WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RACHEL BEUTTLER, *Applicant*

vs.

CITY OF PACIFIC GROVE, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ11143026
Stockton District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of June 9, 2022 wherein it was found that while employed during a cumulative period ending on August 10, 2017 as a police sergeant, applicant sustained industrial injury in the form of sino-nasal adenoid cystic carcinoma. In finding industrial injury, it was found that applicant was entitled to the cancer presumption for peace officers codified in Labor Code section 3212.1 and that defendant did not successfully rebut the presumption.

Defendant contends that the WCJ erred in finding industrial injury, arguing that the reporting of qualified medical evaluator internist Juan César Larach, M.D. rebutted the Labor Code section 3212.1 presumption. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will deny the defendant's Petition.

At trial, the parties stipulated that "applicant was a full-time police officer with the City of Pacific Grove." (Minutes of Hearing and Summary of Evidence of May 4, 2022 trial at p. 2.) Thus, as a peace officer as defined in Penal Code section 830.1(a), which includes "a police officer … of a city," applicant was subject to the Labor Code section 3212.1, which states in pertinent part:

> (a) This section applies to all of the following:
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> (4) 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, who are primarily engaged in active law enforcement activities.
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> (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.
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> (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 120 months in any circumstance, commencing with the last date actually worked in the specified capacity.

In *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (Appeals Bd. en banc), we discussed the 3212.1 presumption in depth, and explained that it was applicant's initial burden to establish that they came into the class of employees covered by the statute, that the cancer manifested itself during the employee's period of service or during the applicable extension period, that they were exposed to an identified known carcinogen as defined by the International Agency for Research on Cancer (IARC) or the Director of the Department of Industrial Relations. (*Faust*, 68 Cal.Comp.Cases at pp. 1830-1831.) The burden then shifts to defendant to rebut the presumption. In order to successfully rebut the presumption, the defendant must establish the primary site of the cancer and show that "the carcinogen to which the applicant has demonstrated exposure is not reasonably linked to the disabling cancer." (*Id.* at p. 1831.)

Here, applicant carried her initial burden. As noted above, police officers employed by city police departments are expressly named in Penal Code section 830.1(a), and, thus, applicant was clearly within the class of employees coming under the scope of section 3212.1. The parties stipulated that applicant's cancer manifested itself while she was still in active service. The parties also stipulated that applicant was exposed to benzene during her service as a police officer and that benzene is a known carcinogen recognized by the International Agency for Research on Cancer. (Minutes of Hearing and Summary of Evidence of May 4, 2022 trial at p. 2.)

The burden then passed to defendant to show the primary site of the cancer, and that the carcinogen that the applicant was exposed to is "not reasonably linked" to the cancer. Here, the parties stipulated that the primary site of the cancer is the right upper palate. Thus, the issue left for determination at trial was whether defendant carried its burden of showing that the benzene was "not reasonably linked" to sino-nasal adenoid cystic carcinoma of the upper palate.

Defendant argues in its Petition that it rebutted the presumption based on Dr. Larach's opinion that applicant's exposures to benzene were too limited to account for applicant's cancer. We note that "[n]o specific level of actual exposure needs to be shown; a minimal exposure is enough to satisfy the applicant's [initial] burden." (*Faust*, *supra*, 68 Cal.Comp.Cases at p. 1830, citing *Leach v. West Stanislaus Cty. Fire Protection Dist.* (2001) 29 Cal. Workers' Comp. Rptr. 188, 189 [Appeals Bd. panel].)

However, a defendant may rebut the presumption with evidence that "the quantity of the carcinogen to which the employee was exposed, or length of time of the exposure, was too small or too brief to have any detrimental effect." (*City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 317-318 [70 Cal.Comp.Cases 109].) Dr. Larach did appear to opine that applicant's exposure to benzene was too brief to have detrimental effect. (February 17, 2021 deposition at p. 15.) However, there must be a solid and reasonable basis for the physician's final conclusion. It is not sufficient for the WCJ to blindly accept a medical opinion that lacks a solid underlying basis. (*National Convenience Stores v. Workers' Comp. Appeals Bd.* (*Kessler*) (1981) 121 Cal.App.3d 420, 427 [46 Cal.Comp.Cases 783].) Here, Dr. Larach never expounded upon his conclusion that the exposure to benzene was too brief to be reasonably linked to applicant's cancer. In any case, it is not clear that Dr. Larach opined that the exposure to benzene was too small to be reasonably linked to applicant's cancer. Dr. Larach's opinion is somewhat vague on this issue given that he appears to testify that the exposure to benzene was too small to

have a detrimental effect "relative to those [cancer] studies. Those studies are people who are working industrially in making solvents." (February 17, 2021 deposition at p. 16.) However, evidence that applicant was less exposed to a carcinogen than people in other professions is different from evidence that the level of exposure of a carcinogen is so low that it cannot be reasonably linked to the development of the cancer. Indeed, elsewhere in his deposition testimony, Dr. Larach appears to not rule out a link between the benzene exposure and the cancer:

> There are industrial exposures [to benzene], but her known carcinogenic significant exposure is to night shift work, and that's why I gave you that analysis. Now again, using the crumbs idea, you could even go and say, golly, these people work in an industry but she pumped her gas and she smelled exhaust and those little crumbs might have contributed a little something to sinonasal cancer development.
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> But the reason I gave you that analysis is because her level to exposure – significant carcinogen exposure is really to night shift work, not the other stuff. That's why I excluded those in the rebuttal analysis – or the non-rebuttal analysis.

(February 17, 2021 deposition at p. 42.)[1] However, the opinion that there is a more likely cause or a greater contributing cause of the applicant's cancer, in and of itself, is insufficient proof of "no reasonable link" between exposure to benzene and applicant's cancer.

Accordingly, defendant did not rebut the presumption with evidence that applicant's exposure to benzene was too brief to have a detrimental effect.

Defendant also argues that applicant's cancer was not reasonably linked to her exposure to benzene because the latency period for the cancer was longer than her employment for defendant. Indeed, a defendant may rebut the presumption by demonstrating that "it is highly unlikely the cancer was industrially caused because the period between the exposure and the manifestation of

[1] Dr. Larach opined that applicant was exposed to the carcinogen of night shift work. Operating on the theory that exposure to night shift work was sufficient to raise the Labor Code section 3212.1 cancer presumption, Dr. Larach found the presumption applicable and not rebuttable. However, the parties stipulated that night shift work is classified as a probable carcinogen and thus is not a "known carcinogen" for the purposes of section 3212.1. Dr. Larach presented ambivalent testimony regarding whether it was medically probable that applicant's exposure to night shift work was a contributing cause of her cancer. The WCJ found, "There is insufficient evidence to ascertain whether the applicant suffered an injury arising out of and in the course of employment due to night shift work resulting in sino-nasal adenoid cystic carcinoma to her right upper palate." In light of the finding that defendant did not rebut the Labor Code section 3212.1 cancer presumption due to benzene exposure, the issue is moot.

the cancer is not within the cancer's latency period." (*Garcia, supra,* 126 Cal.App.4th 298 at p. 317.) However, with regard to the concept of latency, Dr. Larach testified:

> Well, the concept of latency goes way back in the medical literature. And may not always apply, and so I think latency is helpful in doing the epidemiologic studies, but our current understanding of cancers is that often you need a series of genetic events, and they may appear in sequence or separately, but they need to be all present for this to happen.
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> For example, there's one idea of colon cancer, so you really need like five hits, and some of the original cancer studies for skin cancer need two hits. But when they count latency, they're counting the first hit, you see, but you need two hits. You need two different events.
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> And the skin cancer thing, you need one kind of irritant and then you get another irritant, and so those are two hits. But when they count latency, they are counting from the very first hit. The concept isn't very helpful.

(February 17, 2021 deposition at pp. 30-31.)

Thus, Dr. Larach never opined that there was no reasonable link because of any latency period. To the contrary, Dr. Larach's testimony appears to allow for the possibility that, regardless of any earlier exposure or latency period, applicant's exposure to benzene during her employment could still be contributory to applicant's cancer.

Accordingly, since there was insufficient medical evidence to rebut the Labor Code section 3212.1 presumption, we will deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact of June 9, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 6, 2022

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

RACHEL BEUTTLER
MASTAGNI HOLSTEDT
LENAHAN, SLATER, PEARSE & MAJERNIK, LLP

DW/ara

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