COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SRAMENTO, CA 95814
ONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

May 6, 2004

Mr. Allan P. Burdick
Ms. Juliana F. Gmur
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95 84 1

RE: **Final Staff Analysis/Proposed Statement of Decision/Hearing; Date**
Cancer Presumption for Law Enforcement and Firefighters (0 1 -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 final staff analysis and proposed statement of decision for this test claim are complete and enclosed for your review.

Hearing

The test claim and proposed statement of decision are set for hearing on **Thursday,** May **27, 2004, at 9:30 a.m.** in Room 126 of the State Capitol, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, or if other witnesses will appear.

Special Accommodations

For any special accommodations **such** as a sign language interpreter, an assistive listening device, materials in an altemative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

If you have any questions on the above, please contact Camille Shelton at (916) 323-3562.

Sincerely,

Paula Higashi
Executive Director

Enc.

c. Mailing list

MAILED: ✓
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J:/mandates/2001/01-TC-19/FSA
Hearing Date: May 27, 2004

ITEM 5
TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code Section 32 12.1

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

Cancer Presumption for Law Enforcement and Firefighters

(01-TC-19)

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

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 Califomia 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 32 12.1, as amended by the test claim legislation, is not subject to article XIII B, section 6 of the Califomia Constitution because it does not mandate a new program or higher level of service on local agencies.

Staff Recommendation

Staff recommends that the Cornmission 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	Comrnission 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
02104104	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 32 12.1, 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.'

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.*

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 32 12.1, 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 32 12.1 claims, and benefit costs including medical costs, travel expenses, perrnanent 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 32 12.1, as amended by Statutes 1989, chapter 1171 *(Cancer Presumption – Peace Officers,* CSM 44 16.) 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 175 14. 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." "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 175 18 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 fonned 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 cornmon 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.*' 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.4tl-r 1802, 18 17; *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 1 7520.[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 fonnerly 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 32 12.1, 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 32 12.1, 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.'" 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, *Ziptcsupra,* 8 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. 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 Califomia 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 Cornmission 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?

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 Yubn* (1992) 8 Cal.App.4th 2 14, 227.

[57] *City of San Jose, supra,* 45 Cal.App.4th at 18 16-18 17; *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.

J:/mandates/2001/01-TC-19/PropSOD
Hearing Date: May 27, 2004

ITEM 6
DENIED TEST CLAIM
PROPOSED STATEMENT OF DECISION

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)

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

EXECUTIVE SUMMARY

The sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the May 27, 2004 hearing on this test claim.[1]

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page two, which accurately reflects the staff recommendation on the test claim. Minor changes to reflect the hearing testimony and the vote count will be included when issuing the final Statement of Decision.

However, if the Commission's vote on Item 5 modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. In the alternative, if the changes are significant, it is recommended that adoption of a Proposed Statement of Decision be continued to the July 2004 Commission hearing.

[1] California Code of Regulations, title 2, section 1188.1, subdivision (g).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3212.1; Statutes 1999, Chapter 595, Statutes 2000, Chapter 887; Filed on June 27, 2002; By California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and County of Tehama, Claimants.	No. Ol-TC-19 *Cancer Presumption for Law Enforcement and Firefighters* PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Proposed for adoption on May 2 7, 2004)*

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 27, 2004. [Witness list will be included in the final Statement of Decision.]

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

The Commission [adopted/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision].

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.[2]

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.[3] In 1982, the Legislature enacted Labor Code section 32 12.1, 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

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[2] 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."

[3] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

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
- 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.[4]

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*[5], 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.[6] 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.[7]

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[4] 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) 2 18 Cal.App.3d 980, *988, fn. 4.)*

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

[6] *Id.* at page 99 1.

[7] *Id.* at page 990.

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 32 12.1 contained a "limited and disputable presumption."' 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.[9]

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*.[10] 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 defmed 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 32 12.1, 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,

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

[9] *Id.* at page 1128.

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

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 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 tire 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 32 12.1, 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 32 12.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 32 12.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 117 1 *(Cancer Presumption – Peace Officers,* CSM 44 16.) 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 175 14. 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

[11] Exhibit J to Item 5, May 27, 2004 Commission Hearing

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 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?

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]

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[12] Test Claim, page 3 (Exhibit A to Item 5, May 27, 2004 Cornmission Hearing).

[13] Claimants' Response to State Agency Comments, page 3 (Exhibit D to Item 5, May 27, 2004 Commission Hearing).

[14] Exhibit B to Item 5, May 27, 2004 Commission Hearing.

[15] Exhibit I to Item 5, May 27, 2004 Commission Hearing.

[16] Exhibit C to Item 5, May 27, 2004 Commission Hearing.

COMMISSION FINDINGS

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 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, 8 1.

[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?

The Commission 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 1755 1 authorize local agencies and school districts to file test claims seeking reimbursement pursuant to article XIII B, section 6. Government Code section 175 18 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, 33 l-334; Government Code sections 17551, 17552.

[26] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, *18 17; 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 to Item 5, May 27, 2004 Commission Hearing).

[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 1 7520.[31]

Based on the facts of this case, the Commission 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 32 12.1, 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 to Item 5, May 27, 2004 Commission Hearing).

[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, to Item 5, May 27, 2004 Commission Hearing.)

[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, the Commission 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?

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

Labor Code section 3212.1, 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 to Item 5, May 27, 2004 Commission Hearing.

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 32 12.1 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 deterrnined 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

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[38] Claimants' response to draft staff analysis (Exhibit H, p. 4, to Item 5, May 27, 2004 Cornmission Hearing).

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

[40] *Estate of Griswald* (200 1) 25 Cal.4th 904, 9 10-9 11.

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

> 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 .[42]

In the present case, the claimant reads requirements into Labor Code section 32 12.1, 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

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[42] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 18 16-l 8 17.

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

[44] *Id.* page 737.

[45] *Ibid.*

[46] *Id.* page 743.

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

[48] *Ibid.*

> 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.][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 detertnine 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

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[49] *Id.* at page 73 1.

[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.

and does not constitute an arbitrary action by the agency.[53] 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.) [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, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on local agencies.[58]

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

[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, the Commission need not reach the other issues raised by the Department of Industrial Relations.

CONCLUSION

Based on the foregoing, the Commission 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. The Commission further concludes that Labor Code section 32 12.1, 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.

Commission on State Mandates

Original List Date: 7/5/2002
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Claim Number: OI-TC-19
Issue: Cancer Presumption for Law Enforcement and Firefighters

Mailing Information: Other

Mailing List

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Mr. Mark Sigman
Riverside County Sheriffs Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502

Tel: (909) 955-2700
Fax: (909) 955-2720

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

Tel: (916) 646-1400
Fax: (916) 646-1300

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Tel: (916) 939-7901
Fax: (916) 939-7801

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

Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Michael Havey
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 445-8757
Fax: (916) 323-4807

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

Tel: (916) 446-7517
Fax: (916) 446-2011

Mr. Richard Robinson County of Tehama County Clerk's Office P.O. BOX 250 Red Bluff, CA 96080	**Claimant** Tel: (916) 000-0000 Fax: (916) OOO-OOOO
Mr. Leonard Kaye, Esq. County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213) 974-8564 Fax: (213) 617-8106
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 924150018	Tel: (909) 386-8850 Fax: (909) 386-8830
Executive Director California State Firefighters' Association 2701 K Street, Suite 201 Sacramento, CA 95816	Tel: (800) 451-2732 Fax: (916) 446-9889
Mr. Keith B. Petersen SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Tel: (858) 514-8605 Fax: (858) 514-8645
Mr. James Wright Department of Forestry and Fire Protection (A-45) P.O. Box 944246, Room 1646-9 Sacramento, CA 94244-2460	Tel: (916) 653-7370 Fax: (916) 653-8961
Mr. Keith Gmeinder Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: (916) 445-8913 Fax: (916) 327-0225
Executive Director California Peace Officers' Association 1455 Response Road, Suite 190 Sacramento, CA 95815	Tel: (916) 263-0541 Fax: (916) OOO-OOOO
Ms. Gina Dean California State Association of Counties 1100 K Street Sacramento, CA 95814	**Claimant** Tel: (916) 631-7363 Fax: (916) OOO-OOOO

Mr. Allan Burdick **MAXI MUS** 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	**Claimant Representative** Tel: (916) 485-8102 Fax: (916) 485-0111
Mr. Steve Smith Steve Smith Enterprises, Inc. 4633 Whitney Avenue, Suite A Sacramento, CA 95821	Tel: (916) 483-4231 Fax: (916) 483-1403
Ms, Leslie McGill California Peace Officers' Association 1455 Response Road, Suite 190 Sacramento, CA 95815	Tel: (916) OOO-OOOO Fax: (916) OOO-OOOO
Mr. Gary J. O'Mara Department of Industrial Relations Office of the Director 455 Golden Gate Avenue, Tenth Floor San Francisco, CA 94102	Tel: (4 15) 703-4240 Fax: (415) 703-5058
Mr. J. Bradley Burgess Public Resource Management Group 1380 Lead Hill Boulevard, Suite #106 Roseville, CA 95661	Tel: (916) 677-4233 Fax: (916) 677-2283
Mr. Jim Jaggers Centration, Inc. 12150 Tributary Point Drive, Suite 140 Gold River, CA 95670	Tel: (916) 351-1050 Fax: (916) 351-1020
Mr. Todd Wherry MCS Education Services 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Tel: (916) 669-5119 Fax: (916) 669-0888
Ms. Juliana Gmur MAXIMUS 4320 Auburn Boulevard, Suite 2000 Sacramento, CA 95841	Tel: (916) 485-8102 Fax: (916) 485-01 11