

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

RICHARD GREEN (deceased)/CHRISTY GREEN, *Applicant*

vs.

**STATE OF CALIFORNIA - CALIFORNIA HIGHWAY PATROL, legally uninsured,
administered by STATE COMPENSATION INSURANCE FUND/STATE CONTRACT
SERVICES, *Defendants***

**Adjudication Numbers: ADJ12638806, ADJ12014246
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Christy Green (hereafter applicant) seeks reconsideration of the Joint Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on April 20, 2020, wherein the WCJ found in pertinent part that defendant rebutted the Labor Code section 3212.1 cancer presumption, and that the lung cancer, sustained by Richard Green (hereafter Mr. Green), resulting in his death on September 13, 2019, was not an injury arising out of and occurring in the course of employment (AOE/COE).

Applicant contends that the reports from internal medicine qualified medical examiner (QME) Jonathan C. Green, M.D., are substantial evidence that Mr. Green developed the lung cancer during the period of the Labor Code section 3212.1(d) time period extension, so the cancer presumption was not rebutted, and the presumption is applicable to Mr. Green's injury claim.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

¹ We note that the title in our Opinion Granting Reconsideration did not include case number ADJ12638806, this was a clerical error that is hereby corrected. The term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. The Appeals Board may correct a clerical error at any time without the need for further hearings, even after the statutory time for reconsideration is passed. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145].)

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to find that Richard Green sustained injury arising out of and occurring in the course of employment to his lungs in the form of cancer, and resulting in his death on September 13, 2019 (Finding of Fact 1); that pursuant to Labor Code section 5412, the correct date of injury, in case number ADJ12638806, is June 11, 2018 (Finding of Fact 6); that applicant met the burden of proof to establish industrial causation of the lung cancer in case number ADJ12014246 (Finding of Fact 7); and that defendant did not rebut the Labor Code section 3212.1 presumption of injury in case number ADJ12638806 (Finding of Fact 8). Based thereon, we will amend the Order to defer all other issues raised by the parties at the March 2, 2020 trial, and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Mr. Green claimed injury in the form of lung cancer while employed by defendant as a traffic officer during the period from August 10, 1981, through December 31, 2006 (ADJ12014246). Applicant claimed that Mr. Green sustained injury in the form of lung cancer while employed by defendant as a traffic officer during the period from August 10, 1981, through December 31, 2006, that the lung cancer resulted in Mr. Green's death on September 13, 2019, and that she was wholly dependent on Mr. Green (ADJ12638806).

QME Dr. Jonathan Green evaluated Mr. Green on August 15, 2019. Dr. Green examined Mr. Green, took a history, and reviewed the medical record. He diagnosed Mr. Green as having, "Metastatic carcinoma [cancer] of the lung." (Joint Exh. 101, Dr. Green, August 22, 2019, p. 10.)

Addressing the issue of at what time the lung cancer had developed, Dr. Green stated:

With regard to the Presumption, the patient was exposed to products of combustion and diesel exhaust, both of which as per the IARC [International Agency for Research on Cancer] Guidelines are associated with the development of lung cancer. ¶ The patient was, indeed, exposed to products of combustion and diesel exhaust throughout his career with the CHP. ... [A]s will be described below, the latency period is such that even prior to 2013, the cancer was developing. ¶ With regard to the latency period, the reader should note that for solid tumors of this type, the average latency is about ten years. Cancer does not develop "overnight," as it were, as there needs to be a mutation to cause cancer development. ¶ The first manifestation of cancer was June 11, 2018, when the patient first was coughing up blood. Ten years prior to that would be

June 2008. That would be when, in my expert opinion, the first mutation occurred and the cancer began to develop.
(Joint Exh. 101, pp. 12 – 13.)

On September 13, 2019, Mr. Green died as a result of the metastatic lung cancer. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 2, 2020, p 4.)

In his December 14, 2019 supplemental report Dr. Green reiterated his opinion:

Also, I must hasten to add, as I noted in my initial report of August 22, 2019, pages 12 and 13, the latency period is at least 10 years which would point to the onset of the cancer in approximately June 2008. Cancer then developed slowly over the years ...
(Joint Exh. 103, Dr. Green, December 14, 2019, p. 2.)

The parties proceeded to trial on March 2, 2020. The cases were consolidated for trial; the issues submitted for decision in both cases included injury AOE/COE and whether the Labor Code section 3212.1 presumption was applicable. (MOH/SOE, pp. 3 – 4.)

DISCUSSION

Pursuant to Labor Code section 3212.1:

(a) This section applies to all of the following: ... (4) 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. ...

(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 120 months in any circumstance, commencing with the last date actually worked in the specified capacity.
(Lab. Code, § 3212.1.)

The parties do not dispute that Mr. Green was employed as traffic officer by defendant during the period from August 10, 1981, through December 31, 2006. Nor do they dispute that the cancer presumption was extended to March 31, 2013. (See Answer, p. 2 and Petition, p. 2)² The actual dispute is whether Mr. Green's lung cancer developed or manifested itself during the period prior to March 31, 2013.

The California Supreme Court explained that:

We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230 [38 Cal.Comp.Cases 652], citations and quotation marks deleted.)

In plain language, Labor Code section 3212.1 refers to cancer that is "developing or manifesting". Looking at the statutory language, it is clear that the intent of the legislatures was to differentiate between the meaning of the words "developing" and "manifesting." (See *Moyer v. Workmen's Comp. Appeals Bd.*, *supra*.)

Manifestation occurs when the injured worker first has symptoms, even if the injured worker has not yet been diagnosed with cancer. (*City of Los Angeles/Los Angeles Police Department v. Workers' Comp. Appeals Bd. (Darling)* (2005 W/D) 70 Cal.Comp.Cases 1147; *County of El Dorado v. Workers' Comp. Appeals Bd. (Klatt)* (2000 W/D) 65 Cal.Comp.Cases 1437.) Development predates manifestation and determining when a cancer develops or begins developing requires medical expertise. (*Law v. Workers' Comp. Appeals Bd.* (2003 W/D) 68 Cal.Comp.Cases 497.) When there is substantial medical evidence that a cancer began developing during a covered employment, the injured worker is entitled to the Labor Code section 3212.1 presumption. (*City of Fresno v. Workers' Comp. Appeals Bd. (Case)* (2013 W/D) 78 Cal.Comp.Cases 987.)

Here, Dr. Green described the latency period as the time between when the cancer first develops and when it first causes symptoms, i.e. when it manifests. As quoted above, Dr. Green stated:

² The Petition actually indicates that the end date of the extension period is March 30, 2013, but the one day difference is not significant as to the issues addressed herein.

[T]he latency period is such that even prior to 2013, the cancer was developing. ¶ With regard to the latency period, the reader should note that for solid tumors of this type, the average latency is about ten years. Cancer does not develop "overnight," as it were, as there needs to be a mutation to cause cancer development. ¶ The first manifestation of cancer was June 11, 2018, when the patient first was coughing up blood. Ten years prior to that would be June 2008. (Joint Exh. 101, pp. 12 – 13; see also Joint Exh. 103, p. 2.)

Dr. Green noted that Mr. Green was exposed to products of combustion and diesel exhaust throughout his career with the CHP, both of which, pursuant to the IARC Guidelines are associated with the development of lung cancer. (Joint Exh. 101, p. 12.) He explained that the lung cancer developed in June 2008, and that the first manifestation occurred on June 11, 2018. There is no evidence in the trial record that contradicts or is otherwise inconsistent with Dr. Green's opinions. Thus, his reports are substantial evidence that Mr. Green sustained a cumulative injury AOE/COE in the form of metastatic lung cancer and that the cancer developed in June 2008, during the period of the Labor Code section 5212.1(d) extension of time.

Accordingly, we amend the F&O to find that Richard Green sustained injury arising out of and occurring in the course of employment to his lungs in the form of cancer, and resulting in his death on September 13, 2019 (Finding of Fact 1); that pursuant to Labor Code section 5412, the correct date of injury, in case number ADJ12638806, is June 11, 2018 (Finding of Fact 6); that applicant met the burden of proof to establish industrial causation of the lung cancer in case number ADJ12014246 (Finding of Fact 7); and that defendant did not rebut the Labor Code section 3212.1 presumption of injury in case number ADJ12638806 (Finding of Fact 8). Based thereon, we amend the Order to defer all other issues raised by the parties at the March 2, 2020 trial and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 20, 2020 Joint Findings and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Decedent, Richard Green, while employed during the period from August 10, 1981, through December 31, 2006, as a traffic officer, Occupational Group Number 490, at San Diego, California by the State of California - California Highway Patrol, sustained injury arising out of and in the course of employment to his lungs in the form of cancer, and resulting in his death on September 13, 2019.

* * *

6. Pursuant to Labor Code section 5412, the correct date of injury, in case number ADJ12638806, is June 11, 2018.

7. Applicant met the burden of proof to establish industrial causation of the lung cancer in case number ADJ12014246.

8. Defendant did not rebut the Labor Code section 3212.1 presumption of injury in case number ADJ12638806.

ORDER

It is **ORDERED** that all issues raised by the parties at the March 2, 2020 trial, that are not addressed herein, are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 10, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**O'MARA & HAMPTON
CHRISTY GREEN
STATE COMPENSATION INSURANCE FUND**

TLH/pc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS