

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

**GARY HART (Deceased) and
HEIDI ANN HART (Dependent), *Applicant***

vs.

**COUNTY OF VENTURA, permissibly self-insured
administered by YORK;
a subsidiary of SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ12139544
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 25, 2022

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

**HEIDI ANN HART
ADAMS, FERRONE & FERRONE
GOLDMAN, MAGDALIN & KRIKES**

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant, County of Ventura, permissibly self-insured, has filed through its counsel a timely, verified petition for reconsideration of the February 1, 2022 Findings of Fact, which found that Gary Hart, now deceased, while employed during the period of August 15, 1982 to August 21, 2010, as a Battalion Chief, Occupational Group Number 490, sustained injury arising out of and in the course of employment in the form of lung cancer, which was a cause of his death on February 21, 2019. Mr. Hart was 55 years of age at the end of the cumulative trauma period, and 63 years of age at his death.

The February 1, 2022 findings found that although the heart trouble presumption in California Labor Code section 3212 does not apply to this case because it is limited to a period not to exceed 60 months after the last date actually worked, the cancer presumption in Labor Code section 3212.1 does apply, because it extends to up to 120 months after termination of service, and it was not fully rebutted by the medical expert opinion of Qualified Medical Evaluator (QME) Sean Leoni, M.D., who agreed upon cross-examination that the industrial cancer was at least a minor contributing cause of Mr. Hart's death.

The petition for reconsideration contends that the undersigned acted without or in excess of his powers, that the evidence does not justify the findings, and the findings do not support the decision, because the evidence does not link applicant's lung cancer to his death by reasonable probability.

At the time this report was prepared, there was no answer yet from applicant, although one is expected.

II

FACTS

On November 22, 2021, trial proceedings were held, where the parties submitted the issue of injury arising out of and in the course of employment, along with three ancillary issues: the cancer and heart trouble presumptions of California Labor Code sections 3212 and 3212.1, an alleged party admission of liability by Fire Chief Mark Lorenzen, and defendant's objection to a letter from County Fire Chief Mark Lorenzen, identified as Applicant's Exhibit 1 at trial. Applicant's widow, Heidi Ann Hart, testified at trial that Mr. Hart had worked for Ventura County Fire Department for about 37 years, first as a Smoke Jumper at age 18, then moving up through the ranks after college as a Fire Engineer, Fire Chief, and finally a Battalion Chief. As a Battalion Chief, Mr. Hart still went to a lot of fires, and came home smelling "like a barbecue" (Minutes of Hearing and Summary of Evidence, 11/22/2021, p. 4, line 15). Ms. Hart believes her husband was

exposed to diesel exhaust from fire trucks as well as gasoline exhaust from the Suburbans driven by Battalion Chiefs (*Id.*, p. 6, lines 19-20).

Ventura County Fire Chief Mark Lorenzen also testified at trial. Mr. Hart was Fire Chief Lorenzen's friend, co-worker, and mentor. They did not work directly together, but, occasionally, they worked overtime shifts together, and Chief Lorenzen got involved in Incident Management Teams with Mr. Hart (*Id.*, p. 6, lines 8-10). Fire Chief Lorenzen believes it was absolutely unavoidable to have smoke exposure and exposure to fire byproducts in Mr. Hart's work. This is also true of his work as a Battalion Chief. Exposure to smoke and fire byproducts is especially unavoidable with wildland fires. In structure fires, there is a little more protection with a breathing apparatus, but there is still skin exposure. From what Mr. Lorenzen has read, these fire byproducts contain carcinogens (*Id.*, p. 6, lines 14-18). Chief Lorenzen confirmed that fire trucks run on diesel fuel. The Battalion Chiefs drive Suburbans that run on gasoline. Mr. Lorenzen believes that Mr. Hart was likely exposed to diesel exhaust as part of his work (*Id.*, p. 6, lines 19-20).

Fire Chief Lorenzen testified that he is aware that Mr. Hart died. Chief Lorenzen identified his signature on Applicant's Exhibit 1, a letter to California Fire Foundation dated April 29, 2020 ascribing Mr. Hart's "line of duty death" to "job-related cancer" (*Id.*, p. 6, lines 21-22; Applicant's Exhibit 1, Letter from Fire Chief Mark Lorenzen, 4/29/2020, p. 1, paragraph 1, lines 2-3). Fire Chief Lorenzen recalls this letter, and he did personally sign it, but a Battalion Chief drafted it for him. Chief Lorenzen did not disagree with any statement in the letter at the time he signed it. The purpose of the letter was to add Mr. Hart's name to a fallen firefighter memorial (*Id.*, p. 6, lines 22-25). Fire Chief Lorenzen recalls that cancer is considered related to work if it is within ten years of a firefighter's retirement. He believes Mr. Hart's cancer is presumed to be job-related for this reason, but he has no medical opinion regarding Mr. Hart's cancer and it was not his intention to bind the County to a legal decision when he signed the letter.

The opinion on decision issued with the findings of February 1, 2022 confirmed that Chief Lorenzen was correct in his understanding of the cancer presumption. The cancer presumption in Labor Code section 3212.1 applies to active firefighting members of county fire departments, and extends to up to 120 months after termination of service, and a claim form alleging presumptive lung cancer dated March 21, 2019 was filed herein, along with a proof of service on the employer, County of Ventura and its claims administrator, York on that same date, which is certainly within 10 years of Mr. Hart's termination of service for the County. Accordingly, the cancer presumption does apply to this case (Opinion on Decision, 2/1/2022, p. 2, paragraph 2).

On the other hand, it was found that the heart trouble presumption in Labor Code section 3212 does not apply to Mr. Hart's death. Although Mr. Hart is the kind of fire department employee contemplated by the heart trouble presumption in Labor Code section 3212, and the pericardial tamponade from which he suffered is certainly heart trouble, the provisions of section 3212 are limited to a period not to exceed 60 months after the last date actually worked, which in Mr. Hart's case appears to have been August 21, 2010, so the heart trouble presumption does not apply to Mr. Hart (*Id.*).

The only medical opinions offered into evidence at trial were those of internal medicine Panel QME Sean Leoni, M.D, whose report dated June 8, 2020 was admitted into evidence as Joint Exhibit 1, and whose deposition transcript of February 1, 2021 was admitted as Joint Exhibit 2. In

his report, Dr. Leoni did not rebut the presumption of Labor Code section 3212.1 that Mr. Hart's cancer was industrial, but he found that Mr. Hart's death was not related to the presumably industrial cancer, but was instead due to perforation of a non-industrial duodenal ulcer, which led to septic shock (Joint Exhibit 1, QME Report of Sean Leoni, M.D., 6/8/2020, p. 41, lines 3-7). At his cross-examination of February 1, 2021, Dr. Leoni at first clearly confirmed this opinion, then, later in the deposition, distinguished the causes of death reflected on Mr. Hart's death certificate—pericardial tamponade due to duodenal perforation, acute renal failure, and lung cancer—as a main cause and lesser causes that all “played a role” in Mr. Hart's death:

Q Okay. And I guess that's the subtlety of the distinction that, I think, I'm trying to draw here is: While we have a main cause of the duodenal ulcer, that's not to say that those other diagnoses that are listed on the death certificate didn't play a role. In fact, it's in all reasonable medical probability it did play a role just in a lesser manner?

A Yes. I mean, again –

MR. STRAATSMA: Sorry. Go ahead, please, Doctor. I apologize.

THE WITNESS: So when you have -- again, when you do the death certificate, the ulcer is the first importance. What's the main cause of this guy's death? This gentleman's death main cause was duodenal perforation which causes pericardial tamponade. So tamponade not just comes from the infection or peripheral ulceration -- perforational ulcer, it could also come from the cancer. So the cancer also played a role and the lung effusion that he had in his lung also was cancerous. So that led to hypoxemia as well.

BY MR. BANNON:

Q Okay.

A And if you're asking me what the main cause of his death was, the main cause of his death was duodenal ulcer perforation.

Q Okay. But that doesn't mean that we're excluding the other as playing a role, it's just we have a main role and we have lesser contributing roles?

A Yes.

(Joint Exhibit 2, Deposition Transcript of QME Sean Leoni, M.D., 2/1/2021, p. 24, line 17 to p. 25, line 20.)

Based on Dr. Leoni's testimony, the February 1, 2022 Findings of Fact found that Dr. Leoni's testimony established that the presumed industrial cancer had caused Mr. Hart's death, if only in small part. The purported admission of Chief Lorenzen to “job-related cancer” causing a “line of duty death” was found to not constitute a medical opinion, and was in any event moot based on the presumption of Labor Code section 3212.1 and the medical opinion of Dr. Leoni starting at page 24 of his deposition.

Defendant County of Ventura filed a timely, verified petition for reconsideration dated February 24, 2022, which does not question the presumption that Mr. Hart's cancer was industrial,

but contends that there is no evidence linking applicant's lung cancer to his death by reasonable probability. The petition provides quotes from Dr. Leoni's deposition prior to where he changes his opinion at page 24, and represents Dr. Leoni's opinions as being unequivocally against Mr. Hart's cancer having played a role in his death. No answer to the petition has been filed as of the time of preparation of this report, but one is anticipated.

III DISCUSSION

Defendant's petition provides quotes from Dr. Leoni's deposition prior to where he changes his opinion at page 24, and the petition does not include the portion quoted above at page 24, line 24 where Dr. Leoni changed his opinion to agree that Mr. Hart's lung cancer "in all reasonable medical probability...did play a role just in a lesser manner," explaining on the record: "So the cancer also played a role and the lung effusion that he had in his lung also was cancerous. So that led to hypoxemia as well" (*Id.*, p. 25, lines 9-11). While it is true, as defendant points out, that Dr. Leoni used the word "could" (at page 25, line 8, where he says, "tamponade not just comes from the infection or peripheral ulceration -- perforational ulcer, it could also come from the cancer") he then explains, in the next sentence, without the use of the word "could," that "the cancer also played a role and the lung effusion that he had in his lung also was cancerous. So that led to hypoxemia as well" (*Id.*, p. 25, lines 6-11). Dr. Leoni ultimately agrees that the fact that the duodenal ulcer perforation was the main cause of Mr. Hart's death "doesn't mean that we're excluding the other as playing a role, it's just we have a main role and we have lesser contributing roles" (*Id.*, p. 25, lines 17-20).

A lesser contributing industrial role is sufficient to find a death compensable, as explained by the California Supreme Court in *South Coast Framing v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489]. Death benefits do not require a showing that the predominant or greatest cause is work-related. Even the slightest modicum of contributing industrial causation is sufficient to regard a worker's death as arising out of and in the course of employment. In Mr. Hart's case, Dr. Leoni's opinion at deposition that the lung cancer constituted even a minor contributing cause of Mr. Hart's death is sufficient to require a finding that the death was industrial.

Contrary to the assertions in the petition, the case of *South Coast Framing* is remarkably similar to the instant case. In the *South Coast Framing* case, the QME concluded that the applicant's death by overdose was caused solely by medications prescribed by his personal doctor and not his workers' compensation physician. The QME's subsequent deposition testimony then "retreated somewhat from his report," by admitting that Elavil, an industrial medication, "may have had a small role at the levels found." (*South Coast Framing*, cited above, 61 Cal.4th at 295.) Although the QME in the *South Coast Framing* case believed Ambien and Xanax had "more weight," he could not "absolutely slam the door and say [Elavil] had no effect." (*Id.*) The QME thought it would be speculative to assign a percentage to the causation of industrial medications, but testified that "[t]he exact amount is way down there" and "we literally are dancing about the minimum level of causation," and "[w]e're looking at one percent causation" (*Id.* at 296). The California Supreme Court held that this was a sufficient contributing cause to award death benefits.

In the present case, QME Dr. Leoni wrote a report concluding that Mr. Hart's death was solely caused by a non-industrial duodenal ulcer, then retreated somewhat from the report in his deposition testimony by admitting that although the ulcer was the main cause of death, there were other, lesser causes that also played a role, including lung cancer that is presumed to be industrial. The opinion that the industrial causes of death played only a minor role should not preclude the award of death benefits, just as it did not in the *South Coast Framing* case.

IV
RECOMMENDATION

It is respectfully recommended that the petition be denied.

DATE: 3/8/2022

Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE