(1) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman . . . and is assigned specific police functions by such authority, such person is a peace officer; provided, such person qualifies as set forth in Section 832.6, and provided further, that the authority of such person as a peace officer shall extend only for the duration of such specific assignment.

'(2) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman . . . and is so designated by local ordinance or, if the local agency is not authorized to act by ordinance, by resolution, either individually or by class, and is assigned to the

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prevention and detection of crime and the general enforcement of the laws of this state by such authority, such person is a peace officer; provided such person qualifies as set forth in paragraph (1) of subdivision (a) of section 832.6, and provided further, that the authority of such person shall include the full powers and duties of a peace officer as provided by Section 830.1.'
'Deputize' refers to sheriffs, while 'appoint' refers to policemen.

*6 We need not consider, however, whether section 830.6 would be applicable to the facts presented herein. (See 56 Ops.Cal.Atty.Gen. 390, 393 (1973).) 'Deputizing' the airport security officers would not change their employment relationship with the airport authority for purposes of section 1463, subdivision (1). Salaries of the officers would still be paid by the airport authority under the postulated facts. While the term 'employed' is not easily defined and may have different meanings in different contexts (see Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal.3d 771, 777; Edwards v. Hollywood Canteen (1946) 27 Cal.2d 802, 805-807; Golden West Broadcasters, Inc. v. Superior Court (1981) 114 Cal.App.3d 947, 958-959), a determination that the officers were the 'employees' of the City of Burbank by being 'deputized' would be inimical to the purposes of section 1493.

In 25 Ops.Cal.Atty.Gen. 122, 123 (1955), we stated:
'Subdivision (1)(c) of Penal Code section 1463 provides that a fine or forfeiture of bail shall be distributed between the county and the city employing the arresting officer, according to a schedule contained in that section . . . [W]e feel it is clear that it was the intention of the Legislature to provide that the city whose employee made the original arrest should participate in the distribution of a subsequently imposed fine in order to reimburse the city of its expenses in law enforcement.'
We said in 53 Ops.Cal.Atty.Gen. 29, 31 (1970):
'The distribution scheme of Penal Code section 1463 is dependent upon the identity of the 'arresting' officer. It appears that the intent of the Legislature was to reimburse the entity which made the arrest for the costs of its law enforcement.'

Consequently, as long as the airport authority is responsible for the compensation of the security officers, the latter may not be considered the employees of the City of Burbank even if 'deputized' by the Burbank Police Chief. It would be incongruous to benefit the City of Burbank where it did not provide the funds for maintaining the airport security officers. [FN8]

In answer to the second question, therefore, we conclude that even if the Chief of the Burbank Police Department were to 'deputize' the airport security officers, the distribution of fines resulting from arrests and the issuance of parking citations by the officers would not be governed by the provisions of section 1463 except where the airport authority itself processes the parking violation fines or contracts for such services under subdivision (3) of the statute.

3. Peace Officer Status

The third question concerns whether the airport security officers have peace officer status while off duty and not involved in law enforcement activities relating to the airport. We conclude that they do not have such status in the

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specified circumstances.

In relevant part, section 830.4 states:

'The following persons are peace officers while engaged in the performance of their duties in or about the properties owned, operated, or administered by their employing agency, or when they are required by their employer to perform their duties anywhere within the political subdivision which employs them. Such officers shall also have the authority of peace officers anywhere in the state as to an offense committed, or which there is probable cause to believe has been committed, with respect to persons or property the protection of which is the duty of such officer or when making an arrest pursuant to Section 836 of the Penal Code as to any public offense with respect to which there is an immediate danger to person or property or the escape of the perpetrator of the offense. Such peace officers may carry firearms only if authorized by and under such terms and conditions as are specified by their employing agency:

*7 '. . . .

'(k) Any person regularly employed as an airport law enforcement officer by a city, county, or district operating the airport or by a joint powers agency, created pursuant to [§ § 6500-6583] of the Government Code, operating the airport.' (Emphasis added.)

Under section 830.4, the airport security officers 'are' peace officers (i.e., have the 'status' of peace officers) depending upon their performance of law enforcement duties relating to the airport. (See Fowler v. State Personnel Bd., (1982) 134 Cal.App.3d 964, 970.)

Giving meaning to the language as to when one is a peace officer under section 830.4, we believe that the airport security officers are not peace officers when they are off duty and not performing their airport related activities.

It should be noted, however, that a person who is not a peace officer may nevertheless have certain peace officer powers. We recently examined the distinction between the status and the authority of a peace officer in various contexts. (65 Ops.Cal.Atty.Gen. ---- (Sept. 3, 1982) No. 81-1216.) With regard to section 830.4, the situations in which persons are granted 'the authority of peace officers' involve the powers of making arrests.

We need not dwell here, however, on the various 'powers' of peace officers. 'Status' refers to one's position or rank in relation to others (Webster's New Internat. Dict. (3d ed. 1966) p. 2230), which we do not equate with the various attributes of the position itself.

Hence, we conclude in answer to the third question that the airport security officers do not have peace officer status while off duty and not involved in law enforcement activities relating to the airport.

GEORGE DEUKMEJIAN

Attorney General

RODNEY O. LILYQUIST

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Deputy Attorney General

[FN1]. The authorizing legislation for entering into joint powers agreements is Government Code sections 6500-6583, whereby 'public agencies by agreement may jointly exercise any power common to the contracting parties.' (Gov. Code, § 6502.)

[FN2]. All section references hereafter are to the Penal Code unless otherwise indicated.

[FN3]. 'Forfeitures' here mean the same thing as 'fines.' (Board of Trustees v. Municipal Court (1977) 95 Cal.App.3d 322, 326.) Also, it is to be noted that the percentages listed in subdivision (1) are the percentages that go to the counties for arrests made in the listed cities.

[FN4]. In the typical situation of a parking violation, the person is 'notified' rather than 'arrested' by placing the parking ticket on the vehicle. (See County of Los Angeles v. City of Alhambra, supra, 27 Cal.3d 184, 193-194; 63 Ops.Cal.Atty.Gen. 29, 31, (1970).) Although subdivision (1) of section 1463 distributes the percentages of the fines collected depending in part on who has 'arrested' the person for a 'misdemeanor,' the same distribution formula is followed when a notification has been made of a parking violation 'infraction.' (See Veh. Code, § 42201.5; County of Los Angeles v. City of Alhambra, supra, 27 Cal.3d 184, 194.)

[FN5]. We look to subdivision (3) first because it would control over the provisions of subdivision (1) when both might otherwise be applicable. The latter subdivision begins with the phrase 'Except as otherwise specifically provided by law,' while the former begins, 'Notwithstanding any other provision of law.' (See In re Marriage of Dover (1971) 15 Cal.App.3d 675, 678, fn. 3; State of California v. Superior Court (1965) 238 Cal.App.2d 691, 695-696.)

[FN6]. Under subdivision (1) of the statute, the counties receive 100 percent of the fines, except where the arrests take place within a city. In the latter case, each city receives between 25 and 95 percent, depending on the circumstances and the particular percentage specified by the Legislature in the statute. Normally, a city will get most of the money resulting from arrests within its boundaries.

[FN7]. If the character of the contracting parties were controlling, a joint powers agreement between a city and county would present obvious difficulties, as would an agreement between two counties and a city, and so forth.

[FN8]. On the other hand, if the City of Burbank agrees to provide its employees for airport law enforcement duties under the joint powers agreement, a different conclusion would be reached. Other arrangements could also be made under the joint

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powers agreement that would possibly render applicable the provisions of subdivision (1) of the statute.

65 Ops. Cal. Atty. Gen. 618, 1982 WL 156003 (Cal.A.G.)

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H

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.

No. S087881.

Supreme Court of California

June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of "acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties *905 in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of "acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance contingent upon the decedent's awareness of the relatives who claim an inheritance right.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, § § 153, 153A, 153B.]

(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental

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task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the *906 ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only "natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial *907 court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing this outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL

Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.

Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.

BAXTER, J.

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child

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support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of- wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory *908 construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self- described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court- ordered support to the clerk of the Huron County court.

FN2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold *909 divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property.

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Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. ***910**

As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [***911**105 Cal.Rptr.2d 457, 19 P.3d 1196].) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal.4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we " ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word "acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may

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logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge " is "to admit to be true or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

> FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, *912 test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the legislation was to "make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation *913 of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to

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make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child " and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing *914 Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly acknowledging it as his own." (See Civ. Code, former § 230.) [FN4] Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

FN4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388-389 [330 P.2d 452]; see *Estate*

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of Gird, supra, 157 Cal. at pp. 542- 543), but, as discussed, the word retains virtually the same meaning in general usage today-"to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his *915 one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird, supra*, 157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird, supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young, supra*, 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young, supra*, 80 Cal.App.2d at p. 394.)

FN5 Section 255 of the former Probate Code provided in pertinent part: " ' Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the *916 same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. [FN6]

FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child

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born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. *917

In *Estate of Maxey*, *supra*, 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or "shouted ... from the house-tops " (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11

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Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, *918257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledg[e] it as his own"; (2) that he "receiv[e] it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra*, 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity." (*Id.* at p. 276.) *919

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's

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unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a "natural brother or sister" within the meaning of such *920 exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of- wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

FN7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*, 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8] *921

FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262-263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, § § 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child*

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Relationship

(5a) Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: "For the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453, subd. (b)(1).)

FN10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."

FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he *922 argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal.App.4th at pp. 1516- 1517, 1521.) Instead, she contends See has not shown that the issue adjudicated

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in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d 1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. ***923** It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. ***924**

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the

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Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. *925

BROWN, J.

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court- ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. *926

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Cal. 2001.

Estate of DENIS H. GRISWOLD, Deceased. NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.

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C

WHITCOMB HOTEL, INC. (a Corporation) et al., Petitioners,
v.
CALIFORNIA EMPLOYMENT COMMISSION et al., Respondents; FERNANDO R. NIDOY et al., Interveners and Respondents.

S. F. No. 16854.

Supreme Court of California

Aug. 18, 1944.

HEADNOTES

(1) Statutes § 180(2)--Construction--Executive or Departmental Construction.
The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in drafting the statute.

See 23 Cal.Jur. 776; 15 Am.Jur. 309.

(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

(4) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
The disqualification imposed on a claimant by Unemployment Insurance Act, § 56(b) (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), for refusing without good cause to accept suitable employment when offered to him, or failing to apply for such employment when notified by the district public employment office, is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment.

See 11 Cal.Jur. Ten-year Supp. (Pocket Part) "Unemployment Reserves and Social Security."

(5) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within the Unemployment Insurance Act. *754

(6) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
Employment Commission Rule 56.1, which attempts to create a limitation as to the time a person may be disqualified for refusing to accept suitable employment, conflicts with Unemployment Insurance Act, § 56(b), and is void.

(7) Unemployment Relief--Powers of Employment Commission--Adoption of Rules.
The power given the Employment Commission by the Unemployment Insurance Act, § 90, to adopt rules and regulations is not a grant of legislative power, and in promulgating such rules the commission may not alter or amend the statute or enlarge or impair its scope.

(8) Unemployment Relief--Remedies of Employer--Mandamus.
Inasmuch as the Unemployment Insurance Act, § 67, provides that in certain cases payment of benefits shall be made irrespective of a subsequent appeal, the fact that such payment has been made does not deprive an employer of the issuance of a writ of mandamus to compel the vacation of an award of benefits when he is entitled to such relief.

SUMMARY

PROCEEDING in mandamus to compel the California Employment Commission to vacate an award of unemployment benefits and to refrain from charging petitioners' accounts with benefits paid. Writ granted.

COUNSEL

Brobeck, Phleger & Harrison, Gregory A. Harrison and Richard Ernst for Petitioners.

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Robert W. Kenny, Attorney General, John J. Dailey, Deputy Attorney General, Forrest M. Hill, Gladstein, Grossman, Margolis & Sawyer, Ben Margolis, William Murrish, Gladstein, Grossman, Sawyer & Edises, Aubrey Grossman and Richard Gladstein for Respondents.

Clarence E. Todd and Charles P. Scully as Amici Curiae on behalf of Respondents.

TRAYNOR, J.

In this proceeding the operators of the Whitcomb Hotel and of the St. Francis Hotel in San Francisco seek a writ of mandamus to compel the California Employment Commission to set aside its order granting unemployment insurance benefits to two of their former employees, Fernando R. Nidoy and Betty Anderson, corespondents in this action, and to restrain the commission from charging petitioners' accounts with benefits paid pursuant to *755 that order. Nidoy had been employed as a dishwasher at the Whitcomb Hotel, and Betty Anderson as a maid at the St. Francis Hotel. Both lost their employment but were subsequently offered reemployment in their usual occupations at the Whitcomb Hotel. These offers were made through the district public employment office and were in keeping with a policy adopted by the members of the Hotel Employers' Association of San Francisco, to which this hotel belonged, of offering available work to any former employees who recently lost their work in the member hotels. The object of this policy was to stabilize employment, improve working conditions, and minimize the members' unemployment insurance contributions. Both claimants refused to accept the proffered employment, whereupon the claims deputy of the commission ruled that they were disqualified for benefits under section 56(b) of the California Unemployment Insurance Act (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), on the ground that they had refused to accept offers of suitable employment, but limited their disqualification to four weeks in accord with the commission's Rule 56.1. These decisions were affirmed by the Appeals Bureau of the commission. The commission, however, reversed the rulings and awarded claimants benefits for the full period of unemployment on the ground that under the collective bargaining contract in effect between the hotels and the unions, offers of employment could be made only through the union.

In its return to the writ, the commission concedes that it misinterpreted the collective bargaining contract, that the agreement did not require all offers of employment to be made through the union, and that the claimants are therefore subject to disqualification for refusing an offer of suitable employment without good cause. It alleges, however, that the maximum penalty for such refusal under the provisions of Rule 56.1, then in effect, was a four-week disqualification, and contends that it has on its own motion removed all charges against the employers for such period.

The sole issue on the merits of the case involves the validity of Rule 56.1, which limits to a specific period the disqualification imposed by section 56(b) of the act. Section 56 of the act, under which the claimants herein were admittedly disqualified, *756 provides that: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: ... (b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the District Public Employment Office." Rule 56.1, as adopted by the commission and in effect at the time here in question, restated the statute and in addition provided that: "In pursuance of its authority to promulgate rules and regulations for the administration of the Act, the Commission hereby provides that an individual shall be disqualified from receiving benefits if it finds that he has failed or refused, without good cause, either to apply for available, suitable work when so directed by a public employment office of the Department of Employment or to accept suitable work when offered by any employing unit or by any public employment office of said Department. Such disqualification shall continue for the week in which such failure or refusal occurred, and for not more than three weeks which immediately follow such week as determined by the Commission according to the circumstances in each case." The validity of this rule depends upon whether the commission was empowered to adopt it, and if so, whether the rule is reasonable.

The commission contends that in adopting Rule 56.1 it exercised the power given it by section 90 of the act to adopt "rules and regulations which to it seem necessary and suitable to carry out the provisions of this act" (2 Deering's Gen. Laws, 1937, Act 8780d, § 90(a)). In its view section 56(b) is ambiguous because it fails to specify a definite period of disqualification. The commission contends that a fixed period is essential to proper administration of the act and that its construction of the section should

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be given great weight by the court. It contends that in any event its interpretation of the act as embodied in Rule 56.1 received the approval of the Legislature in 1939 by the reenactment of section 56(b) without change after Rule 56.1 was already in effect.

(1) The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are *757 highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club*, 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson*, 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; see, Griswold, *A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 405; 27 Cal.L.Rev. 578; 23 Cal.Jur. 776.) When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. (*Helvering v. Griffiths*, 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill*, 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners*, 21 Cal.2d 399, 402 [132 P.2d 804].) Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. "At most administrative practice is a weight in the scale, to be considered but not to be inevitably followed. ... While we are of course bound to weigh seriously such rulings, they are never conclusive." (*F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976.) (2) An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (*California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028]; *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935]; *Boone v. Kingsbury*, 206 Cal. 148, 161 [273 P. 797]; *Bank of Italy v. Johnson*, 200 Cal. 1, 21 [251 P. 784]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.*, 297 U.S. 129 [56 S.Ct. 397, 80 L.Ed. 528]; *Montgomery v. Board of Administration*, 34 Cal.App.2d 514, 521 [93 P.2d 1046, 94 A.L.R. 610].) (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted *758 without change. (*Biddle v. Commissioner of Internal Revenue*, 302 U.S. 573, 582 [58 S.Ct. 379, 82 L.Ed. 431]; *Houghton v. Payne*, 194 U.S. 88 [24 S.Ct. 590, 48 L.Ed. 888]; *Iselin v. United States*, 270 U.S. 245, 251 [46 S.Ct. 248, 70 L.Ed. 566]; *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 757 [51 S.Ct. 297, 75 L.Ed. 672]; *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976; *Pacific Greyhound Lines v. Johnson*, 54 Cal.App.2d 297, 303 [129 P.2d 32]; see *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 [60 S.Ct. 18, 84 L.Ed. 101]; *Helvering v. Hallock*, 309 U.S. 106, 119 [60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368]; *Federal Comm. Com. v. Columbia Broadcasting System*, 311 U.S. 132, 137 [61 S.Ct. 152, 85 L.Ed. 87]; Feller, *Addendum to the Regulations Problem*, 54 Harv.L.Rev. 1311, and articles there cited.)

In the present case Rule 56.1 was first adopted by the commission in 1938. It was amended twice to make minor changes in language, and again in 1942 to extend the maximum period of disqualification to six weeks. The commission's construction of section 56(b) has thus been neither uniform nor of long standing. Moreover, the section is not ambiguous, nor does it fail to indicate the extent of the disqualification. (4) The disqualification imposed upon a claimant who without good cause "has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office" is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment. (Accord: 5 C.C.H. Unemployment Insurance Service 35,100, par. 1965.04 [N.Y.App.Bd.Dec. 830-39, 5/27/39].) The Unemployment Insurance Act was expressly intended to establish a system of unemployment insurance to provide benefits for "persons unemployed through no fault of their own, and to reduce involuntary unemployment. ..." (Stats. 1939, ch. 564, § 2; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 1.) The public policy of the State as thus declared by the Legislature was intended as a guide to the interpretation and application of the act. (*Ibid.*) (5) One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within *759 the provisions of the

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statute. (See 1 C.C.H. Unemployment Insurance Service 869, par. 1963.) Section 56(b) in excluding absolutely from benefits those who without good cause have demonstrated an unwillingness to work at suitable employment stands out in contrast to other sections of the act that impose limited disqualifications. Thus, section 56(a) disqualifies a person who leaves his work because of a trade dispute for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; and other sections at the time in question disqualified for a fixed number of weeks persons discharged for misconduct, persons who left their work voluntarily, and those who made wilful misstatements. (2 Deering's Gen. Laws, 1937, Act 8780(d), § § 56(a), 55, 58(e); see, also, Stats. 1939, ch. 674, § 14; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 58.) Had the Legislature intended the disqualification imposed by section 56(b) to be similarly limited, it would have expressly so provided. (6) Rule 56.1, which attempts to create such a limitation by an administrative ruling, conflicts with the statute and is void. (*Hodge v. McCall, supra;* Manhattan General Equipment Co. v. Commissioner of Int. Rev., 297 U.S. 129, 134 [56 S.Ct. 397, 80 L.Ed. 528]; see *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935].) Even if the failure to limit the disqualification were an oversight on the part of the Legislature, the commission would have no power to remedy the omission. (7) The power given it to adopt rules and regulations (§ 90) is not a grant of legislative power (see 40 Columb. L. Rev. 252; cf. Deering's Gen. Laws, 1939 Supp., Act 8780(d), § 58(b)) and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope. (*Hodge v. McCall, supra;* Bank of Italy v. Johnson, 200 Cal. 1, 21 [251 P. 784]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev., supra;* Koshland v. Helvering, 298 U.S. 441 [56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756]; *Iselin v. United States, supra.*) Since the commission was without power to adopt Rule 56.1, it is unnecessary to consider whether, if given such power, the provisions of the rule were reasonable.

The commission contends, however, that petitioners are not entitled to the writ because they have failed to exhaust *760 their administrative remedies under section 41.1. This contention was decided adversely in *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]. It contends further that since all the benefits herein involved have been paid, the only question is whether the charges made to the employers' accounts should be removed, and that since the employers will have the opportunity to protest these charges in other proceedings, they have an adequate remedy and there is therefore no need for the issuance of the writ in the present case. The propriety of the payment of benefits, however, is properly challenged by an employer in proceedings under section 67 and by a petition for a writ of mandamus from the determination of the commission in such proceedings. (See *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]; *W. R. Grace & Co. v. California Employment Com., ante,* p. 720 [151 P.2d 215].) An employer's remedy thereunder is distinct from that afforded by section 45.10 and 41.1, and the commission may not deprive him of it by the expedient of paying the benefits before the writ is obtained. (8) The statute itself provides that in certain cases payment shall be made irrespective of a subsequent appeal (§ 67) and such payment does not preclude issuance of the writ. (See *Bodinson Mfg. Co. v. California Emp. Com., supra,* at pp. 330-331; *Matson Terminals, Inc. v. California Emp. Com., supra.*)

Let a peremptory writ of mandamus issue ordering the California Employment Commission to set aside its order granting unemployment insurance benefits to the corespondents, and to refrain from charging petitioners' accounts with any benefits paid pursuant to that award.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.

CARTER, J.

I concur in the conclusion reached in the majority opinion for the reason stated in my concurring opinion in *Mark Hopkins, Inc. v. California Emp. Co.*, this day filed, *ante*, p. 752 [151 P.2d 233].

Schauer, J., concurred.

Intervener's petition for a rehearing was denied September 13, 1944. Carter, J., and Schauer, J., voted for a rehearing. *761

Cal.,1944.

Whitcomb Hotel v. California Employment Commission

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ALFRED K. WEISS et al., Appellants,
v.
STATE BOARD OF EQUALIZATION et al., Respondents.

L. A. No. 22697.

Supreme Court of California

Apr. 28, 1953.

HEADNOTES

(1) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
In exercising power which State Board of Equalization has under Const., art. XX, § 22, to deny, in its discretion, "any specific liquor license if it shall determine for good cause that the granting ... of such license would be contrary to public welfare or morals," the board performs a quasi judicial function similar to local administrative agencies.

See **Cal.Jur.2d**, Alcoholic Beverages, § 25 et seq.; **Am.Jur.**, Intoxicating Liquors, § 121.

(2) Licenses § 32--Application.
Under appropriate circumstances, the same rules apply to determination of an application for a license as those for its revocation.

(3) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
The discretion of the State Board of Equalization to deny or revoke a liquor license is not absolute but must be exercised in accordance with the law, and the provision that it may revoke or deny a license "for good cause" necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.

(4) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
3While the State Board of Equalization may refuse an on-sale liquor license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, § 13), the absence of such a provision or regulation by the board as to off-sale licenses does not preclude it from making proximity of the premises to a school *773 an adequate basis for denying an off-sale license as being inimical to public morals and welfare.

(5) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
It is not unreasonable for the State Board of Equalization to decide that public welfare and morals would be jeopardized by the granting of an off-sale liquor license within 80 feet of some of the buildings on a school ground.

(6) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
Denial of an application for an off-sale license to sell beer and wine at a store conducting a grocery and delicatessen business across the street from high school grounds is not arbitrary because there are other liquor licenses operating in the vicinity of the school, where all of them, except a drugstore, are at such a distance from the school that it cannot be said the board acted arbitrarily, and where, in any event, the mere fact that the board may have erroneously granted licenses to be used near the school in the past does not make it mandatory for the board to continue its error and grant any subsequent application.

(7) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
Denial of an application for an off-sale license to sell beer and wine at a store across the street from high school grounds is not arbitrary because the neighborhood is predominantly Jewish and applicants intend to sell wine to customers of the Jewish faith for sacramental purposes, especially where there is no showing that wine for this purpose could not be conveniently obtained elsewhere.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Swain, Judge. Affirmed.

Proceeding in mandamus to compel State Board of Equalization to issue an off- sale liquor license. Judgment denying writ affirmed.

COUNSEL

Riedman & Silverberg and Milton H. Silverberg for Appellants.

Edmund G. Brown, Attorney General, and Howard S. Goldin, Deputy Attorney General, for

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Respondents.

CARTER, J.

Plaintiffs brought mandamus proceedings in the superior court to review the refusal of defendant, State Board of Equalization, to issue them an off-sale beer and wine license at their premises and to compel the issuance of such a license. The court gave judgment for the board and plaintiffs appeal. *774

Plaintiffs filed their application with the board for an off-sale beer and wine license (a license to sell those beverages to be consumed elsewhere than on the premises) at their premises where they conducted a grocery and delicatessen business. After a hearing the board denied the application on the grounds that the issuance of the license would be contrary to the "public welfare and morals" because of the proximity of the premises to a school.

According to the evidence before the board, the area concerned is in Los Angeles. The school is located in the block bordered on the south by Rosewood Avenue, on the west by Fairfax Avenue, and on the north by Melrose Avenue-an 80-foot street running east and west parallel to Rosewood and a block north therefrom. The school grounds are enclosed by a fence, the gates of which are kept locked most of the time. Plaintiffs' premises for which the license is sought are west across Fairfax, an 80-foot street, and on the corner of Fairfax and Rosewood. The area on the west side of Fairfax, both north and south from Rosewood, and on the east side of Fairfax south from Rosewood, is a business district. The balance of the area in the vicinity is residential. The school is a high school. The portion along Rosewood is an athletic field with the exception of buildings on the corner of Fairfax and Rosewood across Fairfax from plaintiffs' premises. Those buildings are used for R.O.T.C. The main buildings of the school are on Fairfax south of Melrose. There are gates along the Fairfax and Rosewood sides of the school but they are kept locked most of the time. There are other premises in the vicinity having liquor licenses. There are five on the west side of Fairfax in the block south of Rosewood and one on the east side of Fairfax about three-fourths of a block south of Rosewood. North across Melrose and at the corner of Melrose and Fairfax is a drugstore which has an off-sale license. That place is 80 feet from the northwest corner of the school property as Melrose is 80 feet wide and plaintiffs' premises are 80 feet from the southwest corner of the school property. It does not appear when any of the licenses were issued, with reference to the existence of the school or otherwise. Nor does it appear what the distance is between the licensed drugstore and any school buildings as distinguished from school grounds. The licenses on Fairfax Avenue are all farther away from the school than plaintiffs' premises.

Plaintiffs contend that the action of the board in denying them a license is arbitrary and unreasonable and they particularly *775 point to the other licenses now outstanding on premises as near as or not much farther from the school.

The board has the power "in its discretion, to deny ... any specific liquor license if it shall determine for good cause that the granting ... of such license would be contrary to public welfare or morals." (Cal. Const., art. XX, § 22.) (1) In exercising that power it performs a quasi judicial function similar to local administrative agencies. (*Covert v. State Board of Equalization*, 29 Cal.2d 125 [173 P.2d 545]; *Reynolds v. State Board of Equalization*, 29 Cal.2d 137 [173 P.2d 551, 174 P.2d 4]; *Stoumen v. Reilly*, 37 Cal.2d 713 [234 P.2d 969].) (2) Under appropriate circumstances, such as we have here, the same rules apply to the determination of an application for a license as those for the revocation of a license. (*Fascination, Inc. v. Hoover*, 39 Cal.2d 260 [246 P.2d 656]; Alcoholic Beverage Control Act, § 39; Stats. 1935, p. 1123, as amended.) (3) In making its decision "The board's discretion ... however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." (*Stoumen v. Reilly, supra*, 37 Cal.2d 713, 717.)

(4) Applying those rules to this case, it is pertinent to observe that while the board may refuse an on-sale license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, *supra*, § 13) there is no such provision or regulation by the board as to off-sale licenses. Nevertheless, proximity of the licensed premises to a school may supply an adequate basis for denial of a license as being inimical to public morals and welfare. (See *Altadena Community Church v. State Board of Equalization*, 109 Cal.App.2d 99 [240 P.2d 322]; *State v. City of Racine*, 220 Wis. 490 [264 N.W. 490]; *Ex parte Velasco*, (Tex.Civ.App.) 225 S.W. 2d 921; *Harrison v. People*, 222 Ill. 150 [78 N.E. 52].)

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The question is, therefore, whether the board acted arbitrarily in denying the application for the license on the ground of the proximity of the premises to the school. No question is raised as to the personal qualifications of the applicants. (5) We cannot say, however, that it was unreasonable for the board to decide that public welfare and morals would be jeopardized by the granting of an off-sale license at premises *776 within 80 feet of some of the buildings on a school ground. As has been seen, a liquor license may be refused when the premises, where it is to be used, are in the vicinity of a school. While there may not be as much probability that an off-sale license in such a place would be as detrimental as an on-sale license, yet we believe a reasonable person could conclude that the sale of any liquor on such premises would adversely affect the public welfare and morals.

(6) Plaintiffs argue, however, that assuming the foregoing is true, the action of the board was arbitrary because there are other liquor licensees operating in the vicinity of the school. All of them, except the drugstore at the northeast corner of Fairfax and Melrose, are at such a distance from the school that we cannot say the board acted arbitrarily. It should be noted also that as to the drugstore, while it is within 80 feet of a corner of the school grounds, it does not appear whether there were any buildings near that corner, and as to all of the licensees, it does not appear when those licenses were granted with reference to the establishment of the school.

Aside from these factors, plaintiffs' 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. Perhaps the best authority for this observation is *FCC v. WOKO* [329 U.S. 223 (67 S.Ct. 213, 91 L.Ed. 204).] The Commission denied renewal of a broadcasting license because of misrepresentations made by the licensee concerning ownership of its capital stock. Before the reviewing courts one of the principal arguments was that comparable deceptions by other licensees had not been dealt with so severely. A unanimous Supreme Court easily rejected this argument: 'The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.' *777 In rejecting a similar argument that the SEC without warning had changed its policy so as to treat the complainant differently from others in similar circumstances, Judge Wyzanski said: 'Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination of the problems of security regulation. ... The administrator is expected to treat experience not as a jailer but as a teacher.' Chief Justice Vinson, speaking for a Court of Appeals, once declared: 'In the instant case, it seems to us there has been a departure from the policy of the Commission expressed in the decided cases, but this is not a controlling factor upon the Commission.' Other similar authority is rather abundant. Possibly the outstanding decision the other way, unless the dissenting opinion in the second Chenery case is regarded as authority, is *NLRB v. Mall Tool Co.* [119 F.2d 700.] The Board in ordering back pay for employees wrongfully discharged had in the court's opinion departed from its usual rule of ordering back pay only from time of filing charges, when filing of charges is unreasonably delayed and no mitigating circumstances are shown. The Court, assuming unto itself the Board's power to find facts, said: 'We find in the record no mitigating circumstances justifying the delay.' Then it modified the order on the ground that 'Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.' From the standpoint of an ideal system, one can hardly disagree with the court's remark. But from the standpoint of a workable system, perhaps the courts should not impose upon the agencies standards of consistency of action which the courts themselves customarily violate. Probably deliberate change in or deviation from established administrative policy should be permitted so long as the action is not arbitrary or unreasonable. This is the view of most courts." (Davis, Administrative Law, § 168; see also Parker, Administrative Law, pp. 250-253; 73 C.J.S., Public Administrative Bodies and Procedure, § 148; *California Emp. Com. v. Black-Foxe M. Inst.*, 43 Cal.App.2d Supp. 868 [110 P.2d 729].) Here the board was not acting arbitrarily if it did change its position because it may have concluded that another license would be too many in the vicinity of the school.

(7) The contention is also advanced that the neighborhood is predominantly Jewish and plaintiffs

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intend to sell wine to customers of the Jewish faith for sacramental purposes. We fail to see how that has any bearing on the issue. The wine *778 to be sold is an intoxicating beverage, the sale of which requires a license under the law. Furthermore, it cannot be said that wine for this purpose could not be conveniently obtained elsewhere.

The judgment is affirmed.

Gibson, C. J., Shenk, J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Appellants' petition for a rehearing was denied May 21, 1953.

Cal.,1953.

Weiss v. State Bd. of Equalization

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C

Office of the Attorney General
State of California

*1 Opinion No. 88-702
September 13, 1989

THE COMMISSION ON STATE MANDATES

THE COMMISSION ON STATE MANDATES has requested an opinion on the following question:

Does the Commission on State Mandates have the authority to reconsider a prior final decision relating to the existence or nonexistence of state mandated costs?

CONCLUSION

The Commission on State Mandates does have the authority to reconsider a prior final decision relating to the existence or nonexistence of state mandated costs, where the prior decision was contrary to law.

ANALYSIS

Section 6 of article XIII B of the California Constitution, an initiative constitutional amendment which became effective on July 1, 1980, 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 such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

"(a) Legislative mandates requested by the local agency affected;

"(b) Legislation defining a new crime or changing an existing definition of a crime; or

"(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

In order to implement the provisions of section 6, supra, the Commission on State Mandates ("commission," post) was established on January 1, 1985. (Gov.Code, 17525.) [FN1] Its basic purpose is to adjudicate claims filed by local agencies for costs incurred as a result of certain state mandated programs. (See 68 Ops.Cal.Atty.Gen. 245 (1985).) Specifically, section 17551, subdivision (a), provides:

"The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

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The present inquiry is whether the commission is authorized to reconsider, pursuant to its own motion, its determination in a prior case respecting the entitlement of a claimant (local agency or school district) to reimbursement for state mandated costs. It is understood for purposes of this discussion that the prior decision was duly rendered and has become final. Our attention has been directed, for illustrative purposes, upon the interpretive clarification by the California Supreme Court in County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56-57, providing a limited definition of the phrase "new program or higher level of service" within the context of section 6 of article XIII B of the California Constitution, supra. Specifically, it was decided that that phrase does not include any incidental increase in local costs arising upon the enactment of a law of general application. Consequently, there was no mandatory subvention for increased costs to local agencies resulting from the legislative authorization for higher workers' compensation benefits. As a result of this clarification, the commission may have reached different determinations with respect to certain prior claims which it now wishes to reopen for consideration.

*2 In the absence of any specific statutory authority, an administrative agency has, as a general rule, no power to grant a rehearing or otherwise to reconsider a previous final decision. In 37 Ops.Cal.Atty.Gen. 133 (1961), we considered whether the California Unemployment Insurance Appeals Board was authorized to set aside its decision and reopen a matter for the purpose of receiving written argument or reevaluating the evidence and issuing a different decision. We explained in part (id., at 134-135):

"In 2 Ops.Cal.Atty.Gen. 442, 443, the specific question of the board's jurisdiction to review, rehear or reconsider formal decisions was discussed as follows:

"+-In cases such as this one, the jurisdiction of boards and agencies such as the California Employment Commission and its successor the California Unemployment Insurance Appeals Board, is special and limited. (Heap v. City of Los Angeles, 6 Cal. (2d) 405; Peterson v. Civil Service Board, 67 Cal.App. 70; Krohn v. Board of Water and Power Com., 95 Cal.App. 289.) It would seem that if such an agency did not have the express power to grant a rehearing, it could not grant such a rehearing.

"+-The reason for this rule of law is well expressed in the case of Heap v. City of Los Angeles, supra, where the Court said:

" " ' ... But the rule stated above, that a civil service commission has no such power in the absence of express authorization, is sound and practical. If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure...." '

" 'The rule and reason therefor is well supported by California authority. (Pacheco v. Clark, 44 Cal.App. (2d) 147; Olive Proration etc. Com. v. Agricultural etc. Com., 17 Cal. (2d) 204; Proud v. McGregor, 9 Cal. (2d) 178.) This office has adhered to the rule just set out in Opinions (NS 2192, NS 2192a and NS 2192b) addressed to the State Board of Equalization.'

"It was concluded therein that the Unemployment Insurance Appeals Board has no

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jurisdiction to review, rehear or reconsider its formal decisions for the reasons stated above.

"Again in 16 Ops.Cal.Atty.Gen. 214 at 215, this office stated:

" 'It appears to be the general rule that if the jurisdiction of an administrative board is purely statutory, it must look to its statute to ascertain whether its determinations may be reopened. (People v. Wemple (1895) 144 N.Y. 478, 39 N.E. 397; State v. Brown (1923) 126 Wash. 175, 218 P. 9; Note (1941) 29 Geo. L. J. 878; Comment (1941) 29 Cal. L. Rev. 741). That this is the California rule is illustrated by the decision in Olive Proration Committee v. Agricultural Prorate Commission, (1941) 17 Cal.2d 204, 109 P.2d 918, wherein the court said, at page 209:

*3 " ' "... since all administrative actions must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right so to do." ' (See also Cook v.Civil Service Commission (1911) 160 Cal. 589, 117 P. 662; Heap v. Los Angeles (1936) 6 Cal.2d 405, 57 P.2d 1323; 1 Ops.Cal.Atty.Gen. 412, 417; 2 Ops.Cal.Atty.Gen. 442; 3 Ops.Cal.Atty.Gen. 143, 144; 4 Ops.Cal.Atty.Gen. 34, 36; 9 Ops.Cal.Atty.Gen. 294, 295.)" ' "

In 59 Ops.Cal.Atty.Gen. 123 (1976) we pointed to certain "narrow exceptions" to the general rule. (Id. at 126-127.) For example, the rule would not apply where the Legislature intended that the agency should exercise a continuing jurisdiction with power to reconsider its orders. As stated by the court in Olive Proration etc. Com. v. Agric. etc. Com. (1941) 17 Cal.2d 204, 209:

"Where orders which relate to what may be rather broadly defined as individual rights are concerned, the question whether the administrative agency may reverse a particular determination depends upon the kind of power exercised in making the order and the terms of the statute under which the power was exercised. As to the first factor, almost without exception, courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of facts, may not thereafter be altered or modified. (Muncy v. Hughes, 265 Ky. 588 [97 S. W. (2d) 546]; Little v. Board of Adjustment, 195 N. C. 793 [143 S. E. 827]; Lilienthal v. Wyandotte, 286 Mich. 604 [282 N.W. 837].) As concisely stated by the New York Court of Appeals, +-officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them'. (People ex rel. Chase v. Wemple, 144 N. Y. 478 [39 N. E. 397].) But if it is clear that the legislature intended that the agency should exercise a continuing jurisdiction with power to modify or alter its orders to conform to changing conditions, the doctrine of res judicata is not applicable. The determination depends upon the provisions of the particular statute.

"... And since all administrative action must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right so to do." (Emphasis added.) (Accord, Hollywood Circle, Inc. v. Dept. of Alc. Bev. Cont. (1961) 55 Cal.2d 728, 732.) We find no such provision in the statute in question. (See 17551 (a) supra.)

Further, the rule would not apply where the agency's decision exceeded its authority or was made without sufficient evidence. In Aylward v. State Bd. etc. Examiners (1948) 31 Cal.2d 833, the Board of Chiropractic Examiners adopted, without notice, and based upon the board's own records, a resolution canceling forty licenses, previously issued by the board, to practice chiropractic on the ground that such licenses had been issued contrary to numerous prerequisites of the

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Chiropractic Act. This action purported to reverse the action of the board during the previous year, in which it was concluded, upon a noticed and contested hearing, that "none of the matters presented were grounds under the Chiropractic Act for revocation of any licenses." The Supreme Court held that the board improperly canceled the licenses in the absence of a statutorily required noticed hearing (id. at 838), but that the board should not be precluded from taking adverse action based on any proper legal ground (id. at 842). The court explained as follows (id. at 839):

*4 "The agency however, may be bound by its prior action where it has made a determination of a question of fact within its powers, and it lacks authority to rehear or reopen the question. (Olive Proration etc. Com. v. Agricultural etc. Com., 17 Cal.2d 204, 209; Heap v. City of Los Angeles, 6 Cal.2d 405; Proud v. McGregor, 9 Cal.2d 178, 179; Pacheco v. Clark, 44 Cal.App.2d 147, 153; Hoertkorn v. Sullivan, 67 Cal.App.2d 151, 154; Matson Terminals, Inc. v. California Emp. Com., 24 Cal.2d 695, 702.)

"Implicit in the cases denying a board's power to review or reexamine a question, however, is the qualification that the board must have acted within its jurisdiction and within the powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board (Proud v. McGregor, 9 Cal.2d 178; Pacheco v. Clark, 44 Cal.App.2d 147), but mandate will lie to compel the board to nullify or rescind its void acts. (Board of Trustees v. State Bd. of Equalization, 1 Cal.2d 784. While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." (Emphasis added.)

In Ferdig v. State Personnel Board (1969) 71 Cal.2d 96, the board had approved the appointment of an applicant to a state civil service position. More than seven months later, the board, after a hearing, adopted its order revoking the appointment due to the erroneous grant of veterans' preference points. (Id. at 100.) Responding to the contention that the initial order approving the appointment having become final, the board was, in the absence of statutory authority, without jurisdiction to reconsider it, the court observed (id. at 105-106):

"What we examine here is the jurisdiction of the Board to take corrective action with respect to an appointment which it lacked authority to make. It defies logic to say that the mere enumeration in the Act of the methods of separating an employee from state civil service in a situation where an appointment has been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the Board in a situation where an appointment has been made without authority.

"We conclude, therefore, that when the matter was brought to its attention, the Board had jurisdiction to inquire into and review the certification as to veterans' preference credits made by the Department of Veterans Affairs and having determined that appellant was not entitled to such credits, to take the corrective action

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which it did by revoking appellant's appointment. While this jurisdiction does not appear to have been conferred upon the Board in so many words by the express or precise language of constitutional or statutory provision, there can be no question in that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws."

*5 Determinations by the commission as to entitlement of local agencies to reimbursement for state mandated costs are questions of law. (Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at 536.) An administrative agency is not authorized to act contrary to law. (Ferdig v. State Personnel Board, supra, 71 Cal.2d at 103-104.) Consequently, where the decision in a prior case was based upon an erroneous legal premise, and is contrary to law (e.g., licenses issued or veterans preference points granted contrary to law), the administrative agency, having exceeded its authority, may reconsider its decision notwithstanding the absence of express statutory sanction. In the case presented for illustrative purposes, the commission's prior determination, based upon an erroneous interpretation of law, to provide a subvention for an incidental increase in local costs arising upon an increase in workers' compensation benefits, was contrary to law. Under the principles set forth above, the commission would be authorized to reconsider its prior decision.

The question remains, however, whether the Legislature in this instance has authorized a different result, precluding the commission from reconsidering a prior final decision. [FN2] The commission is authorized to adopt procedures for hearing claims and for the taking of evidence. (17553.) [FN3] Pursuant to its authority to adopt and amend rules and regulations (17527, subd. (g)), the commission has promulgated rules for the conduct of hearings. (Tit. 2, C.C.R., 1187-1188.3, hereafter referred to as "rules.") Upon receipt of a claim, the commission is required to conduct a hearing within a reasonable time. (17555; rule 1187.1, subd. (a).) The hearing shall be conducted in accordance with specified rules of evidence and procedure. (Rules 1187.5, 1187.6.) Prior to the adoption of its written decision the commission may, on its own motion or upon a showing of good cause, order a further hearing. (Rule 1187.9, subd. (a).) Within a reasonable time following the hearing, a proposed decision of the commission panel, commission staff, or hearing officer, as the case may be, shall be prepared and served upon the parties. (Rule 1188.1.) The decision of the commission itself must be written, based on the record, and contain a statement of reasons for the decisions, findings and conclusion. (Rule 1188.2, subd. (a).) After the decision has been served, it shall not be changed except to correct clerical errors. (Rule 1188.2, subd. (b).) Either party may commence a proceeding for judicial review of a decision of the commission. (17559.) The period of limitations applicable to such review is three years. (Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at 534.)

If the commission determines that costs are mandated by the state, it must determine the amount to be subvened to local agencies and adopt "parameters and guidelines" for reimbursement of claims. (17557; rule 1183.1.) Thereafter, the commission shall adopt an estimate of statewide costs resulting from the mandate. (Rule 1183.3, subd. (a).) At least twice each calendar year, the commission is required to identify and report to the Legislature the statewide costs estimated for each mandate and the reasons for recommending reimbursement. (17600; rule 1183.3, subd. (b).) The amounts awarded are included in the local government claims bill and thereafter, in the case of continuing costs, in the budget bill for

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subsequent fiscal years. (17561, subd. (b)(2).)

*6 The Supreme Court has applied a uniform set of rules when reviewing the validity of administrative regulations. "Where a statute empowers an administrative agency to adopt regulations, such regulations +-must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.' " (Ontario Community Foundation, Inc. v. State Bd. of Equalization (1984) 35 Cal.3d 811, 816.) "[T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute." (Woods v. Superior Court (1981) 28 Cal.3d 668, 679.) "Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (Morris v. Wil liams (1967) 67 Cal.2d 733, 737.) "Administrative regulations that alter or amend that statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (Ontario Community Foundation, Inc. v. State Bd. of Equalization, supra, 35 Cal.3d 811,816-817; emphasis added.) "It is fundamental that an administrative agency may not usurp the legislative function, no matter now altruistic its motives are." (Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392, 419.)

There is no indication in the statutory scheme that the jurisdiction of the commission is limited to rectify its action where a determination of entitlement had been adopted without authority. As observed in Ferdig v. State Personnel Board, supra, 106, "[w]hile this jurisdiction does not appear to have been conferred upon the [commission] in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers that [commission to provide +-an effective means of resolving disputes over the existence of state-mandated local programs' (sec. 17500).]"

To the extent that rule 1188.2, subdivision (b), may be interpreted to foreclose the commission from rectifying a decision made or action taken contrary to law, it impairs the scope of the statute, and to that extent is void. (Cf. Ontario Community Foundation, Inc. v. State Bd. of Equal., supra, 35 Cal.3d at 816-817; 64 Ops.Cal.Atty.Gen. 425, 430 (1981).) In our view, an administrative agency has no more power to promulgate a rule preserving or perpetuating its decisions made or actions taken without authority, than it has to undertake such decisions or actions in the first instance.

It is concluded that the commission is authorized to reconsider a prior final decision relating to entitlement for reimbursement for state mandated costs, where the prior decision was contrary to law.

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RIDEOUT HOSPITAL FOUNDATION, INC., Plaintiff and Respondent,
v.
COUNTY OF YUBA et al., Defendants and Appellants.

No. C011614.

Court of Appeal, Third District, California.

Jul 20, 1992.

SUMMARY

A nonprofit hospital brought an action against a county to recover property taxes it had paid under protest after the county denied the hospital's application for the welfare exemption (Rev. & Tax. Code, § 214) on the ground that the hospital had net operating revenues in excess of 10 percent for the two tax years in question. The trial court granted summary judgment in favor of the hospital, finding that a nonprofit hospital that earns surplus revenues in excess of 10 percent for a given tax year can still qualify for the welfare exemption. (Superior Court of Yuba County, No. 45090, Robert C. Lenhard, Judge.)

The Court of Appeal affirmed. The court held that Rev. & Tax. Code, § 214, subd. (a)(1), which provides that a hospital will not be deemed to be operated for profit if its operating revenue does not exceed 10 percent, does not automatically preclude a hospital that does have revenue in excess of 10 percent from invoking the welfare exemption. The legislative history of the provision, the court held, indicates that it was not intended to deny exemption to a nonprofit organization earning excess revenues for debt retirement, facility expansion, or operating cost contingencies, but merely to require a hospital earning such excess revenue to affirmatively show that, in fact, it is not operated for profit and that it meets the other statutory conditions for invoking the exemption. (Opinion by Davis, J., with Sparks, Acting P. J., and Nicholson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Property Taxes § 24--Exemptions--Property Used for Religious, Hospital, or Charitable Purposes--Hospital Earning in Excess of 10 Percent Revenue.

In a nonprofit hospital's action against a county to recover property taxes paid under protest, the trial court *215 properly found that the hospital, which had net operating revenues in excess of 10 percent for the tax years in question, was not automatically ineligible for the "welfare exemption" of Rev. & Tax. Code, § 214. Rev. & Tax. Code, § 214, subd. (a)(1), provides that a hospital will not be deemed to be operated for profit if its operating revenue does not exceed 10 percent, but does not state the effect of earnings in excess of that amount. The legislative history of the provision indicates that it was not intended to deny exemption to a nonprofit organization earning excess revenues if those revenues were to be used for debt retirement, facility expansion, or operating cost contingencies. Thus, while a hospital earning such excess revenue does not receive the benefit of being deemed nonprofit, it can still invoke the exemption if it can show that, in fact, it is not operated for profit and meets the other statutory conditions for invoking the exemption.

[See **Cal.Jur.3d**, Property Taxes, § § 18, 20; 9 **Witkin**, Summary of Cal. Law (9th ed. 1989) Taxation, § § 153, 155.]

(2) Taxpayers' Remedies § 14--Proceedings and Actions to Recover Taxes Paid--Review--Questions of Law--Interpretation of Welfare Exemption Statute.

In a nonprofit hospital's action against a county to recover taxes paid under protest, the question of whether the hospital qualified for the "welfare exemption" of Rev. & Tax. Code, § 214, even though it had earned surplus revenue in excess of 10 percent for the tax years in question, was a question of law for the Court of Appeal's independent consideration on review.

(3) Statutes § 29--Construction--Language--Legislative Intent.

In interpreting a statute, the court's function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. To ascertain such intent, courts turn first to the words of the statute itself, and seek to give those words their usual and ordinary meaning. When a court interprets statutory language, it may neither insert language that has been omitted nor ignore language that has been inserted. The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute. If possible, the language should be read so as to conform to the spirit

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of the enactment. If the statute is ambiguous or uncertain, a court employs various rules of construction to assist in its interpretation.

(4) Property Taxes § 24--Exemptions--Property Used for Religious, Hospital, or Charitable Purposes--Strict Construction of Welfare *216 Exemption Statute.
The "welfare exemption" of Rev. & Tax. Code, § 214, like all tax exemption statutes, is to be strictly construed to the end that the exemption allowed is not extended beyond the plain meaning of the language employed. The rule of strict construction, however, does not mean that the narrowest possible interpretation must be given to the statute, since strict construction must still be reasonable.

(5) Statutes § 46--Construction--Presumptions--Legislative Intent.
A fundamental rule of statutory construction is that the court must assume that the Legislature knew what it was saying and meant what it said. A related principle is that a court will not presume an intent to legislate by implication. Moreover, when the Legislature has expressly declared its intent, the courts must accept that declaration.

(6) Statutes § 42--Construction--Aids--Opinions of Attorney General.
Opinions of the Attorney General, while not binding, are entitled to great weight, and the Legislature is presumed to know of the Attorney General's formal interpretation of a statute.

COUNSEL

Daniel G. Montgomery, County Counsel, and James W. Calkins, Chief Deputy County Counsel, for Defendants and Appellants.

McCutchen, Doyle, Brown & Enersen, John R. Reese and Gerald R. Peters for Plaintiff and Respondent.

DAVIS, J.

In this action to recover property taxes paid under protest, County of Yuba (County) appeals from a decision in favor of the taxpayer, Rideout Memorial Hospital (Rideout). There is but one issue on appeal: can a nonprofit hospital that earned surplus revenue in excess of 10 percent (for a given year) still qualify for the "welfare exemption" from property taxation in light of Revenue and Taxation Code section 214, subdivision (a)(1)? We hold that it can.

Background

Revenue and Taxation Code section 214 (section 214) sets forth the "welfare exemption" from property taxation. For the tax years in question *217 here, the section provided in pertinent part: "(a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in- aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness.

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual.

"(3) The property is used for the actual operation of the exempt activity, and does not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose.

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession.

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose.

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment

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of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes. ...

"The exemption provided for herein shall be known as the 'welfare exemption.' " *218

Our concern centers on section 214, subdivision (a)(1) (hereafter, section 214(a)(1)). [FN1]

> FN1 Section 214(a)(1) was amended nonsubstantively in 1989 and now provides: "(a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: [¶] (1) The owner is not organized or operated for profit. However, in the case of hospitals, the organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in- aid, over operating expenses has not exceeded a sum equivalent to 10 percent of those operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness." (Stats. 1989, ch. 1292, § 1.) In 1985, the previously undesignated introductory paragraph of section 214 was lettered "(a)." (Stats. 1985, ch. 542, § 2, p. 2026.) This change redesignated section 214(1) as 214(a)(1), section 214(2) as 214(a)(2), and so on. For the sake of simplicity we will use the terms "section 214(a)(1)" "section 214(a)(2)" and the like when referring to the pre- or the post-1985 section 214.

County denied Rideout's applications for the welfare exemption for the tax years 1986-1987 and 1987-1988. Rideout paid the taxes under protest and applied for a refund. After County denied the refund, Rideout sued County.

County contends that Rideout had excess revenues, under section 214, of 24 and 21 percent for the two years in question. Rideout concedes that its net operating revenues under section 214 exceeded 10 percent in each of those two years.

In summary judgment proceedings, the parties narrowed the issues to the single issue stated above and the trial court ruled in favor of Rideout. (1a) County argues that Rideout is *automatically* ineligible for the welfare exemption for the years in question because its net revenues exceeded the 10 percent limitation of section 214(a)(1). Rideout counters that the 10 percent provision constitutes a "safe harbor" for nonprofit hospitals by which the hospital can be deemed to satisfy section 214(a)(1), but that a nonprofit hospital with revenues over 10 percent can still meet the condition of section 214(a)(1) by showing, pursuant to the general rule, that it is not organized or operated for profit. We conclude that Rideout's position is essentially correct.

Discussion

(2) The issue in this case presents a question of law that we consider independently. (See *219 *Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624]; *Burke Concrete Accessories, Inc. v. Superior Court* (1970) 8 Cal.App.3d 773, 774-775 [87 Cal.Rptr. 619].)

All property in California is subject to taxation unless exempted under federal or California law. (Cal. Const., art. XIII, § 1; Rev. & Tax. Code, § 201; all further references to undesignated sections are to the Revenue and Taxation Code unless otherwise specified.) The constitutional basis for the "welfare exemption" was added to the California Constitution in 1944; as revised nonsubstantively in 1974, it now provides: "The Legislature may exempt from property taxation in whole or in part: [¶] ... Property used exclusively for religious, hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those purposes, (2) that are nonprofit, and (3) no part of whose net earnings inures to the benefit of any private shareholder or individual." (Cal. Const., art. XIII, § 4, subd. (b); formerly art. XIII, § 1c.) The rationale for the welfare exemption is that the exempt property is being used either to provide a government-like service or to accomplish some desired social objective. (Ehrman & Flavin, Taxing Cal. Property (3d ed. 1989) Exempt Property, § 6.05, p. 9.)

Pursuant to this constitutional authorization, the Legislature in 1945 enacted section 214 and labeled that exemption the "welfare exemption." In this appeal, we are asked to interpret subdivision (a)(1) of

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section 214.

Certain general principles guide our interpretation. (3) "Our function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817, 621 P.2d 856].) To ascertain such intent, courts turn first to the words of the statute itself (*ibid.*), and seek to give the words employed by the Legislature their usual and ordinary meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted. (Code Civ. Proc., § 1858.) The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 608 [86 Cal.Rptr. 793, 469 P.2d 665]), and where possible the language should be read so as to conform to the spirit of the enactment. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735.)" (*Rudd v. California Casualty Gen. Ins. Co., supra*, 219 Cal.App.3d at p. 952.) If the statute is ambiguous or uncertain, courts employ various rules of construction to assist in the interpretation. (See 58 Cal.Jur.3d, Statutes, § § 82- 118, *220 pp. 430-508.) (4) Finally, "[t]he welfare exemption, like all tax exemption statutes, is to be strictly construed to the end that the exemption allowed is not extended beyond the plain meaning of the language employed. However, the rule of strict construction does not mean that the narrowest possible interpretation be given; ' "strict construction must still be a reasonable construction." ' (*Cedars of Lebanon Hosp. v. County of L.A.* (1950) 35 Cal.2d 729, 734- 735 [221 P.2d 31, 15 A.L.R.2d 1045]; *English v. County of Alameda* (1977) 70 Cal.App.3d 226, 234 [138 Cal.Rptr. 634].)" (*Peninsula Covenant Church v. County of San Mateo* (1979) 94 Cal.App.3d 382, 392 [156 Cal.Rptr. 431].)

(1b) We therefore first consider the language of section 214(a)(1), which stated at the relevant times herein: "(a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: [¶] (1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness." (See fn. 1, *ante*.)

As we immediately see, the proviso presents somewhat of a "knotty" problem, being cast as a double negative-if revenues did *not* exceed 10 percent, the hospital shall *not* be deemed to be organized or operated for profit. [FN2] Under the language of section 214(a)(1), the Legislature did not *automatically* exclude nonprofit hospitals earning *more* than 10 percent surplus revenues from the welfare exemption. The proviso does not address this situation on its face; it concerns only the hospital earning 10 percent or *under*. In fact, the automatic exclusion would have been a simple matter to accomplish-a mere untying of the two "knots" from the proviso would have done it. We note that in other sections of the Revenue and Taxation Code, when the Legislature wishes to exclude certain entities from a taxation exemption it can do so in clear terms. (See, e.g., § 201.2, subd. (c): "(c) This section shall not be construed to exempt any profit- making organization or concessionaire from any property tax, ...") *221

FN2 Of course, if a hospital satisfies this proviso it must still actually be nonprofit because the welfare exemption does not apply to profitmaking hospitals regardless of their earnings (Cal. Const., art. XIII, § 4, subd. (b)); moreover, to claim the exemption, the nonprofit hospital must satisfy all of the other conditions set forth in section 214(a) (i.e., subds. (2) through (6)).

Nevertheless, there is that double negative. Does that double negative make a positive? In other words, is the converse of the proviso to be implied-as County argues-so that a hospital which exceeded the 10 percent figure is deemed unable to satisfy section 214(a)(1)? These questions raise ambiguities that call for the employment of certain rules of construction.

(5) A fundamental rule of construction is that we must assume the Legislature knew what it was saying and meant what it said. (*Blew v. Horner* (1986) 187 Cal.App.3d 1380, 1388 [232 Cal.Rptr. 660]; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 764 [150

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Cal.Rptr. 785, 587 P.2d 227]; *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 604 [45 Cal.Rptr. 512].) In related fashion, courts will not presume an intent to legislate by implication. (*People v. Welch* (1971) 20 Cal.App.3d 997, 1002 [98 Cal.Rptr. 113]; *First M. E. Church v. Los Angeles Co.* (1928) 204 Cal. 201, 204 [267 P. 703].) County has constructed section 214 on a foundation of implication which does not fare well under the weight of these rules.

Another important rule is that when the Legislature has expressly declared its intent, the courts must accept that declaration. (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 11 [106 Cal.Rptr. 761, 507 P.2d 65]; see *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15 [270 Cal.Rptr. 796, 793 P.2d 2].) (1c) Here, the application of this rule requires us to consider section 214's legislative history. (See 51 Cal.3d at pp. 14-16.)

As originally enacted in 1945, section 214 did not contain the proviso found in subdivision (a)(1), and the condition stated by subdivision (a)(3) was different. The section originally read in pertinent part as follows: "[a] Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted; ..." (Stats. 1945, ch. 241, § 1, p. 706.)

In *Sutter Hospital v. City of Sacramento* (1952) 39 Cal.2d 33 [244 P.2d 390], the California Supreme Court was asked whether a nonprofit hospital *222 which had deliberately earned an 8 percent surplus of income over expenses to be used for debt retirement and facility expansion could qualify for the welfare exemption of section 214. Relying on subdivision (a)(3) as stated above, the court said no. (39 Cal.2d at pp. 39-41.) The court acknowledged that its holding made it difficult for modern hospitals to operate in a financially sound manner to reduce indebtedness and expand their facilities, but said that matter should be addressed to the Legislature rather than the courts because subdivision (a)(3) compelled the court's holding. (39 Cal.2d at pp. 40-41.)

Responding to the challenge raised by the *Sutter* decision, the Legislature in 1953 amended section 214. (Stats. 1953, ch. 730, § 1-4, pp. 1994-1996; *Christ The Good Shepherd Lutheran Church v. Mathiesen* (1978) 81 Cal.App.3d 355, 365 [146 Cal.Rptr. 321].) This amendment was proposed in Assembly Bill No. 1023 (A.B. 1023). As originally introduced, A.B. 1023 rewrote subdivision (a)(3) to require simply that the property be "used for the actual operation of the exempt activity," and contained an urgency clause setting forth the Legislature's intent as follows: "This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution, and shall go into immediate effect. The facts constituting such necessity are: Continuously since the adoption of the 'welfare exemption' it has been understood by the administrators of the law, as well as by the public generally, that it was the purpose and the intent of Legislature in the adoption of subdivision [a](3) of Section 214 of the Revenue and Taxation Code to disqualify for tax exemption any property of a tax exempt organization which was not used for the actual operation of the exempt activity, but that such organization could rightfully use the income from the property devoted to the exempt activity for the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies without losing the tax exempt status of its property.

"Recently, doubt has been cast upon the foregoing interpretation by a decision of the State Supreme Court involving the tax exemption of a hospital. This decision was broad in its application and has caused the postponement or actual abandonment of plans for urgently needed hospital construction and expansion at a time when there are insufficient hospital facilities in this State to properly care for the health needs of its citizens, and virtually no surplus facilities for use in case of serious epidemic or disaster. This Legislature has recognized that in addition to gifts and bequests the traditional method for the financing of the expansion and construction of voluntary religious and community nonprofit hospital facilities is through the use of receipts from the actual operating facilities. In its decision the Supreme Court indicated that this was a matter for legislative clarification. *223

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"It has never been the intention of the Legislature that the property of nonprofit religious, hospital or charitable organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, it having been the intent of the Legislature in adopting subsection [a](3) of Section 214 to deny exemption to property not used for exempt purposes even though the income from the property was used to support an exempt activity.

"Therefore, in order to clarify the legislative intent and to remove any doubt with respect to the status of property actually used for exempt purposes, it is necessary to amend subdivision [a](3) of Section 214 of the Revenue and Taxation Code. It is essential that this be done at the earliest possible moment to avoid further delays in the construction and expansion of needed hospital facilities." (Stats. 1953, ch. 730, § 4, pp. 1995-1996.)

About three months after this urgency clause and amendment to subdivision (a)(3) were proposed in A.B. 1023, A.B. 1023 was amended to include the proviso in subdivision (a)(1) at issue here. (Stats. 1953, ch. 730, § 1, p. 1994.) Thereafter, A.B. 1023-with the urgency clause and the noted changes to subdivisions (a)(1) and (a)(3)-was enacted into law. (Stats. 1953, ch. 730, § 1, pp. 1994-1996.)

In the urgency clause, the Legislature expressly stated its intent that a section 214 organization "could rightfully use the income from the property devoted to the exempt activity for the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies without losing the tax exempt status of its property," and that "[i]t has never been the intention of the Legislature that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, ..." (Stats. 1953, ch. 730, § 4, pp. 1995-1996.)

Where the Legislature has expressly declared its intent, we must accept that declaration. (*Tyrone v. Kelley, supra*, 9 Cal.3d at p. 11; see *California Assn. of Psychology Providers v. Rank, supra*, 51 Cal.3d at p. 15.) Pursuant to the legislative expression here, there is no limitation on earned revenue that *automatically* disqualifies a nonprofit hospital from obtaining the welfare exemption; the concern is whether that revenue is devoted to furthering the *224 exempt purpose by retiring debt, expanding facilities or saving for contingencies. [FN3]

FN3 This is not to say that a nonprofit hospital can earn any amount above 10 percent and still qualify for the welfare exemption. The hospital must show that indeed it is not organized or operated for profit and that it meets all of the other conditions in section 214. One of these other conditions, section 214 (a)(3), now mandates in pertinent part that the "property [be] used for the actual operation of the exempt activity, *and ... not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose.*" (Italics added.)

It is true that the urgency clause containing the Legislature's expressed intent was made a part of A.B. 1023 before the proviso in section 214(a)(1) was added to that bill, and that the clause refers to section 214(a)(3). Regardless of timing, however, both the section 214(a)(1) proviso and the urgency clause were enacted into law as part of A.B. 1023. (Stats. 1953, ch. 730, § § 1, 4, pp. 1995-1996.) More importantly, the urgency clause focuses on the issues of tax exemptions for *hospitals*, the urgent need for *hospital* construction and expansion, and the ways of financing that construction and expansion for nonprofit *hospitals*. It is in this context-a context fundamentally implicated by a hospital earning above the 10 percent figure in section 214(a)(1)-that the Legislature declares "[i]t has never been the intention of the Legislature that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, ..." (Stats. 1953, ch. 730, § 4, p. 1996.) In a related vein, the reference in the urgency clause to section 214(a)(3) concerns the issue of how the use of income from exempted property affects welfare exemption eligibility; this issue is also fundamentally implicated in the context of a nonprofit hospital earning a surplus revenue greater than 10 percent.

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County contends the section 214 (a)(1) proviso is rendered meaningless if interpreted to allow a nonprofit hospital that earns more than 10 percent the welfare exemption; under such an interpretation, County maintains, it makes no difference whether a nonprofit hospital earns below or above the 10 percent figure-the exemption can be claimed in either instance.

We think the 10 percent figure in section 214(a)(1) is meaningful even if nonprofit hospitals that earn over that figure can still qualify for the welfare exemption. The 10 percent figure provides a clear guideline by which nonprofit hospitals can engage in sound financial practices to further the exempt activity without jeopardizing their tax exempt status, assuming they otherwise qualify for the welfare exemption. The proviso in *225section 214(a)(1) recognizes the complex financial and functional realities of the modern hospital operation, an operation that often requires deliberately designed surplus revenues to ensure adequate levels of service and resources. (See *Sutter Hospital v. City of Sacramento, supra*, 39 Cal.2d at pp. 36, 39- 40; see also *St. Francis Hosp. v. City & County of S. F.* (1955) 137 Cal.App.2d 321, 323-326 [290 P.2d 275]; *Cedars of Lebanon Hosp. v. County of L. A.* (1950) 35 Cal.2d 729, 735- 736 [221 P.2d 31, 15 A.L.R.2d 1045].)

The modern hospital is an extremely complex entity-essentially, it is a minicity. (See *Cedars of Lebanon Hosp. v. County of L. A., supra*, 35 Cal.2d at pp. 735-745.) A modern hospital generates significant revenue but spends considerable amounts for labor, equipment, facilities and capital outlay; large and complex annual budgets are commonplace in this setting. (See *St. Francis Hosp. v. City & County of S. F., supra*, 137 Cal.App.2d at p. 325.) And in this setting, a surplus might be accidental rather than designed; or a particular surplus might be designed but the fate of fortuity intervenes and the budget forecasters have sleepless nights. (*Ibid.*)

Recall, section 214 was amended in light of the *Sutter Hospital* court's request for legislative intervention after the court acknowledged that its holding made it difficult for modern hospitals to operate in a financially sound manner to reduce indebtedness and expand their facilities. In that case, the nonprofit hospital purposely earned surplus revenue to retire its debt and expand its facilities. (39 Cal.2d at pp. 36, 40.) Accordingly, § 214(a)(1) provides a clear guideline by which nonprofit hospitals can deliberately design surplus revenues and not risk losing their tax exempt status (provided the other conditions of section 214 are satisfied and the revenues are used for proper purposes).

The very complexity just described and recognized in the cited cases runs counter to an interpretation that an earned surplus revenue above 10 percent *automatically* disqualifies a nonprofit hospital from the welfare exemption. To say, as County does with its interpretation of *automatic* ineligibility, that a nonprofit hospital which earned 10 percent is eligible for the exemption while the nonprofit hospital which earned 10.01 percent is *automatically* excluded from it, is to say that these complex realities are irrelevant.

Rather, the nonprofit hospital earning over 10 percent is outside the clear guideline offered by section 214(a)(1) and thereby subject to an increased scrutiny by tax authorities and an increased burden in showing it is not organized or operated for profit. Such a nonprofit hospital is no longer "deemed" to meet the condition of section 214(a)(1). In short, the proviso of *226 section 214(a)(1) provides no protection for the nonprofit hospital earning over 10 percent; that hospital must prove it is not organized or operated for profit under the general rule of section 214(a)(1). Contrary to County's argument, therefore, the section 214(a)(1) 10 percent proviso is meaningful even if not construed as a point of automatic disqualification.

County also relies on a 1954 opinion of the Attorney General and a 1967 opinion from the First District. The Attorney General's opinion considered whether the 1953 amendments to subdivisions (a)(1) and (a)(3) of section 214 were valid and effective in a general sense. (*Welfare Exemptions*, 23 Ops.Cal.Atty.Gen. 136 (1954).) In passing, the Attorney General noted that "[t]he Legislature might well determine that hospitals as distinguished from other organizations entitled to the welfare exemption usually operate on a schedule of rates more comparable to a schedule of rates by a commercial organization and therefore their net earnings should be restricted in order for them to have the benefit of the welfare exemption (see *Sutter Hospital* case pp. 39-40)." (*Id.* at p. 139.) The First District opinion-*San Francisco Boys' Club, Inc. v. County of Mendocino* (1967) 254 Cal.App.2d 548 [62 Cal.Rptr. 294]-involved profitmaking logging operations on land owned by and used for a nonprofit, charitable club for boys. Referring to the section 214(a)(1) proviso at issue here, the court noted that "the Legislature amended section 214 to permit nonprofit hospitals to

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have excess operating revenues in a sum equivalent to 10 percent of operating expenses." (254 Cal.App.2d at p. 557.)

Against the Attorney General's passing reference of 1954 and the First District's dicta of 1967 stands an Attorney General opinion from 1988 on the identical issue in this case. (*Welfare Exemption Qualification*, 71 Ops.Cal.Atty.Gen. 106 (1988).) In fact, it was County that requested this 1988 opinion. In that opinion, the Attorney General concluded that "[a] non-profit hospital which had earned surplus revenue in excess of ten percent during the preceding fiscal year might still qualify for the 'welfare exemption' from taxation under section 214 of the Revenue and Taxation Code." (*Id.* at p. 107.) Although it was not used as pivotal support, the 1954 Attorney General opinion was cited twice in the 1988 opinion. (*Id.* at p. 112.) [FN4]

> FN4 County also relies on cryptic passages in certain letters written in 1953 to then Governor Earl Warren. These letters were from the attorney for the California Hospital Association, which sponsored A.B. 1023, and from the Attorney General. In deciding whether to sign A.B. 1023 amending subdivisions (a)(1) and (a)(3), Governor Warren requested the views of these two entities. These unpublished and informal expressions to the Governor-especially the letter from the hospital association attorney-are not the type of extrinsic aids that courts can meaningfully use in discerning legislative intent. (See 58 Cal.Jur.3d, Statutes, § § 160- 172, pp. 558-582.)

The First District's opinion in *San Francisco Boys' Club* concerned an issue relating to a charitable social organization rather than a hospital. For *227 that reason, the analysis there is not germane to the hospital-specific provision before us. (6, 1d) Although opinions of the Attorney General, while not binding, are entitled to great weight (*Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 251 [239 Cal.Rptr. 395]; *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 883 [144 Cal.Rptr. 568]), it is unclear how to apply this principle to the two published Attorney General opinions noted above. This principle applies because the Legislature is presumed to know of the Attorney General's formal interpretation of the statute. (*Ibid.*) But the two Attorney General opinions seem to be at odds. And while the 1954 opinion is a contemporaneous construction of long duration, the 1988 opinion involves the identical issue in this case and the Legislature amended section 214(a)(1) nonsubstantively about one and one- half years after the 1988 opinion was published. (*Welfare Exemption Qualification, supra,* 71 Ops.Cal.Atty.Gen. 106; Stats. 1989, ch. 1292, § 1.) So we return, as we must, to the words used by the Legislature in the statute and in the urgency clause's declaration of intent.

That return also provides the answer to County's final argument. County argues that its interpretation of the 10 percent figure in section 214 as a point of automatic ineligibility is supported by the language in section 214(a)(1) that qualifies the terms "operating revenues" and "operating expenses." Under section 214(a)(1), gifts, endowments and grants-in-aid are excluded from "operating revenues" while depreciation based on cost of replacement and amortization of, and interest on, indebtedness are included in "operating expenses." Basically, County argues that the Legislature has provided certain financial advantages for facility improvement, debt retirement and nonoperating revenues in section 214(a)(1), thereby intending to place a cap on what nonprofit hospitals can earn for welfare exemption eligibility.

The problem with this argument is that it is difficult to define automatic ineligibility in a more roundabout way than that suggested by County's interpretation. If the section 214(a)(1) proviso accounts favorably to nonprofit hospitals for all of the uses of net earnings that do not defeat welfare exemption eligibility, why did the Legislature include that double negative? In such a situation, the proviso would be tailor-made for dispensing with the double negative because the statute has the sound financial management practices and the allowed uses for net earnings built into it. But the section 214(a)(1) proviso, by its terms, applies only to the nonprofit hospital whose operating revenues have *not* exceeded 10 percent of operating expenses; in that situation, the proviso *deems* the nonprofit hospital in compliance with section 214(a)(1). The proviso, by its terms, does not cover the nonprofit *228 hospital which has earned over 10 percent; in that situation, the nonprofit hospital must *show* it is not organized or operated for profit. And the Legislature stated in the urgency clause that it has never been the Legislature's intent "that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual

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operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies ...."

Nor does our construction of section 214(a)(1) violate the rule of strict construction by extending the tax exemption allowed beyond the plain meaning of the language employed. (*Peninsula Covenant Church v. County of San Mateo, supra,* 94 Cal.App.3d at p. 392.) If we have attempted to do anything in this opinion, we have attempted to adhere to the plain meaning of the language employed in section 214(a)(1).

For all of these reasons, we conclude that a nonprofit hospital that earned surplus revenue in excess of 10 percent during the relevant fiscal year can still qualify for the "welfare exemption" from taxation under section 214. [FN5]

FN5 Our opinion and conclusion are limited to this single question of law. Accordingly, we express no views on whether Rideout actually was or was not organized or operated for profit or whether Rideout can obtain the welfare exemption for the specific years in question, aside from concluding that earnings in excess of 10 percent do not *automatically* disqualify Rideout from the exemption.

Disposition

The judgment is affirmed. Each party to bear its own costs on appeal.

Sparks, Acting P. J., and Nicholson, J., concurred.

A petition for a rehearing was denied August 17, 1992. *229

Cal.App.3.Dist.,1992.

Rideout Hosp. Foundation, Inc. v. County of Yuba

END OF DOCUMENT

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Original List Date: 7/5/2002
Last Updated: 3/26/2003
List Print Date: 03/23/2004
Claim Number: 01-TC-19
Issue: Cancer Presumption for Law Enforcement and Firefighters

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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July 5, 2002

Mr. Allan Burdick
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And Affected State Agencies and Interested Parties (see enclosed mailing list)

Re: *Cancer Presumption for Law Enforcement and Firefighters*, 01-TC-19
California State Association of Counties - Excess Insurance Authority and County of Tehama, Co-Claimants
Labor Code section 3212.1
Statutes 1999, Chapter 595 (AB 539)
Statutes 2000, Chapter 887 (SB 1820)

Dear Mr. Burdick:

Commission staff has reviewed the above-named test claim and determined that it is complete. A copy of the test claim is being provided to affected state agencies and interested parties because of their interest in the Commission's determination.

The key issues before the Commission are:

- Do the provisions listed above impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and costs mandated by the state pursuant to section 17514 of the Government Code?
- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?

The Commission requests your participation in the following activities concerning this test claim:

- **Informal Conference.** An informal conference may be scheduled if requested by any party. See Title 2, California Code of Regulations, section 1183.04 (the regulations).
- **State Agency Review of Test Claim.** State agencies receiving this letter are requested to analyze the merits of the test claim and to file written comments on the key issues before the Commission. Alternatively, if a state agency chooses not to respond to this request, please submit a written statement of non-response to the Commission. Requests for extensions of time may be filed in accordance with sections 1183.01 (c)

and 1181.1 (g) of the regulations. State agency comments are due 30 days from the date of this letter.

- **Claimant Rebuttal.** The claimant and interested parties may file rebuttals to state agencies' comments under section 1183.02 of the regulations. The rebuttal is due 30 days from the service date of written comments.
- **Hearing and Staff Analysis.** A hearing on the test claim will be set when the draft staff analysis of the claim is being prepared. At least eight weeks before a hearing is conducted, the draft staff analysis will be issued to parties, interested parties, and interested persons for comment. Comments are due at least five weeks prior to the hearing or on the date set by the Executive Director, pursuant to section 1183.07 of the Commission's regulations. Before the hearing, a final staff analysis will be issued.
- **Mailing Lists.** Under section 1181.2 of the Commission's regulations, the Commission will promulgate a mailing list of parties, interested parties, and interested persons for each test claim and provide the list to those included on the list, and to anyone who requests a copy. Any written material filed on that claim with the Commission shall be simultaneously served on the other parties listed on the mailing list provided by the Commission.
- **Dismissal of Test Claims.** Under section 1183.09 of the Commission's regulations, test claims may be dismissed if postponed or placed on inactive status by the claimant for more than one year. Prior to dismissing a test claim, the Commission will provide 150 days notice and opportunity for other parties to take over the claim.

If the Commission determines that a reimbursable state mandate exists, the claimant is responsible for submitting proposed parameters and guidelines for reimbursing all eligible local entities. All interested parties and affected state agencies will be given an opportunity to comment on the claimant's proposal before consideration and adoption by the Commission.

Finally, the Commission is required to adopt a statewide cost estimate of the reimbursable state-mandated program within 12 months of receipt of an amended test claim. This deadline may be extended for up to six months upon the request of either the claimant or the Commission.

Please contact Nancy Patton at (916) 323-8217 if you have any questions.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enclosure: Copy of Test Claim

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MAILED: FAXED:
DATE: 7/15/02 INITIAL: VS
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WORKING BINDER:

Commission on State Mandates

Original List Date: 07/05/2002 **Mailing Information** Completeness Determination

Last Updated: 07/05/2002

List Print Date: 07/05/2002

Mailing List

Claim Number: 01-TC-19

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Commission on State Mandates

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Tel: (916) 323-5849 *Fax:* (916) 327-0832 State Agency

Mr. Richard Robinson, County Administrative Officer
County of Tehama

County Clerk's Office P.O. BOX 250
Red Bluff CA 96080
Tel: (916) 000-0000 *Fax:* (916) 000-0000 Claimant

Mr. David Wellhouse,
David Wellhouse & Associates, Inc.,

9175 Kiefer Blvd Suite 121
Sacramento CA 95826
Tel: (916) 368-9244 *Fax:* (916) 368-5723 Interested Person

Mr. Steve Shields,
Shields Consulting Group, Inc.

1536 36th Street
Sacramento CA 95816
Tel: (916) 454-7310 *Fax:* (916) 454-7312 Interested Person

Mr. James Wright, Assistant Deputy Director (A-45)
Department of Forestry and Fire Protection

P.O. Box 944246, Room 1646-9
Sacramento CA 94244-2460
Tel: (916) 653-7370 *Fax:* (916) 653-8961 State Agency

Commission on State Mandates

Original List Date: 07/05/2002 **Mailing Information** Completeness Determination

Last Updated: 07/05/2002

List Print Date: 07/05/2002

Mailing List

Claim Number: 01-TC-19

Issue: Cancer Presumption for Law Enforcement and Firefighters

TO ALL PARTIES AND INTERESTED PARTIES h commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

EXHIBIT H

APR 13 2004
COMMISSION ON STATE MANDATES

RESPONSE TO DRAFT STAFF ANALYSIS

Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000
Labor Code Section 3212.1
Claim no. CSM-01-TC-19

Cancer Presumption for Law Enforcement and Firefighters

INTRODUCTION:

Test claimants, California State Association of Counties - Excess Insurance Authority (CSAC-EIA) and the County of Tehama, submit the following in response to the Draft Staff Analysis issued by Commission staff on March 23, 2004. Two issues were raised in the Draft Staff Analysis. In each case, Staff's conclusions were based on inaccuracies and improper reasoning. Test claimants wish to set the record straight.

ISSUE 1: Does CSAC-EIA have standing as a claimant for this test claim?

Staff answers the above question in the negative concluding that CSAC-EIA is not a proper party to bring this test claim. Staff's reasoning as illustrated below is faulty and its conclusion is in error.

Although Staff acknowledges that the Government Code in sections 17550, 17551, 17518, and 17520 specifically states that joint powers agencies are proper parties to file test claims, it ignores that clear statement of law in favor of muddled legal analysis. As pointed out later in the Staff's analysis with regard to the second issue:

> 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 case, our fundamental task is to ascertain the intent of the lawmakers 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.]

> 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.[1]

Let us look at the result if that rule of law had been consistently applied throughout Staff's analysis. Government Code section 17518 defines a local agency as "any city, county, special district, authority, or other political subdivision of the state." Government Code section 17520 states, in pertinent part, " 'Special district' includes a redevelopment agency, a joint powers agency or entity, a county service area, a maintenance district or area, an improvement district or improvement zone, or any zone or area." Clearly, joint powers agency is a type of local agency that can file a test claim. No fancy legalese or reading between the lines is necessary to come to that conclusion.

Staff next turns to *Kinlaw v. State of California*[2] for some guidance. It offers none. The case concerns the ability of individual taxpayers to bring a court action against the state for violation of Article XIIIB, section 6. Factually the case has nothing in common with CSAC-EIA's test claim before this Commission. Staff attempts to tie the *Kinlaw* plaintiffs to CSAC-EIA by characterizing CSAC-EIA as an outsider and thus not a proper party to bring the test claim. Staff errs on two grounds. First, Staff presses the fact that CSAC-EIA is a separate entity and not a county. Indeed, CSAC-EIA is a separate entity comprised of counties to act as a mechanism to protect the counties' fisc. Although CSAC-EIA does not employ peace officers, when it comes to their workers' compensation, the buck stops at CSAC-EIA. So, CSAC-EIA, is not the outside, alien entity the Staff would have one believe. Second, Staff relies on a case about the filing of a lawsuit by taxpayers to set the legal issue of standing before this Commission. The matter of standing before the Commission is clearly set forth in the Government Code as set forth above and it need not rely on who can prosecute constitutional law cases in the courts.

Finally, Staff turns to *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates*[3] for the proposition that although redevelopment agencies are specifically listed as parties that can bring test claim, they can be excluded on other grounds. Again, the reach of Staff to create some nexus between that case and the test claim now before this Commission falls short. Redevelopment agencies and joint powers agencies are completely dissimilar entities. Redevelopment agencies are created by local governmental ordinance,[4] they have appointed board members who serve specific terms,[5]

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[1] Draft Staff Analysis, Pages 10-11, quoting *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911 and citing *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757. Footnotes omitted.

[2] (1991) 54 Cal.3d 326.

[3] (1991) 55 Cal.App.4th 976.

[4] Health and Safety Code section 33100 *et seq.*

and their powers are limited to suing, being sued, having a seal, making contracts, and creating bylaws and regulations.[6] On the other hand, joint powers agencies are created by agreement of the participating governmental entities,[7] they have freedom to create a board or not and no restrictions on membership save the designation of an auditor and a treasurer, [8] and their powers are only limited to those which are common to the members and the contract which created the joint powers agency.[9] In short, a joint powers agency is a mere extension of its membership — created by its members and empowered to do only what the members themselves are empowered to do.

Moreover, as was explained by the court in *San Marcos*, redevelopment agencies obtain their funding through a unique source: tax increment financing which is the difference in property taxes attributable to the work of the agency in redeveloping the area. CSAC-EIA and other joint powers agencies have no such funding source. The monies, in accord with Government Code section 6504, come from the counties:

> The parties to the agreement may provide that (a) contributions from the treasuries may be made for the purpose set forth in the agreement, (b) payments of public funds may be made to defray the cost of such purpose, (c) advances of public funds may be made for the purpose set forth in the agreement, such advances to be repaid as provided in said agreement, or (d) personnel, equipment or property of one or more of the parties to the agreement may be used in lieu of other contributions or advances. The funds may be paid to and distributed by the agency or entity agreed upon, which may include a nonprofit corporation designated by the agreement to administer or execute the agreement for the parties to the agreement. (Emphasis added.)

The counties acquire the funds as proceeds of taxes and transfer the funds as proceeds of taxes to CSAC-EIA. These funds do not lose their characterization in the hands of CSAC-EIA. The exclusion created by *San Marcos* is inapplicable to CSA-EIA and this test claim.

ISSUE 2: Is the test claim legislation subject to article XIIIB, section 6 of the California Constitution?

Staff answers the above question in the negative concluding that there is no reimbursable state mandate. Staff arrives at this erroneous conclusion through a contorted reading of

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[5] Health and Safety Code sections 33110 *et seq.*
[6] Health and Safety Code sections 33122 and 33125.
[7] Government Code sections 6502 and 6503.
[8] Government Code sections 6505.5, 6505.6, and 6508.
[9] Government Code sections 6502 and 6503.

the statute in question and an improper reliance on inapplicable case law.

Before jumping into the legal question at hand, a review of the dynamics of a lawsuit is in order. In general, the plaintiff files the lawsuit and the plaintiff has the burden of proof, that is, the plaintiff must prove the elements of the allegations. For example, in a case about a traffic collision, the plaintiff must prove that he was injured, the extent of his injury and that the defendant caused his injury. In the workers' compensation arena, the plaintiff worker, called the applicant, must prove that he was injured, the extent of his injury and the injury arose out of employment and was in the course of employment, the shorthand for which is AOE/COE. Depending on the injury, the AOE/COE portion of the claim can be tough to prove. If the applicant was at work and someone drops a heavy box on his foot, the causal connection between the injury and what happened at work is clear. On the other hand, if the applicant develops cancer during his employment trying to tie that cancer back to the workplace can be impossible.

The statute at issue is Labor Code section 3212.1, subdivision (d) which states:

> The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member 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.)

This statute addresses the problem of putting the burden on the applicant to prove the origin of the cancer: It places the burden on the employer to disprove that the cancer is work related. Under this statute, then, the AOE/COE portion of the applicant's claim is assumed as a matter of law and the applicant need only prove that he was injured and the extent of his injury. 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 is the creation of the presumption.

Staff relies on *City of Merced v. State of California*[10] to show that the presumption is not a mandate. Staff has misinterpreted the case and its applicability. The *City of Merced* involved a statute[11] which basically said that when the city opts to acquire property by

[10] (1984) 153 Cal.App.3d 777.
[11] Code of Civil Procedure §1263.510

eminent domain, the city had to pay for loss of goodwill. The city used eminent domain to acquire property and then filed a test claim for reimbursement of the cost of goodwill.[12] On appeal, the court pointed out that the use of eminent domain was optional: The city could have used other means to obtain the property.[13] Since the city could have avoided the costs by using another means to obtain the property, there was no mandate.

Staff argues that the rule of law from *City of Merced* should apply to this test claim pointing to the word "may" in the statute. The error in this reasoning is that the word "may" stands in regard to the option for the employer to raise a defense. The creation of the mandate lies in the word "shall" which relates to the presumption. To further illustrate, the application of the rule of law works like this: The city of Merced could have bought the property out right and could have avoided the application of the statute regarding goodwill. What can the local government employer do in this case to avoid that statute? Staff asserts that the answer has to do with the option for the employer to defend itself. So, can it be said that the employer who does not defend itself avoids the statute? No. That employer risks paying out on fraudulent or improper claims and may save some defense costs, but cannot avoid the presumption in favor of the employee created in the statute. So, then can it be said that the employer who does defend itself avoids the statute? No. That employer may have higher defense costs and reduces its risk of paying out on fraudulent or improper claims, but avoid the presumption in favor of the employee created in the statute. Clearly, the presumption is triggered by the filing of the claim by the applicant and cannot be avoided by any action of the local government employer. The employer is left to pursue the course of action that is most fiscally sound based on the facts in each case.

Finally, Staff relies on *Department of Finance v. Commission on State Mandates*[14] to focus on the voluntary nature of participating in programs which takes the resulting costs outside the mandate. Again, there is nothing voluntary about the local government employer's participation in the program when the statute by its own language and use of "shall" creates a mandatory presumption in favor of the applicant.

CONCLUSION:

Based on the preceding arguments, test claimants urge the Commission to find that CSAC-EIA is a proper party to bring such a test claim and to find the presumption creates a reimbursable state mandate under Article XIIIB, section 6 of the California Constitution.

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[12] *Id.* at p. 780.
[13] *Id.* at p. 783.
[14] (2003) 30 Cal.4th 727.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 8th day of April, 2004, at Mendocino, California, by:

Gina C. Dean,
Management Analyst
CSAC Excess Insurance Authority

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true..

Executed this 8th day of April, 2004, at Mendocino, California, by:

Richard Robinson,
County Administrative Officer
County of Tehama

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On April 13, 2004, I served:

RESPONSE TO DRAFT STAFF ANALYSIS

Chapter 595, Statutes of 1999 and Chapter 887, Statutes of 2000
Labor Code Section 3212.1
Claim no. CSM-01-TC-19

Cancer Presumption for Law Enforcement and Firefighters

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 13th day of April, 2004, at Sacramento, California.

Declarant

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Mr. Michael Havey
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Ms. Jennifer Osborn, Principal Program Budget Analyst
Department of Finance
915 L Street
Sacramento, CA 95814

Executive Director
California State Firefighters' Association
2701 K Street, Suite 201
Sacramento, CA 95816

Executive Director
California Peace Officers' Association
1455 Response Road, Suite 190
Sacramento, CA 95815

Chief of Fire Prevention
State Fire Marshall
CDF/State Fire Training
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Sacramento, CA 94244

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

Mr. George P. Parisotto, Esq.
Industrial Relations Counsel
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Nancy Wolfe, Assistant State Fire Marshal
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Sacramento, CA 94244-2460

Commissioner
California Highway Patrol
Executive Office
2555 First Avenue
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Mr. Richard W. Reed
Assistant executive Director
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Ms. Carol Berg
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Mr. Keith B. Peterson
Six Ten and Associates
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San Diego, CA 92117

Mr. Paul Minney
Spector, Middleton, Young & Minney
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Sacramento, CA 95825

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street #294
Folsom, CA 95630

Mr. David Wellhouse
David Wellhouse & Associates
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Ms. Bonnie Ter Keurst
County of San Bernardino
222 West Hospitality Lane
San Bernardino, CA 92415

Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P.O. Box 512
Riverside, CA 92502

EXHIBIT I

DEPARTMENT OF FINANCE
ARNOLD SCHWARZENEGGER, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

April 13, 2004

RECEIVED

APR 14 2004

COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms Higashi:

As requested in your letter of March 23, 2004, the Department of Finance has reviewed the draft of the staff analysis of the test claim submitted by the County of Tehama (claimant) asking the Commission to determine whether specified costs incurred under Chapter 595, Statutes of 1999 (AB 539, Papan), and Chapter 887, Statutes of 2000 (SB 1820, Burton), are reimbursable state mandated costs (Claim No. CSM-01-TC-019 "Cancer Presumption for Law Enforcement and Firefighters"). Commencing with page one, of the test claim, claimant has identified the following new duty, which it asserts are reimbursable state mandates:

- Increases in workers' compensation claims for firefighters

As the result of our review of the draft of the Commission's staff analysis, including new information we were not previously aware of (the *Weiss v. State Board of Equalization* [1953] court case) we have the following conclusions:

- We withdraw our former conclusion that the statute(s), as amended by the test claim legislation, may have resulted in a new state mandated program.
- Further, we concur with the draft staff analysis that the evidence of costs alone do not result in a reimbursable state-mandated program under Article XIII, section 6.
- We also concur with the determination of the draft staff analysis that the California State Association of Counties—Excess Insurance Authority does not have a direct interest in the claim, and thus does not have standing as a claimant.
- Finally, we concur with the draft staff analysis that the legislation does not mandate a new program or higher level of service on local agencies.

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

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your April 13, 2004 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Jennifer Osborn, Principal Program Budget Analyst at (916) 445-8913 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Nona Martinez

Nona Martinez
Assistant Program Budget Manager

Attachments

Attachment A

DECLARATION OF JENNIFER OSBORN
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-019

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter Nos. 595 and 887, Statutes of 1999, 2000, (AB 539, SB 1820) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

April 9, 2004
at Sacramento, CA

Jennifer Osborn

PROOF OF SERVICE

Test Claim Name: Cancer Presumption for Law Enforcement and Firefighters
Test Claim Number: CSM-01-TC-019

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, Floor, Sacramento, CA 95814.

On April 13, 2004, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Jim Spano
3301 C Street, Room 518
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

County of Tehama
Mr. Richard Robinson
County Clerk's Office
P.O. Box 250
Red Bluff, CA 96080

Ms. Gina Dean
California State Association of Counties
1100 K Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 13, 2004 at Sacramento, California.

Mary Latorre

Mary Latorre

Board of Control Decision

Adopted: 10/24/85
Amended: 3/26/87
WP 1098A

PARAMETERS AND GUIDELINES

Chapter 1568, Statutes of 1982
Firefiahter's Cancer Presumption

I. SUMMARY OF MANDATE

Chapter 1568, Statutes of 1982, added Section 3272.1 to the Labor Code. This section states that cancer that has developed or manifested itself in firefighters will be presumed to have arisen out of and in the course of employment, unless the presumption is controverted by other evidence. The presumption is extended to a firefighter following termination of service for a period of three calendar months for each year of requisite service, but not to exceed sixty (60) months in any circumstance, commencing with the last date actually worked in the specified capacity.

II BOARD OF CONTROL DECISION

On February 23, 1984, the Board of Control determined that fire departments will incur "costs mandated by the state" as a result of Chapter 7568, Statutes of 1982.

III. ELIGIBLE CLAIMANTS

Any fire department of a city, a county, a city and county, a local fire protection district, or other public or municipal corporation or political subdivision of the state which employs firefighters.

IV. OPERATIVE DATE OF MANDATE

The operative date of Chapter 1568, Statutes of 1982 is January 1, 1983 through January 1, 1989, unless a statute which is chaptered before January 1, 1989 deletes or extends the repealer date for Labor Code Section 3212.1.

V. PERIOD OF CLAIM

Claims may be filed for costs paid for workers' compensation claims where the date of injury is from January 1, 1983 to January 1, 1989, unless a statute which is chaptered before January 1, 1989 deletes or extends the repealer date for Labor Code Section 3212.1.

The claims must be submitted to the State Controller in accordance with existing statutory deadlines, except that a claimant shall be entitled to file a claim for all costs associated with a particular case upon

completion of the case or at such earlier or later time as costs have accrued and been paid on an interim or post-award/compromise and release basis.

VI. FORMULA FOR DETERMINATION OF CASES SUBJECT TO REIMBURSEMENT

Reimbursement requires a demonstration of elements as follows:

A. A claim under Chapter 1568, Statutes of 1982 is reimbursable if:

A. The worker is a firefighter within the meaning of Labor Code Section 3212.1; and

B. The worker has cancer which has caused the disability; and

C. The worker's cancer developed or manifested itself during a period while the worker was in the service of the employer, or within the extended period provided for in Labor Code Section 3212.1; and

D. The worker was exposed, while in the service of the employer, to one or more known carcinogens as defined by the International Agency for Research on Cancer, or the Director of the Department of Industrial Relations; and

E. The one or more carcinogens to which the worker was exposed are reasonably linked to the disabling cancer, as demonstrated by competent medical evidence.

VII. CLAIMING FORMULA

If a case is reimbursable under Section VI, fifty percent (50%) of the reimbursable costs as defined in Section VIII shall be paid to claiming agencies.

VIII. REIMBURSABLE COSTS

A. Insured Local Agencies and Fire Districts

Insured local entities may be reimbursed for any increases for workers' compensation premium costs directly and specifically attributable to Labor Code Section 3212.1.

B. Self-Insured Local Agencies

All actual costs of a claim based upon the presumption set forth in Labor Code Section 3212.1 are reimbursable, including but not limited to the following:

(1) Administrative Costs

(a) Staff Costs

1. Salaries and employee benefits;

2. Costs of supplies;

3. Legal counsel costs;

4. Clerical support;

5. Normal local rates of reimbursement for necessary and reasonable travel and related expenses for staff;

6. Amounts paid to adjusting agencies.

(b) Overhead Costs

Counties, cities and special districts may claim an indirect cost through an indirect cost rate proposal prepared in accordance with the provision of Federal Regulation OASC-10 (used in conjunction with FMC 74-4) as a percentage of direct salaries and wages. Indirect costs may include costs of space, equipment, utilities, insurance, administration, etc. (i.e., those elements of indirect cost incurred as the result of the mandate originating in the performing unit and the costs of central government services distributed through the central services cost allocation plan and not otherwise treated as direct costs). Computation of the indirect cost rate must accompany the claim showing how that vote was derived.

(2) Benefit Costs

Actual benefit costs under this presumption shall be reimbursable and shall include, but are not limited to:

(a) All medical expenses.

(b) Necessary and reasonable travel and related expenses.

(c) All compensation benefits, including but not limited to:

1. Permanent disability benefits;

2. Life pension benefits;

3. Death benefits;

4. Temporary disability benefits or full salary in lieu of temporary disability benefits as required by Labor Code Section 4850, or other local charter provision or ordinance in existence on January 1, 1983.

Provided, however, that salary in lieu of temporary disability benefits were payable under local charter provision or ordinance in existence on January 1, 1983. Provided, however, that salary in lieu of temporary disability benefits payable under local charter provision or ordinance shall be reimbursable only to the extent that those benefits do not exceed the benefits required by Labor Code Section 4850.

IX. OFFSETTING, SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimants experience as a direct result of this statute must be deducted from the costs claimed. Such offsetting savings shall include, but not be limited to, savings in the cost of personnel, service or supplies, or increased revenues obtained by the claimant..

In addition, reimbursement for this mandate received from any source, e.g., federal, state, etc., shall be identified and deducted from this claim.

X. SUPPORTING DATA

For auditing purposes, all costs claimed must be traceable to source documents or worksheets that show evidence of and the validity of such costs. These documents must be kept on file and made available on the request of the State Controller.

XI. REQUIRED CERTIFICATION

The following certification must accompany the claim:

IDOHEREBYCERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the Jaw have been complied with; and

THAT I am the person authorized by the local agency to file claims with the State of California.

Signature of Authorized Representative	Date
Title	Telephone Number

Adopted 10/24/85
WP 0664A

PARAMETERS AND GUIDELINES
Chapter 1568, Statutes of 1982
Workers' Compensation--Firefighters

I. SUMMARY OF MANDATE

Chapter 1568, Statutes of 1982, added Section 3212.1 to the Labor Code. This section states that cancer that has developed or manifested itself in firefighters will be presumed to have arisen out of and in the course of employment, unless the presumption is controverted by other evidence. The presumption is extended to a firefighter following termination of service for a period of three calendar months for each year of requisite service, but not to exceed sixty (60) months in any circumstance, commencing with the last date actually worked in the specified capacity.

II. BOARD OF CONTROL DECISION

On February 23, 1984, the Board of Control determined that fire departments will incur "costs mandated by the state" as a result of Chapter 1568, Statutes of 1982.

III. ELIGIBLE CLAIMANTS

Any fire department of a city, a county, a city and county, a local fire protection district, or other public or municipal corporation or political subdivision of the state which employs firefighters.

IV. OPERATIVE DATE OF MANDATE

The operative date of Chapter 1568, Statutes of 1982 is January 1, 1983 through January 1, 1989, unless a statute which is chaptered before January 1, 1989 deletes or extends the repealer date for Labor Code Section 3212.1.

V. PERIOD OF CLAIM

Claims may be filed for costs paid for workers' compensation claims where the date of injury is from January 1, 1983 to January 1, 1989, unless a statute which is chaptered before January 1, 1989 deletes or extends the repealer date for Labor Code Section 3212.1.

The claims must be submitted to the State Controller in accordance with existing statutory deadlines, except that a claimant shall be entitled to file a claim for all costs associated with a particular case upon completion of the case or at such earlier or later time as costs have accrued and been paid on an interim or post-award/compromise and release basis.

VI. FORMULA FOR DETERMINATION OF CASES SUBJECT TO REIMBURSEMENT

Reimbursement requires a demonstration of elements in the following (A), and either (B)(1) or (B)(2):

A. A claim under Chapter 1568, Statutes of 1982 is reimbursable if:

(1) The worker is a firefighter within the meaning of Labor Code Section 3212.1; and

(2) The worker has cancer which has caused the disability; and

(3) The worker's cancer developed or manifested itself during a period while the worker was in the service of the employer, or within the extended period provided for in Labor Code Section 3212.1; and

(4) The worker was exposed, while in the service of the employer, to one or more known carcinogens as defined by the International Agency for Research on Cancer, or the Director of the Department of Industrial Relations; and

(5) The one or more carcinogens to which the worker was exposed are reasonably linked to the disabling cancer, as demonstrated by competent medical evidence; and

(6) The worker's cancer is presumed to have arisen out of and in the course of employment pursuant to the presumption set forth in Labor Code Section 3212.1.

B. The claimant can demonstrate that the presumption determined the outcome of the case in one of two methods:

(1) Benefits paid pursuant to Findings and Award or Compromise and Release.

Where the benefits were paid pursuant to a Findings and Award or a Compromise and Release,

the claimant can demonstrate that the case was determined by the presumption by producing a Findings and Award issued by a Workers' Compensation Judge or the Workers' Compensation Appeals Board or a Compromise and Release approved by an order of a Workers' Compensation Appeals Judge or the Compensation Appeals Board which includes all of the required facts specified in subsection A(1)-(6), together with a finding that the presumption operated because either:

(a) No contrary evidence could have been introduced to rebut the elements set out in subsection A(1)-(5) and none could have been introduced to rebut the presumption set forth in subsection A(6); or

(b) The evidence to rebut the five elements set out above and to rebut the presumption did not in fact overcome the presumption.

(2) Benefits paid pursuant to informal ratings or in cases where no Informal rating occurred.

Where benefits are paid in cases involving an informal rating process where no formal board order is sought or procured, or in cases where there is not an informal rating because it is not required, claimants can demonstrate that the presumption determined the outcome of the case by producing the necessary documentation as a substitute for a Findings and Award or Compromise and Release as specified in subsection B(1) above.

VII. CLAIMING FORMULA

If a case is reimbursable under Section VI, sixty-five percent (65%) of the reimbursable costs as defined in Section VIII shall be paid to claiming agencies.

VIII. REIMBURSABLE COSTS

A. Insured Local Agencies and School Districts

Insured local entities may be reimbursed for any increases for workers' compensation premium costs directly and specifically attributable to Labor Code Section 3212.1.

B. Self-Insured Local Agencies

All actual costs of a claim based upon the presumption set forth in Labor Code Section 3212.1 are reimbursable, including but not limited to the following:

(1) Administrative Costs

(a) Staff Costs

1. Salaries and employee benefits;

2. Costs of supplies;

3. Legal counsel costs;

4. Clerical support;

5. Normal local rates of reimbursement for necessary and reasonable travel and related expenses for staff;

6. Amounts paid to adjusting agencies.

(b) Overhead Costs

Counties, cities and special districts may claim an indirect cost through an indirect cost rate proposal prepared in accordance with the provision of Federal Regulation OASC-10 (used in conjunction with FMC 74-4) as a percentage of direct salaries and wages. Indirect costs may include costs of space, equipment, utilities, insurance, administration, etc. (i.e., those elements of indirect cost incurred as the result of the mandate originating in the performing unit and the costs of central government services distributed through the central services cost allocation plan and not otherwise treated as direct costs). Computation of the indirect cost rate must accompany the claim showing how that vote was derived.

(2) Benefit Costs

Actual benefit costs under this presumption shall be reimbursable and shall include, but are not limited to:

(a) All medical expenses.

(b) Necessary and reasonable travel and related expenses.

(c) All compensation benefits, including but not limited to:

1. Permanent disability benefits;

2. Life pension benefits;

3. Death benefits;

4. Temporary disability benefits or full salary in lieu of temporary disability benefits as required by Labor Code Section 4850, or other local charter provision or ordinance in existence on January 1, 1983. Provided, however, that salary in lieu of temporary disability benefits were payable under local charter provision or ordinance in existence on January 1, 1983. Provided, however, that salary in lieu of temporary disability benefits payable under local charter provision or ordinance shall be reimbursable only to the extent that those benefits do not exceed the benefits required by Labor Code Section 4850.

IX. OFFSETTING SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimants experience as a direct result of this statute must be deducted from the costs claimed. Such offsetting savings shall include, but not be limited to, savings in the cost of personnel, service or supplies, or increased revenues obtained by the claimant.

In addition, reimbursement for this mandate received from any source, e.g., federal, state, etc., shall be indentified and deducted from this claim.

X. SUPPORTING DATA

For auditing purposes, all costs claimed must be traceable to source documents or worksheets that show evidence of and the validity of such costs. These documents must be kept on file and made available on the request of the State Controller.

XI. REQUIRED CERTIFICATION

The following certification must accompany-the claim:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, or the Government Code and other applicable provisions of the law have been complied with; and THAT I am the person authorized by the local agency to file claims with the State of California.

Signature of Authorized Representative

Date

Title

Telephone Number

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of:	)	
	)	
County of Sacramento	)	No. CSM-4416
	)	Labor Code
Claimant	)	Section 3212.1
	)	Chapter 1171, Statutes of 1989
	)	Cancer Presumption-Peace Officers

DECISION

I, ROBERT W. EICH, declare:

I am the Executive Director of the Commission on State Mandates. In my capacity as Executive Director, I am the custodian of the records of the Commission on State Mandates.

Attached is a true and correct copy of the Proposed Statement of Decision that was adopted by the Commission on State Mandates on August 27, 1992, as its Decision in the above-entitled matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 2, 1992, at Sacramento, California.

Robert W. Eich
ROBERT W. EICH

a:sta.dec

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment and business address is 1414 K Street, Suite 315, Sacramento, California 95814.

On September 2, 1992, I served the attached Statement of Decision regarding Cancer Presumption-Peace Officers by placing a true copy thereof in an envelope addressed to each of the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

(See the attached mailing list.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 2, 1992, at Sacramento, California.

Debra J. Oliver
Debra Oliver

a:dec.ser

Hearing: August 27, 1992
File Number: CSM 4411
Staff: Michael Coleman
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STATEMENT OF DECISION
TEST CLAIM
APPROVED MANDATE
Labor Code Section 3212.1
Chapter 1171, Statutes of 1989
Cancer Presumption-Peace Officers

Executive Summary

The Commission on State Mandates, at its July 23, 1992 hearing, determined that a reimbursable state mandated program exists under the provisions of Labor Code section 3212.1

Member Creighton moved to adopt the staff recommendation to approve the test claim. Member Romero seconded the motion. Without objection, the motion carried.

Staff has prepared the attached proposed statement of decision which identifies the basis for the Commission's decision.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: County of Sacramento Claimant	No. CSM-4416 Labor Code Section 3212.1 Chapter 1171, Statutes of 1989 Cancer Presumption-Peace Officers

STATEMENT OF DECISION

This claim was heard by the Commission on State Mandates (Commission) on July 23, 1992, in Sacramento, California, during a regularly scheduled hearing.

Mr. Allan Burdick, Mr. Ed Lambert, Ms. Linda Sera and Mr. Anthony Wright appeared on behalf of County of Sacramento. Mr. James Apps appeared on behalf of Department of Finance.

Evidence both oral and documentary having been introduced, the matter submitted, and vote taken, the Commission finds:

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ISSUES

Do the provisions of Labor Code section 3212.1, as amended by Chapter 1171, Statutes of 1989, impose a new program or higher level of service in an existing program on local agencies, within the meaning of Government Code 17514 and section 6, article XIIIB of the California Constitution?

If SO, are local government agencies entitled to reimbursement pursuant to section 6 of article XIIIb?

BACKGROUND AND FINDINGS OF FACT

County of Sacramento (Sacramento) filed this test claim with the Commission on December 3, 1991.

The elements for filing a test claim, as specified in section 1183 of Title 2 of the California Code of Regulations, were satisfied.

Sacramento alleged that Chapter 1171, Statutes of 1989 (Chapter 1171/89), resulted in a reimbursable state mandate by amending Labor Code section 3212.1, to add cancer to the types of diseases/injuries which, when diagnosed in peace affixers is presumed to be a job related illness for workers' compensation purposes. Sacramento alleged that the pravisions of this statute are identical to the current reimbursable state mandate, Chapter 1568, statutes of 1982, (Chapter 1568/82) which made cancer a presumed workers' compensation injury for firefighters,

Sacramento alleged that prior to the amendment of Labor Code section 3212.1 by Chapter 1171/89, there was no cancer presumption for peace officers.

Labor Code 3212.1, as amended by Chapter 1171/89, states in pertinent part:

> "In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, ... and peace officers as defined in Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code who are primarily engaged in active law enforcement activities, the term "injury" as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonable linked to the disabling cancer.
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> "**********
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> "The cancer so developing or manifesting itself in these cases 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 is bound to find in accordance with it. This presumption shall be extended to a member 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."

(Amendments made by Chapter 1171/89 are underlined)

The Commission noted that Labor Code 3212.1, as amended by Chapter 1171/89, extends the cancer presumption benefit to peace officers as specified in Penal Code sections 830.1 and 830.2 subdivision (a) which includes peace officers employed by noted state agencies as well as those employed by local agencies.

The Commission found that prior to the amendment of Labor Code section 3212.1, there was no presumption regarding workers' compensation cancer claims made by peace officers. Peace officers' cancer claims were subject to the same conditions as that of most other employees. That is, in order to receive workers' compensation for cancer claims, the burden of proof rested with the peace officer to show:

1) an employment relationship
2) an injury occurred in the course of that relationship
3) that the cancer was psoximately caused by the employment.

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In short, the Commission noted that Chapter 1171/89, amended Labor Code section 3212.1, to provide an additional benefit to peace officers by removing the burden of proof on the employee to provide evidence that the cancer was proximately caused by the employment. Instead, the cancer is presumed to be caused by the employment, provided that the peace officer can show exposure to a recognized carcinogen while employed as a peace officer and establish a reasonable link between the carcinogen and the cancer.

The Commission also noted that since the February 23, 1984, Board of Control decision on Chapter 1568/82, the California Supreme Court issued its decision in County of Los Angeles v. State of California (1987) 43 Cal.3d 46. In that case, the court determined that providing workers' compensation benefits by local agencies is not subject to reimbursement as a state mandated program. However, the cancer presumption benefit extended to peace officers and firefighters is distinctive and is a reimbursable state mandated program because it requires local governments to implement a state policy of providing an additional benefit to select employees that carry out the governmental function of providing public safety.

The Commission found that by amending Labor Code section 3212.1 to extend the cancer presumption benefit to peace officers, the Legislature intended to provide peace officers with an additional benefit not available to most other workers. The Commission observed the Zipton v. Workers' Compensation Appeals Board case (1990) 218 Cal.App.3d 980, where the court noted that:

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> "The foremost purpose of the presumptions of industrial causation found in Labor Code [section 3212 et seq.] is to provide additional benefits to certain public employees who provide vital. and hazardous services, by easing the burden of proof of industrial causation* "

The Commissisn observed that the County of Los Angeles court decision also went on to define the term "program" for purposes of costs mandated by the state. On page 56 of its decision, the court determined the following:

> ". . . . We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term-programs that carry out the governmental function of providing services to the public, or laws which, to implement state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."

The Commission found that Labor Code section 3212.1 meets the first part of the County of Los Angeles definition of the term program, for the purposes of costs mandated by the state, since both firefighters and peace officers carry out the governmental function

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of providing public safety. The Commission noted the Carmel Valley Fire Protection District v. State of California (1987) 190 Cal.App.3d 521, where the court stated on page 537:

> "First, fire protection is a peculiarly governmental function.... 'Police and fire protection are two of the most essential and basic functions of local government'".

The Commission found that Labor Code section 3212.1 also meets the second part of the County of Los Angeles definition of the term program for the purposes of cost mandated by the state since it imposes unique requirements on local governments by requiring them to implement a state policy of providing cancer presumption as an additional benefit to peace officers and firefighters.

The Commission found that Chapter 1171/89 requires local governments to implement a state policy by providing cancer presumption as an additional benefit to peace officers.

APPLICABLE LAW RELEVANT TO THE DETERMINATION OF A REIMBURSABLE STATE MANDATED PROGRAM

Government Code section 17500 and following, and section 6, article XIIIB of the California Constitution and related case law.

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CONCLUSION

The Commission determines that it has the authority to decide this claim under the provisions of Government Code sections 17500 and 17551, subdivision (a).

The Commission concludes that the provisions of Labor Code section 3212.1, as amended by Chapter 1171/89, impose a new program or higher level of service in an existing program on local agencies, within the meaning of Government Code 17514 and section 6, article XIIIB of the California Constitution.

The foregoing determination pertaining to Labor Code section 3212.1, is subject to the following conditions:

> The determination of a reimbursable state mandated program does not mean that all increased costs claimed will be reimbursed. Specifically, reimbursement shall be limited to the additional workers' compensation costs directly attributable to the cancer presumption benefit. Reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program; approval of a statewide cost estimate; a specific legislative appropriation for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller's Office.

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If the statewide cost estimate for this mandate does not exceed one million dollars ($1,000,000) during the first twelve (12) month period following the operative date of the mandate, the Commission shall certify such estimated amount to the State Controller's Office, and the State Controller shall receive, review, and pay claims from the State Mandates Claims Fund as claims are received. (Government Code section 17610.)

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Adopted: 1/21/93

PARAMETERS & GUIDELINES
Chapter 1171, Statutes of 2989
Cancer Presumption-Peace Officers

I. SUMMARY OF MANDATE

Chapter 1171, Statutes of 1989, amended Section 3212.1 of the Labor Code to add "peace officers as defined in Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code who are primarily engaged in active law enforcement activities" to the category of public employees that are covered by its provisions. Previously, the provisions only applied to public sector fire fighting personnel. This section states that cancer that has developed or manifested itself in peace officers will be presumed to have arisen out of and in the course of employment, unless the presumption is controverted by other evidence. The presumption is extended to a peace officer following termination of service for a period of three calendar months for each year of requisite service, but not to exceed sixty (60) months in any circumstance, commencing with the last date actually worked in the specified capacity.

II. COMMISSION ON STATE MANDATES' DECISION

On July 23, 1992, the Commission on State Mandates determined that local law enforcement agencies will incur "cost mandated by the state" as a result of Chapter 1171, Statutes of 1989.

III. ELIGIBLE CLAIMANTS

Any law enforcement department or office of a city, county, a city and county, a special district or school district of the state which employs peace officers as defined in Sections 830.1 and 830.2 of the Penal Code and incurs increased cost as a result of this statute.

IV. PERIOD OF CLAIM

Chapter 1171/89 became effective on September 30, 1989. Section 17557 of the Government Code provides that a test claim must be submitted on or before December 31 following a given fiscal year to establish eligibility for that fiscal year. The test claim for Chapter 1171/89 was initially filed on December 30, 1991., therefore the reimbursable costs

to the local agencies are all such permitted costs incurred on or after July 1, 1990.

V. FORMULA FOR DETERMINATION OF CASES SUBJECT TO REIMBURSEMENT

Reimbursement requires a demonstration of elements as follows:

A. A claim under Chapter 1171, Statutes of 1989 is reimbursable if:

1. The worker is a peace officer within the meaning of Penal Code Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code who are primarily engaged in active law enforcement activities;

2. The worker has cancer which has caused the disability;

3. The worker's cancer developed or manifested itself during a period while the worker was in the service of the employer, or within the extended period provided or in Labor Code Section 3212.1;

4. The worker was exposed, while in the service of the employer, to one or more known carcinogens as defined by the International Agency for Research on Cancer, or the Director of the Department of Industrial Relations; and

5. The one or more carcinogens to which the worker was exposed are reasonably linked to the disabling cancer, as demonstrated by competent medical evidence.

VI. REIMBURSABLE COSTS

A case meeting all the above five conditions is eligible for reimbursement at fifty percent (50%) of the reimbursable costs defined below.

A. Insured Local Agencies

If an insured local entity (insured through State Compensation Insurance Fund) incurred any increased costs as a result of Chapter 1171/89, they would be entitled to seek reimbursement for such costs which are specifically attributable to Labor Code Section 3212.1.

If the local entity can show that its experience modification premium was increased or its dividends were decreased, 50% of those respective increases or decreases will be reimbursed.

B. Local Agencies Covered by a Joint Powers Agreement or Other Carrier

Local agencies covered by a joint powers agreement or other insurance carrier for workers' compensation may claim in the same manner as above for insured local agencies provided;

(1) Insurance premiums or contributions are based on the Workers' Compensation Insurance Rating Bureau rates and the current loss experience modification factor, and

(2) The insurer is responsible for claims of terminated or withdrawn local agencies if such claims arose while insured by the insurer.

C. Self-Insured Local Agencies

All actual costs of a claim based upon the presumption set forth in Labor Code Section 3212.1 are reimbursable, including but not limited to the following:

(1) Administrative Costs

(a) Staff Costs

- Salaries and employee benefits
- Costs of supplies
- Legal counsel costs
- Clerical support
- Normal local rates of reimbursement for necessary and reasonable travel and related expenses for staff
- Amounts paid to adjusting agencies

(b) Overhead Costs

Counties, cities and special district may claim indirect cost through an indirect cost rate proposal prepared in accordance with the provision of the Office of Management and Budget Circular No. A-87, "Cost Principles for Grants to State and Local Governments" as a percentage of direct salaries and wages. Indirect costs amy include costs of

space, equipment, utilities, insurance, administration, etc. (i.e., those elements of indirect costs incurred as the result of the mandate originating in the performing unit and the costs of central government services distributed through the central services cost services cost allocation plan and not otherwise treated as direct costs). Computation of the indirect cost rate must accompany the claim showing how the rate was derived.

(2) Benefit Costs

Actual benefit costs under this presumption shall be reimbursable and shall include, but are not limited to:

- Permanent disability benefits
- Death benefits
- Temporary disability benefits or full salary in lieu of temporary disability benefits as required by Labor Code Section 4850, or other local charter provision or ordinance in existence on January 1, 1990. Provided, however, that salary in lieu of temporary disability benefits were payable under local charter provision or ordinance shall be reimbursable only to the extent that those benefits do not exceed the benefits required by Labor Code Section 4850.

VII. OFFSETTING SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimants experience as a direct result of this statute must be deducted from the cost claimed. Such offsetting savings shall include, but not be limited to, savings in the cost of personnel, service or supplies, or increased revenues obtained by the claimant. In addition, reimbursements received from any source (e.g., federal,state, etc.) for this mandate shall be identified and deducted from the claim.

VIII. CLAIMING FORMS AND INSTRUCTIONS

Supporting Data

For auditing purposes, all costs claimed must be traceable to source documents or worksheets that sho· evidence of the validity of such costs. These documents must be kept on file and made available on the request of the State Controller.

Required Certification

The following certification must accompany the claim:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claims with the State of California.

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