WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOHN BLAIR, *Applicant*

vs.

CITY OF TORRANCE POLICE DEPARTMENT, permissibly self-insured, *Defendant*

Adjudication Number: ADJ11646997
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order of March 23, 2020, the workers' compensation judge (WCJ) found that applicant, while employed as a police officer by the City of Torrance during the period May 20, 1982 through March 6, 2003, sustained industrial injury in the form of bladder cancer. The WCJ also found that the injury is presumptively industrial pursuant to Labor Code section 3212.1, that defendant failed to rebut the presumption of industrial causation under section 3212.1, and that the date of injury for purposes of Labor Code section 5412 is September 25, 2018.

On April 9, 2020, defendant filed a petition for reconsideration of the WCJ's decision. Defendant contends that applicant is not entitled to assert the presumption available to active firefighters and police officers under Labor Code section 3212.1, and that in absence of the presumption, applicant failed to prove that the carcinogens to which he was exposed during his employment as a police officer are linked to the development of his bladder cancer.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

At the outset, we observe that to be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers'

compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).[1] In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.[2] Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020. In this case, defendant's petition was filed on April 9, 2020, but it is deemed filed on April 13, 2020.

Turning to the merits of defendant's petition, we have considered the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate, we will affirm the Findings and Order of March 23, 2020.

We further note that as relevant here, Labor Code section 3212.1 states as follows:

> (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*

[1] The March 16, 2020 DWC Newsline may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-18.html.
[2] The April 3, 2020 DWC Newsline regarding reopening the district offices for filing may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-29.html.

> *120 months in any circumstance, commencing with the last date actually worked in the specified capacity.*
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> (Italics added.)

In *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (Appeals Board en banc), the Board held that under Labor Code section 3212.1, when an applicant establishes both exposure to a known carcinogen and the manifestation *or development* of cancer as the section specifies, the cancer is presumed to be an industrial injury. The burden then shifts to the defendant to rebut the presumption (1) by evidence establishing the primary site of the cancer and (2) by evidence establishing that there is no reasonable link between the carcinogen and the cancer. The defendant must prove that no reasonable link exists; it does not rebut the presumption by merely proving that there is no evidence demonstrating a reasonable link.

One way for a defendant to rebut the presumption is to establish that the latency period of the manifestation of the specific cancer excludes the exposure as the cause of the applicant's cancer. (See *Palsgrove v. City of Palo Alto* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 316, citing *Law v. Workers' Comp. Appeals Bd.* (*2003*) 68 Cal. Comp. Cases 497, 499 (writ den.) and *Leach v. West Stanislaus Cty. Fire Protection Dist.* (2001) 29 Cal. Workers' Comp. Rptr. 188, 189 (Appeals Board Panel).)

In this case, although the foregoing method of rebuttal appears to be the only plausible one available to defendant, it is not advocated in the petition for reconsideration. The probable reason for this approach is that applicant's bladder cancer "developed" when he was in active service and clearly entitled to the presumption. Nonetheless, it is worth reviewing the significance of the words "developing" and "manifesting" in section 3212.1, as discussed by the Board panel in *Nicasio v. City of Modesto* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 580:

> In determining whether applicant is entitled to the Labor Code section 3212.1 presumption when his cancer did not manifest within the statutory timeframe, we begin with the principle of statutory construction that meaning must be given to every word or phrase of a statute, if possible, so as not to cause any word or phrase to be mere surplusage. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652].) Because the Legislature used the phrase "developing or manifesting," we presume that the words "developing" and "manifesting" have different meanings.

> Manifestation occurs when an applicant first has symptoms, even if the applicant has not yet been diagnosed with cancer. (*City of Los Angeles County v. Workers' Comp. Appeals Bd.* (*Darling*) (2000) 70 Cal.Comp.Cases 1147 (writ den.); *County of El Dorado v. Workers' Comp. Appeals Bd.* (*Klatt*) (2000) 65 Cal.Comp.Cases 1437 (writ den.).)
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> Development necessarily predates manifestation and determining when a cancer develops or begins developing requires medical expertise. Where substantial medical evidence shows that a cancer's predicted latency period causes the development of a cancer to predate an applicant's industrial exposure, defendants have successfully rebutted the presumption that a cancer is industrial. (*Law v. Workers' Comp. Appeals Bd.* (2003) 68 Cal.Comp.Cases 497 (writ den.); See also *Sameyah v. Los Angeles County Employees Retirement Assn.* (2010) Cal.App.4th 199 [Government Code section 31720.6 presumption rebutted].) Similarly, where there is substantial medical evidence that a cancer began developing during a covered employment, the applicant is entitled to the presumption. (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Case*) (2013) 78 Cal.Comp.Cases 987 (writ den.).)[[3]]

In this case, the parties agree that because applicant accrued 20 years of service as a police officer, the presumption of industrial causation was extended for 60 months after the time he stopped working on October 26, 2001; thus the presumption was available to applicant until October 26, 2006. (Petition for Reconsideration at 5:9-15; Answer at 5:17-20.) The parties also agree that according to Dr. Majcher, who served as the Agreed Medical Evaluator (AME) in this matter, the latency period for bladder cancer is 20 years. (Petition for Reconsideration at 2:10-12; Answer at 5:24.) Applicant's bladder cancer became manifest on August 30, 2018, and with a latency period of 20 years, this means the cancer was "developing" as early as 1998, when applicant was actively employed as a police officer. As discussed before, where there is substantial medical evidence that a cancer began developing during a period of covered employment, the applicant is entitled to the presumption, as found by the WCJ herein.

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[3] Accord, *Chavarria v. Cal. Dep't. of Forestry and Fire Protection* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 10; *McIntyre v. County of San Diego* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 601 [applicant may be entitled to the presumption if his bladder cancer "developed" before expiration of the presumption's extension]; *Andrews v. City of Los Angeles* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 54; *Hoglund v. Cal. Highway Patrol* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 203; *Judd v. City of Desert Hot Springs* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 463; *Bigelow v. City of Paso Robles* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 532; *City of San Diego v. Workers' Compensation Appeals Bd.* (2005) 70 Cal.Comp.Cases 241 (writ den.).

Undeterred, defendant relies upon the language in section 3212.1(d) stating that the extension of the presumption must not "exceed 120 months *in any circumstance*." Thus, defendant contends that applicant is not entitled to the presumption because his bladder cancer did not become manifest until August 30, 2018, more than 17 years after he stopped working as a police officer and far in excess of the 10-year maximum afforded by the statute.

Defendant's contention is unpersuasive. First, the factual premise of the contention is incorrect, as there is no dispute that the extension of the presumption lasted not 10 years but only 5 years, i.e., until October 26, 2006. Secondly, defendant cites no legal authority for the proposition that the inclusion of the phrase "in any circumstance" in subdivision (d) somehow modifies the legal effect of all the other language in section 3212.1. Thirdly, defendant's suggested interpretation would require us to ignore the significance of the Legislature's inclusion of the word "developing" in section 3212.1. This we cannot do. Rather, we must follow the Legislature's directive that "[t]he cancer so *developing* or manifesting itself in these cases *shall be presumed* to arise out of and in the course of the employment." (Italics added.) Defendant's hyperbolic complaint – that extension of the presumption can last many decades - is best directed to the Legislature.

In summary, the overwhelming weight of legal authority holds that the presumption of industrial causation of cancer under section 3212.1 applies where, as here, the cancer began developing during a period in which the applicant was actively employed, even if the cancer in question "manifested" much later in time. The latest example is *California Highway Patrol v. Workers' Comp. Appeals Bd.* (*Hazelbaker*) (2021) 86 Cal.Comp.Cases 230 (writ den.), wherein the Board panel stated, "[t]he presumption of industrial causation will apply if the cancer develops or manifests within the extended statutory period." (Underscoring in original.)

In reference to defendant's contention that applicant's claim of industrial bladder cancer fails without the presumption, we dismiss the contention as moot because we agree with the WCJ's determination that the presumption is properly applied under the circumstances of this case.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of March 23, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 27, 2021

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

JOHN BLAIR
WHITING COTTER & HURLIMANN
LISTER MARTIN & THOMPSON

JTL/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

FACTS AND INTRODUCTION

The facts of this matter are largely undisputed. Applicant was employed as a police officer with the City of Torrance and alleges that he sustained an industrial injury in the form of bladder cancer. He was hired on May 29, 1982 and actively worked until October 26, 2001 before a disability retirement on March 6, 2003. Applicant began noticing symptoms on August 30, 2018 for which diagnostic testing confirmed applicant's having developed bladder cancer. In regards to the industrial claim, applicant was examined by Agreed Medical Examiner Dr. Stanley Majcher who found the cancer to be of a non-industrial origin. The matter was brought before the Court on the issues of the industrial nature of the injury and presumption of Labor Code section 3212.1, the part of body injured, and applicant's date of injury under Labor Code section 5402.

The undersigned issued a Findings and Order and Opinion on Decision on March 23, 2020 finding that the presumption of compensability under Labor Code section 3212.1 was applicable to applicant's claim, that applicant suffered from bladder cancer, and that the date of applicant's injury for purposes of Labor Code section 5412 was September 25, 2018 when applicant's was diagnosed with bladder cancer.

Defendant is aggrieved of the undersigned's Findings and Order and Opinion on Decisionand filed a timely and verified Petition for Reconsideration alleging that the undersigned erred in applying the Labor Code section 3212.1 presumption to applicant's claim.

DISCUSSION

Defendant's Petition alleges the undersigned misapplied the presumption of industrial causation of cancer found in Labor Code section 3212.1 to applicant's claim. The essence of defendant's argument is that the presumption for this covered class of individuals is three months forevery year of service for a maximum of 120 months in any circumstance. In the present matter, applicant was employed from 1982 until 2001 in active service. His bladder cancer did not manifest until 2018,

17 years after retiring from his position as a police officer. Defendant contends that applicant's presumption would not extend past 2006.

In deciding this matter, the Court was presented with evidence by AME Dr. Stanley Majcher that the type of cancer that developed in applicant has a latency period of twenty years. (Exhibit D, page 6 line 13 thorough). Based on Dr. Majcher's unrebutted opinion, the undersigned found that applicant's bladder cancer would have begun developing in August of 1998.

Labor Code section 3212.1 (b) reads that

> "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."

Section 3212.1(d) further reads:

> "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."

The Court also relied on the *Faust* opinion where the Court stated "The applicant must also show the development or manifestation of the cancer, during the statutory time period, by medical evidence that must include the date of development or manifestation." *Faust v. City of San Diego,* (2003) 68 Cal. Comp. Cases 1822, 1830.

As applicant's cancer began to develop while he was actively employed as a peace officer, the undersigned determined that applicant's bladder cancer should be presumed to be the result of industrial causation.

As to defendant's second argument in their Petition, as the undersigned found the presumption to apply no decision regarding applicant's burden without the presumption was considered by the undersigned. Should the Board disagree with the undersigned's Findings and Opinion, the matter should be returned to the trial level for determination of that issue.

RECOMMENDATION

Based on the foregoing, it is respectfully requested that defendant's Petition forReconsideration be denied.

Dated: May 11, 2020
Served On: May 12, 2020
Jeremy Clifft
WORKERS' COMPENSATION JUDGE