WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

YSIDRO ANAYA, *Applicant*

vs.

STATE OF CALIFORNIA, Legally Uninsured, *Defendant*

Adjudication Number: ADJ12932864
San Bernardino District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of our Decision After Reconsideration of June 24, 2022, wherein we found that while employed as a correctional officer during a cumulative period ending on June 6, 2017, applicant sustained industrial injury to his heart and in the form of hypertension causing permanent disability of 54%. In so finding, we amended a workers' compensation administrative law judge's (WCJ) Findings, Award and Order of March 29, 2022, wherein it was found that applicant's injury had caused permanent disability of 29% after Labor Code section 4663 apportionment of permanent disability. In our Opinion and Decision of June 24, 2022, we explained that apportionment was not applicable pursuant to Labor Code section 4663(e) because applicant's injury was subject to the Labor Code section 3212.2 heart trouble presumption because applicant's heart trouble had "developed" during applicant's service or a statutory period after his service as a correctional officer. The WCJ had found that the section 3212.2 heart trouble presumption was not applicable because applicant had not filed an application for adjudication of claim during his service or the statutory period. We explained that the presumption was available so long as the heart trouble "developed or manifested" during service or the statutory period after service, and the timing of filing an application for adjudication was not relevant to the applicability of the presumption or, by extension, the Labor Code section 4663(e) apportionment exemption.

Defendant contends that we erred in finding permanent disability of 54%, arguing that we erred in finding the injury subject to the Labor Code 3212.2 heart trouble presumption and the Labor Code section 4663(e) apportionment exemption because applicant's heart trouble did not "manifest itself" until after section 3212.2 statutory period. We note that this is a different

argument than the one advanced by the defendant in its Trial Brief and relied upon by the WCJ, which focused on when applicant "asserted" the presumption by filing an application for adjudication of claim.

We will deny defendant's Petition.

Preliminarily, we note that defendant has asked us to take judicial notice of the following documents:

1. Senate Bill, No. 839 (Exhibit 1 to Request for Judicial Notice)

2. Bakersfield Board of Supervisors Letter to the Senate Industrial Relations Committee on May 6, 1975 (Exhibit 2 to Request for Judicial Notice)

3. Assembly Finance, Insurance and Commerce Committee Report on Senate Bill 839 (Exhibit 3 to Request for Judicial Notice)

4. Third Reading Analysis, Assembly Office of Research, Senate Bill 839 (Exhibit 4 to Request for Judicial Notice)

5. Legislative History Report and Analysis prepared by Legislative Intent Service, Inc. (Exhibit 4 to Request for Judicial Notice)

We take judicial notice of, and have considered Exhibits 1, 3, and 4. We do not take judicial notice of Exhibits 2 and 5. As explained by the Court of Appeal in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29:

> Many attorneys apparently believe that every scrap of paper that is generated in the legislative process constitutes the proper subject of judicial notice. They are aided in this view by some professional legislative intent services. Consequently, it is not uncommon for this court to receive motions for judicial notice of documents that are tendered to the court in a form resembling a telephone book. The various documents are not segregated and no attempt is made in a memorandum of points and authorities to justify each request for judicial notice. This must stop. And the purpose of this opinion is to help attorneys to better understand the role of legislative history and to encourage them to request judicial notice only of documents that constitute cognizable legislative history.
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> Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole*. [Citation.] Thus, to pick but one example, our Supreme Court has said, "We have frequently stated … that the statements of an individual legislator, including the author of

> a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation. [Citations.]" (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062.)

Thus, while reports by legislative committees and legislative staff analysis is judicially noticeable (*Kaufman & Broad Communities, Inc., supra,* at pp. 32-36), letters written by interested parties, magazine articles, and other documents without evidence that that they were made known to the Legislature as a whole are not. (*Id.* at pp. 37-38.)

As noted in our Opinion and Decision after Reconsideration of June 24, 2022, the Labor Code section 3212.2 presumption applies to heart trouble that "develops *or* manifests itself" during the statutory period. As noted in *State Employees' Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)* (1968) 267 Cal.App.2d 611, 616-617 [33 Cal.Comp.Cases 710], in which the Court of Appeal interpreted identical language in Labor Code section 3212:

> Obviously, heart disease may develop without manifesting itself. It may develop as an unrecognized, undiagnosed, asymptomatic condition, displaying or manifesting itself only after the commencement of employment. [Citations.] Where such is the case, it might be argued that in-service manifestation is a reason for invoking the presumption or that preemployment development is a ground for barring it. Such arguments would simultaneously place the ailment within and outside the operative phrase on which the presumption depends. The overlapping and partially contradictory character of the statutory alternatives creates an ambiguity requiring construction. The ambiguity exists because the language is reasonably susceptible of several meanings. [Citation.]
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> As noted earlier, such statutory provisions are to be liberally construed in the claimant's favor. Section 3212 is designed to favor a class of public employees by restricting preemployment heart disease as a factor preventing compensations for in-service "heart trouble." [Citation.] This objective is frustrated by postulating in-service manifestation as a condition activating the presumption and preemployment development as a condition barring it. More in keeping with the statutory objective is the interpretation that either event, ***development or manifestation during employment, will activate the presumption***; that only where both events, development and manifestation, precede the employment, is the presumption unavailable.

(Emphasis added.)

Subsequently, in *Soby v. Workers' Comp. Appeals Bd.* (1972) 26 Cal.App.3d 555, 557-558 [37 Cal.Comp.Cases 405], wrote:

> The board, in its opinion on reconsideration, ruled that "'heart trouble which develops or manifests itself' must be interpreted to mean heart trouble which becomes symptomatic." But it is semantically clear that what has "become symptomatic" has "manifested" itself. Thus the board treats "developed" and "manifested" as synonymous. But in section 3212 the Legislature has thrice repeated the disjunctive phrase applying the presumption of employment causation to heart trouble which "develops or manifests itself" during the employment. The legislative intent to assign different and distinct meanings to the words "develop" and "manifest" seems clear.
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> If heart trouble can develop only when it manifests itself, i.e., becomes symptomatic, the legislative use of the word "develops" as well as its repeated use of the disjunctive "or" is ignored. Yet we must presume that "every word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function" [citations].

As noted by defendant, after the *Soby* decision, Senate Bill 839 was introduced in an apparent attempt to limit the reach of the holding. As initially introduced, SB 899 contained language amending section 3212.2 to read:

> The term "injury" as used in this section , and the presumption that such heart trouble arises out of and in the course of employment, shall not apply to any "injury" which develops during a period of service described in this section but which does not manifest itself within period of five years commencing with the last date actually worked in the specified capacity.

(Request for Judicial Notice, Exhibit 1.)

Crucially, however, this language was never passed by the Legislature. Rather, the final bill amended section 3212.2 contained the identical statutory language, "Such heart trouble so developing or manifesting shall be presumed to arise out of and in the course of employment." SB 839 did amend the statute to now state, "This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity." However, the bill as passed, signed and chaptered no longer contained the language that the section does not apply to heart trouble that developed but did not manifest itself within a certain time. To the contrary, the statute maintained the identical disjunctive language interpreted in *McNerney* and *Soby*. The language added onto section 3212.2 by SB899 limits the time period of "this presumption" but "this presumption" clearly refers back

to the presumption that heart trouble "so developing or manifesting" is presumed industrial. Nothing in the language of "this presumption" compels us to conclude that this phrase refers only to manifestation. To the contrary, the language in the initial bill before amendment shows that the Legislature knew exactly how to add language limiting section 3212.2 to manifestation occurring after service rather than development. It is not entirely clear why defendant believes that language that was expressly rejected by the Legislature during the amendment process evinces a statutory intent to limit section 3212.2 to cases where heart trouble manifests during the statutory period. To state the obvious, in order to become law language must be actually passed by both legislative chambers.

Nothing in the Legislative materials provided by the defendant compels a different result. No legislative analyses after the amendment of the initial language state that the presumption is only available if the heart trouble manifests within the statutory period. Rather the new time period limiting claims in section 3212.2 specified the time within which heart trouble could develop or manifest itself.

As noted in our Opinion and Decision of June 24, 2022, qualified medical evaluator internist Stanley J. Machjer, M.D. testified that applicant's heart trouble developed during applicant's period of service beginning in 2012. (October 12, 2021 deposition at pp. 7-8.) Thus, applicant's heart trouble developed during applicant's service as a correctional officer and applicant is entitled to the Labor Code section presumption. Since applicant's injury is subject to the section 3212.2 heart trouble presumption, pursuant to Labor Code section 4663(e), applicant's permanent disability is exempt from section 4663 apportionment. The WCJ found that applicant sustained 51% hypertensive heart disease permanent disability and 7% valvular heart disease permanent disability prior to apportionment. (Opinion on Decision at p. 6.) These permanent disabilities combine to produce 54% permanent disability. (2005 Schedule at p. 8-3.)

Accordingly, we will deny the defendant's Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that that Defendant's Petition for Reconsideration of our Decision After Reconsideration of June 24, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 19, 2022

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

ADAMS, FERRONE & FERRONE
BOEHM & ASSOCIATES
STATE COMPENSATION INSURANCE FUND
YSIDRO ANAYA

DW/oo

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