

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

**NINA BROWN, *Applicant***

**vs.**

**CALIFORNIA DEPARTMENT OF CORRECTIONS  
AND REHABILITATION;  
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ11429197  
Los Angeles District Office**

**OPINION DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the April 27, 2021 Findings and Order issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) in the form of breast cancer while employed during the period from January 28, 2016 to January 28, 2018. Based on this finding the WCJ issued an order that applicant take nothing by way of her claim.

Applicant contends that the WCJ erred in failing to find industrial causation arguing that the evidence in the record supports a finding of injury AOE/COE.

Defendant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny 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 affirm the April 27, 2021 Findings and Order.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 27, 2021 Findings and Order is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 29, 2021**

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

**NINA BROWN  
LAW OFFICE OF LINDA SCOTT  
STATE COMPENSATION INSURANCE FUND**

**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**

Applicant, by and through her attorney of record, Linda Scott of The Law Offices of Linda Scott, has filed a timely, verified Petition for Reconsideration contending that this WCJ erred in finding there was insufficient evidence to establish that the Applicant's injuries arose out of and in the course of employment and erred in issuing the order that the Applicant take nothing on her application for workers' compensation benefits, asserting that the evidence does not justify the findings of fact and the findings of fact do not support the order, decision or award.

**II.**

**FACTS**

The Applicant, ... was employed as a Senior Parole Agent, by the State of California Department of Corrections and Rehabilitation. The parties proceeded to trial on February 2, 2021, on the issue indicated by the parties in the Pre-Trial Conference Statement, and stated on the record (Minutes of Hearing and Summary of Evidence 2/2/2021, EAMS DOC ID 73812595) and confirmed by the parties at the time of trial, which was "Injury arising out of and in the course of employment, including whether the cancer presumption for peace officers under Labor Code 3212.1 should apply to the applicant." The evidence presented was sufficient to prove that the Applicant, Nina Brown, was employed in a position as a Peace Officer, working for the State of California, Department of Corrections, whose work duties included active law enforcement responsibilities. The Applicant's testimony also included that she was routinely exposed to exhaust fumes and exposed to other substances during the course of her work as a Senior Parole Agent, which were confirmed by the Panel Qualified Medical Evaluator, Charles Wiseman, M.D. to be known carcinogens listed by the International Agency for Research on Cancer.

The medical evidence presented confirmed that the Applicant was diagnosed with breast cancer, but the cause of the breast cancer was not linked to the work related exposure. The Applicant, who was found to have worked in the category of Peace Officer defined in Penal Code Section 830.2(d)(1), was found not to be included in the group of peace officers entitled to the presumption based on the categories of Peace Officers included in Labor Code Section 3212.1 (a)(3), and on that basis the presumption was not applied. Without the benefit of the presumption, it was determined that the medical evidence presented by the applicant was insufficient to establish that the applicant sustained injury arising out of and in the course of employment.

With their post-trial brief, the Applicant requested to have an additional exhibit admitted into evidence, in order to further indicate that the applicant was a peace officer, as a senior parole agent. This proposed exhibit was a copy of Nina Brown's retiree Senior Parole Officer Badge, which includes the words Peace Officer. As this exhibit was not listed on the Pre-Trial Conference Statement, was not served prior to trial but was available to have been listed on the Pre-Trial Conference Statement and could have been served prior to the trial date, but Applicant did not do

so, it was not admitted into evidence. It was noted in the decision, that even if this exhibit had been admitted, it would not have altered the decision, as the applicant was found to be a peace officer involved in active law enforcement duties.

The Applicant has asserted an additional issue in the Petition for Reconsideration, not raised at trial, that the claim should be presumed compensable based on a lack of evidence of timely denial. This is a new assertion not previously raised, and no evidence regarding this issue was raised or reviewed at the trial level.

### III.

#### DISCUSSION

##### Labor Code §5402 Presumption of Compensability and Denial Letter

Applicant has argued for the first time, that the presumption of compensability based on a lack of timely denial should have been considered. This was not indicated in the Declaration of Readiness which led to the trial (EAMS DOC ID 32155735). It is not mentioned in the Minutes of Hearing from the Mandatory Settlement Conference when the matter was set for trial (EAMS DOC ID 73029143) and it is not indicated in the Pre-Trial Conference Statement (EAMS Doc ID 34405328) completed and signed by the parties for the trial which was completed on February 2, 2021. It was not included in the issues to be addressed at trial (EAMS DOC ID 73812595), which the trier of fact went over with the parties and when read into the record asked each of the parties to confirm audibly, as accurate, before proceeding. There has been no notice to Defendants at any time prior to or during the trial, to satisfy the due process requirements imposed by the 14th Amendment of the U.S. Constitution, which would necessitate that notice be provided of the intention to raise this issue, such that the other party could have the opportunity to know that the issue was being raised and have the opportunity to respond. To first raise the issue in a Petition for Reconsideration is inappropriate and should not be considered. Additionally, the issue is being asserted, not based on supporting evidence, but based on the lack of evidence from Defendants.

As the issue was not raised, there would have been no reason for the Defendants to have provided the evidence which the Applicant asserts is lacking. Applicant had the opportunity to raise this issue at any time prior to or even at trial, and if raising the issue, should have a claim form in their possession, to provide as substantiating evidence, but did not raise the issue or provide substantiating evidence. Applicant should not be afforded the opportunity to raise the issue for the first time in their Petition for Reconsideration, or use the lack of evidence of an issue not previously raised, to have an issue determined without a trial and deny the Defendants the opportunity for a trial on this issue. As not timely raised, it should be considered waived.

##### Applicability of Labor Code §3212 .1

Applicant states in their Petition For Reconsideration that Penal Code Section 830.2(d)(1) provides, in pertinent part that, this section applies to peace officers who are primarily engaged in active law enforcement activities. The Applicant has been an active peace officer as defined by Penal Code Section 830.2(d)(1) as a Senior Parole Officer involved in the Law Enforcement and Investigations Unit of the Department of Corrections. These assertions by the Applicant are not disputed. The determination of applicability of the presumption afforded by Labor Code §3212.1

hinged on whether the Applicant fit the specifically defined categories of peace officers included in Labor Code Section 3212.1(a)(3) for applicability of the presumption. These are limited, as stated by the Applicant in their Petition for Reconsideration, to 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. This would not include the self-described Section 830.2(d)(1) Senior Parole Officer involved in the Law Enforcement and Investigations Unit of the Department of Corrections. As stated in the decision and in the cited case of *Saal v. Workers' Compensation Appeals Board (1975) 50 Cal App 3d 291, 297 [40 Cal Comp Cases 456]*, not all members of the field of law enforcement were included by the legislature in the presumption, and for reasons determined by the legislature, ... "there are somewhere between 26 and 34 kinds of peace officers who are not benefitted at all by any of the sections in the 3212-3213 series." Unfortunately, for the Applicant, Nina Brown, despite being a peace officer who was involved in duties of active law enforcement, she fits one of these excluded categories of peace officers.

The Board considered this very situation in the matter of *Goslin v. State of California Department of Corrections/Rehabilitation (2011) Cal Wrk. Comp. P.D. LEXIS 481 (ADJ7197213)*. In *Goslin*, it was determined that correctional officers employed by the California Department of Corrections and Rehabilitation are not among the "peace officers" described in Penal Code section 830.1 (a), 830.1 (b), 830.1 (c), 830.2(a), or Penal Code section 830.37(a) and (b). Furthermore, in *Goslin*, it was determined that the notable failure to include peace officers defined in Penal Code section 830.2(d)(1) is indicative of the intent of the Legislature to exclude these particular peace officers from the industrial cancer presumption. This judge found the Board's determination in *Goslin* to be persuasive, as the current case involves an identically situated Applicant employed as a Peace Officer employed by the State of California Department of Corrections and Rehabilitation, defined in Penal Code section 830.2(d)(1), as is admitted by the Applicant in their Petition for Reconsideration at page 5, lines 9-13.

#### Additional Issues Raised

In their conclusion Applicant indicates that no denial was admitted into evidence, which is accurate, but the denial of injury was not raised as an issue. No claim form was admitted into evidence either, and both would be necessary to make an accurate assessment of the timeliness of a denial of the claim, had the issue been raised.

Applicant also states, "It is undisputed that the only issue determined by the Judge was whether applicant was entitled to a presumption. The WCJ did not state that the decision encompassed whether injury was AOE/COE even outside the presumption. This is inaccurate. The issue to be determined was "Injury arising out of and in the course of employment, including whether the cancer presumption for peace officers under Labor Code 3212.1 should apply to the applicant." The findings of fact included both that (2) the presumption of compensability pursuant to Labor Code §3212.1 is not applicable and (3) that the medical evidence presented, the Reports of Qualified Medical Evaluator, Charles Wiseman, M.D. do not establish by substantial medical evidence that the applicant sustained injury arising out of and in the course of employment.

The order from these findings is that the Applicant, Nina Brown, take nothing on her application, as there is insufficient evidence to establish that her injuries arose out of and in the course of employment. Applicant notes in their Petition for Reconsideration, a critical point from

the July 29, 2019 Report of Dr. Charles Wiseman, Exhibit 1 (EAMS DOC ID 34405331) where he states, "There is not sufficient evidence to scientifically establish an industrial causation of the applicant's cancer." Based on the determinations of Dr. Wiseman, which did not establish that the Applicant's injury arose out of and in the course of employment, after making the finding that the Applicant was not entitled to the presumption of compensability based on Labor Code §3212.1, it was found that there is insufficient evidence to establish that her injuries arose out of and in the course of employment and the determination was made that the Applicant take nothing on her application for workers' compensation benefits.

#### **IV.**

#### **RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied for the reasons stated above.

Dated: June 1, 2021

Respectfully submitted,

**Lori Alison Oesterreich**  
Workers' Compensation Judge