

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

HAROLD MISKELL, *Applicant*

vs.

COUNTY OF RIVERSIDE, *Permissibly Self-Insured, Defendant*

**Adjudication Number: ADJ11612658
Riverside District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of December 3, 2020, wherein it was found that while employed during a cumulative period ending on October 3, 2018 as a correctional deputy, applicant sustained industrial injury to his heart, circulatory system, and excretory system, and in the form of hypertension, but did not sustain industrial injury in the form of prostate cancer. In finding that applicant did not sustain industrial injury in the form of prostate cancer, it was found that the Labor Code section 3212.1 cancer presumption was rebutted by the report and deposition testimony of agreed medical evaluator oncologist James Padova, M.D. It was also found in the opinion that, while industrial injury to the excretory system was found, "The heart presumption on LC 3212 [sic]¹ does not extend a presumption of injury to the kidney."

Applicant contends that the WCJ erred in (1) finding that the excretory system injury was not covered by the Labor Code section 3212.5 heart trouble presumption and in (2) not finding industrial injury in the form of prostate cancer. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we hereby adopt and incorporate, we affirm the finding that "The heart presumption of LC 3212 does not extend a presumption of

¹ The WCJ mistakenly cited to Labor Code section 3212, which creates a heart trouble presumption for other classes of safety workers, but not for sheriffs or sheriff's deputies. The heart trouble presumption for a deputy sheriff is governed by Labor Code section 3212.5. However, other than the classes of safety workers covered, the heart trouble presumptions codified in sections 3212 and 3212.5 are identical.

injury to the kidney.” However, we grant reconsideration and amend the WCJ’s decision to defer the issue of injury to the kidney so that the record may be developed for Dr. Padova to issue a supplemental report with a more expansive explanation of why applicant’s elevated prostate-specific antigen (PSA) levels in 2005 make it more likely than not that industrial exposure to diesel exhaust did not cause applicant’s prostate cancer.

In this matter, it appears uncontested that applicant’s prostate cancer is presumed compensable pursuant to Labor Code section 3212.1. The issue in dispute is whether the defendant properly rebutted the presumption. The Labor Code section 3212.1 presumption arises when certain public safety officers (including, as relevant to this matter, peace officers) develop cancer or leukemia during active service, or a period after service determined by their years of service, and have shown that they were exposed to a known carcinogen during their period of service. Here applicant showed that he was exposed to the known carcinogen diesel exhaust during his service as a peace officer.

Once the presumption has been established, 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.” (Lab. Code, § 3212.1, subd. (d).) The Court of Appeal has held that one way to rebut the presumption is “to demonstrate it is highly unlikely the cancer was industrially caused because the period between the exposure and the manifestation of the cancer is not within the cancer’s latency period.” (*City of Long Beach v. Workers’ Comp. Appeals Bd. (Garcia)* 126 Cal.App.4th 298, 317 [70 Cal.Comp.Cases 109].) “Further, the nature of the manifestation, or other medical evidence, may be sufficient to show the lack of connection.” (*Id.*)

In this case, Dr. Padova wrote as follows in his October 23, 2019 report:

[A]ccording to the radiation oncologist, Dr. Memula, when first he consulted on this patient in April 2015, the patient had multiple biopsies of his prostate because of a concern of prostate cancer since 2005, which ultimately showed positive prostate cancer on a biopsy in November of 2014. Since the patient was relatively young in 2005, approximately 47 years of age, the high PSA at 7 was much higher than the upper limits of normal at that age which is approximately 2.5. The absence of any other clear-cut cause for the elevated PSA at that time quite correctly led the doctors to consider the diagnosis of prostate cancer, for which reason he was closely followed and required repeated biopsies that ultimately proved the diagnosis of prostate cancer as the cause for the elevated PSA. Therefore, I believe that the elevations of the PSA that was apparent and

followed since 2005, was probably the first clinical evidence of the prostate cancer that was proven by biopsy in 2015.

In this case, since solid tumors such as prostate cancer take 10 years or more before the first clinical manifestation of the cancer to become evident (latency), it is my view that only factors prior to 1995 could have played a role in the causation of Mr. Miskell's prostate cancer that I believe first was clinically evident by an elevated PSA in 2005. Of course, an alternative point of view would indicate that the diagnosis of prostate cancer could not be made until the prostate cancer was histologically proven to be present at the time of biopsy in 2015. In that circumstance, then cancer-causing factors prior to 2005, could be stated to have a role in the causation of the prostate cancer in this case. In that interpretation, then some of the exposures reported during the course of this man's activities while at the Banning station could reasonably be linked to the prostate cancer condition in question, such that presumption could be applied. However, as I have indicated above, this patient's PSA was elevated sometime prior to his employment with the County of Riverside without any other identified causation other than the prostate cancer process, which ultimately was proven at the time of biopsy in 2014.

In this case, however, as I have indicated, based on my interpretation of the history and the records, only factors prior to 1995, could have played a role in the causation of Mr. Miskell's prostate cancer because of the latency effect and, therefore, I did not find it likely to link his work exposure during the course of his work experience with the County of Riverside and the causation of his prostate cancer.

(October 23, 2019 report at pp. 10-12.)

At his July 8, 2020 deposition, in answer to a question regarding why applicant was having negative biopsies despite elevated PSA levels, Dr. Padova testified, "Well, that happens. This patient's prostate cancer wasn't a huge tumor; it was microscopic. And it's just a matter that the prostate cancer location was not biopsied would be my view to explaining that."

After reviewing Dr. Padova's report and deposition, we are of the opinion that more clarity is needed to explain why elevated PSA levels in 2005, in combination with age, lack of other explanation for the elevated PSA level, and pathological confirmation 9 years later in 2014, makes it more likely than not that industrial exposure to diesel exhaust beginning in 2000 did not cause the prostate cancer. Do elevated PSA levels but with a "microscopic" tumor which was not found by multiple biopsies make it more probable than not that the cause of the cancer predated applicant's employment? More explanation is necessary regarding the stages of prostate cancer

development, and why a cancer detectable by laboratory tests but not susceptible to pathological confirmation was sufficiently advanced by 2005 to make it not reasonably medically probable that the prostate cancer was linked to industrial exposure.

The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id.* at p. 404), pursuant to Labor Code section 5906, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record and decision. We express no opinion on the ultimate resolution of this issue.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact of December 3, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact of December 3, 2020 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Harold Miskell, while employed as a correctional deputy (occupational group number 490) from 1/3/00 through 10/3/18 by the County of Riverside, permissibly self-insured, sustained injury arising out of and in the course of employment to his heart, circulatory system, excretory system, and in the form of hypertension. [Claims of injury AOE-COE to the skin, back and left knee were deferred.]

2. The issue of industrial injury in the form of prostate cancer is deferred, with jurisdiction reserved.

3. The heart presumption of Labor Code section 3212.5 does not extend a presumption of injury to the kidney.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 19, 2021

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

**HAROLD MISKELL
LERNER, MOORE, SILVA, CUNNINGHAM & RUBEL
HALLETT, EMERICK, WELLS & SAREEN**

DW/oo

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