WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICHARD ELLENBERGER (deceased); JENNIFER ELLENBERGER, individually and as Guardian Ad Litem for Minor Dependents ISABELLA ELLENBERGER, CAITLYN VASQUEZ and CARISSA VASQUEZ, *Applicants*

vs.

STATE OF CALIFORNIA/CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PREVENTION; legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ9699542
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicants seek reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 1, 2021, in which the WCJ found that decedent, while employed by defendant during the period August 18, 2013 through August 18, 2014, did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his neck, tongue, colon, or rectum, in the form of cancer.

Applicants contend that they met their burden that the presumption under Labor Code section 3212.1[2] applied and that the WCJ erred when she found that defendant successfully rebutted the presumption as defendant failed to prove the absence of a reasonable link between decedent's industrial exposure to carcinogens and his colon/rectal cancer and neck/tongue cancer.

Defendant filed an Answer to Petition for Reconsideration. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been appointed in her place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the WCJ's Report. Based on our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the WCJ's F&O and issue a new decision finding injury AOE/COE, that defendant failed to rebut the presumption pursuant to section 3212.1, and defer issues of temporary disability alleged from August 19, 2014 to June 20, 2015, death benefits, dependency, and CalPERS Special Death Benefit.

FACTS

I.

Applicants claim that decedent, while employed as a Fire Captain during the period August 8, 2013 to August 18, 2014, sustained injury AOE/COE to his neck, tongue, colon, and rectum, in the form of cancer, resulting in his death on July 20, 2015. (Minutes of Hearing and Summary of Evidence (MOH/SOE, 02/05/2020, 2:3-7; 2:15-16.)

Applicants filed their application for adjudication of claim (death claim) on May 13, 2016.

Applicant Jennifer Ellenberg (Applicant) testified that she considers herself a widow of decedent, whom she married on April 30, 2011, after they lived together starting in 2009 until his death. (MOH/SOE, 02/05/2020, 5:6-9.) She identified her children as Carissa and Caitlyn Vasquez, and Isabella Ellenberger, all of whom lived with decedent in Murrieta, California. (MOH/SOE, 02/05/2020, 5:9-12.) Applicant stated that Nicholas Vasquez fathered Carissa and Caitlyn, but he provided no financial support at the time of decedent's death. (MOH/SOE, 02/05/2020, 5:13-14.) Applicant confirmed she earned no income since early 2009 and did not work during her marriage, making decedent's income the sole financial support for the family. (MOH/SOE, 02/05/2020, 4:14-15.) She clarified her timeline with Mr. Vasquez, stating their divorce was finalized in a judgment dated April 19, 2005, and she acknowledged a previous error regarding a 2001 separation date. (MOH/SOE, 02/05/2020, 6:14-17.) She explained that Mr. Vasquez paid approximately $125.00 every two weeks for Carissa for about five years before stopping around 2006, and he relinquished parental rights to Caitlyn during the divorce settlement to avoid financial support. (MOH/SOE, 02/05/2020, 5:16-19). Applicant stated that Caitlyn remained Mr. Vasquez's biological child and never changed her last name, despite a dissolution stipulation stating otherwise. (MOH/SOE, 02/05/2020, 6:17-21). Applicant stated that her children called decedent "Dad" and had no contact with Mr. Vasquez for years prior to her marriage to decedent. (MOH/SOE, 02/05/2020, 5:20-22.)

Regarding her current finances, applicant testified that she receives approximately $3,900.00 per month in CalPERS death benefits, which she considered inadequate in comparison to decedent's earnings. (MOH/SOE, 02/05/2020, 5:23-24; 6:3-4.) She stated she sold their home because the monthly payment exceeded $3,000.00, and she now rents a home in Murrieta for $2,700.00 per month, leaving approximately $1,200.00 for other expenses such as groceries, clothing, and utilities. (MOH/SOE, 02/05/2020, 5:24-25 to 6:1-4.) She stated that a friend, Kevin Quast, lives at her current address, pays $500.00 in rent, but contributes nothing else to household expenses or chores. (MOH/SOE, 02/05/2020, 6:6-10.) She noted she moved in with Mr. Quast in October 2019 after living with her family for a year following the loss of her house. (MOH/SOE, 02/05/2020, 7:4-6.) She testified she and Mr. Quast share a 19-month-old child, Dylan, for whom they both make purchases without a specific child support arrangement, and she clarified she has no plans to marry Mr. Quast. (MOH/SOE, 02/05/2020, 6:12-14, 7:2-3.) She stated that Raneem Zyid, a 17-year-old friend of her daughters, stays at the home part-time without making financial contributions and is still in high school. (MOH/SOE, 02/05/2020, 6:10-12.) Applicant confirmed she receives no benefits other than the CalPERS payments. (MOH/SOE, 02/05/2020, 7:6-7.) She stated she owns a fully paid 2014 Lexus IS 200 purchased during her marriage and pays approximately $29.00 for electricity and $142.00 for water. (MOH/SOE, 02/05/2020, 6:24-25 to 7:1-2.) Finally, she stated she suffers from post-traumatic stress disorder, preventing her from renewing her aesthetician license or working in that field, and she remains unable to work due to a lack of childcare. (MOH/SOE, 02/05/2020, 7:10-11, 7:13-15.)

II.

Panel Qualified Medical Evaluator (PQME) Ira Fishman, M.D., prepared a report dated December 8, 2015, in which he reported that decedent actively participated in wildland firefighting from October 1, 1997, until his promotion to Fire Captain on June 1, 2009. During an average summer, decedent devoted approximately 800 to 1,000 hours to wildland firefighting and experienced less frequent smoke exposure from winter control burns without respiratory protection. (Joint Ex. Y, pp. 4, 28.) The comprehensive medical record review revealed two objective pathological findings: (1) a p16-positive squamous cell carcinoma of the right base of the tongue, treated with definitive chemoradiation therapy in December 2014; and (2) an invasive, 7.0 cm signet ring cell adenocarcinoma of the rectum with positive surgical margins. (*Id.* at pp.

26-27.) Furthermore, a genetic consultation report by Syed A. Ahmed, M.D., dated February 23, 2015 identified a c.467C>G variant in the MSH6 gene, reflecting a substitution of guanine for cytosine at position 467 and supporting the diagnosis of Hereditary Nonpolyposis Colorectal Cancer (HNPCC). (*Id.* at p. 27.)

In his supplemental report dated May 23, 2016, PQME Dr. Fishman documented decedent's extensive treatment for Lynch syndrome, metastatic rectal cancer, and squamous cell carcinoma of the base of the tongue through a comprehensive review of Kaiser Permanente medical records spanning April 25, 2015 to July 14, 2015. (Joint Ex. X, pp. 4-34.) Objective pathological findings include a PET/CT scan dated May 15, 2015 by Aarti Kaushik, M.D., revealing widespread hypermetabolic osseous metastases and a bone biopsy by Mark T. Taira, M.D., dated May 21, 2015 confirming poorly differentiated adenocarcinoma of colorectal origin. (*Id.* at pp. 9, 12.) Additional objective findings detail severe protein-calorie malnutrition, partial bowel obstruction necessitating a diverting loop ileostomy, and recurrent sepsis with acute organ dysfunction secondary to bilateral hydronephrosis requiring nephrostomy tube placement. (*Id.* at pp. 4, 7, 10, 11, 15, 17-21, 25-32, 34, 68-69.) The death certificate dated July 28, 2015 identified Lynch syndrome, colon cancer, and squamous cell cancer of the base of the tongue as the causes of death. (*Id.* at pp. 34, 38; Def. Ex. B.)

The record review also disclosed a pathology report by Stephen S. Koh, M.D., dated September 29, 2014. Dr. Koh noted decedent's prior history of Stage III rectal cancer diagnosed on January 5, 1998, associated with Lynch syndrome, with metastasis to 11 of 16 lymph nodes. Decedent underwent a low anterior resection followed by adjuvant chemoradiation. (Joint Ex. X, p. 35.) Dr. Koh also identified an invasive, poorly differentiated squamous cell carcinoma of the right base of the tongue, characterized as Human Papillomavirus Genotype 16 (HPV-16) positive, for which decedent received definitive chemoradiation that concluded in 2014. (*Id.* at p. 48.)

Finally, the record review also disclosed a colposcopy procedure report by Adam Chen, M.D., dated October 23, 2014, that identified a tumor at the colonic anastomotic region. The following day, Ales Pindur, M.D., issued a surgical pathology report confirming moderately differentiated adenocarcinoma with occasional signet ring cells. (*Id.* at p. 35.) On February 26, 2015, Dr. Koh performed a subsequent resection, removing a 7 cm, moderately to poorly differentiated signet ring cell adenocarcinoma that had invaded the perirectal soft tissue and exhibited extensive lymphovascular and perineural invasion. (*Id.* at p. 36.)

PQME Dr. Fishman opined that decedent's routine firefighting exposed him to benzene, an International Agency for Research on Cancer (IARC) Group 1 carcinogen found in products of combustion, as well as other IARC Group 1 carcinogens, including vinyl chloride. PQME Dr. Fishman concluded that the exposure satisfied the requirements for application of the cancer presumption pursuant to section 3212.1. (*Id.* at p. 49.)

However, PQME Dr. Fishman determined that the extremely short latency period between the October 1, 1997 employment commencement and the January 5, 1998 stage III rectal cancer diagnosis successfully rebutted the section 3212.1 presumption for the malignancy. (*Id.* at p. 52). He further concluded that the genetic mutation manifesting as Lynch Syndrome entirely caused both the initial January 5, 1998 colon cancer and the terminal 2014 recurrent metastatic rectal cancer. (*Id.* at pp. 48, 52.) The death certificate established the date of death as July 20, 2015, recording Lynch Syndrome as the immediate cause, driven by terminal widely metastatic rectal cancer. (*Id.* at pp. 38, 69.) Regarding the oral malignancy, he determined decedent met the evidentiary requirements for the presumption by demonstrating exposure to recognized carcinogens, and he noted that latency could not rebut the presumption for this specific cancer. (*Id.* at p. 48.) However, PQME Dr. Fishman emphasized that the presence of HPV-16, a sexually transmitted oncovirus, complicated the application of the presumption to the oral cancer, noting extensive epidemiological evidence linking this virus to oropharyngeal carcinomas even in non-tobacco users (*Id.* at pp. 48, 64.) Ultimately, he determined that the tongue cancer achieved clinical remission and remained only regionally metastatic at the time of decedent's death. (*Id.* at p. 48.)

In his deposition dated May 9, 2017, PQME Dr. Fishman confirmed decedent sustained cumulative occupational carcinogen exposure as a wildland firefighter. (Joint Ex. Z, 9:24-25 to 10:1-2.) PQME Dr. Fishman acknowledged decedent encountered unprotected environmental exposure to both benzene and diesel fumes, explaining that wildland firefighters do not utilize respiratory protection in the field. (*Id.* at p. 9:10-16; 10:4-8.) Furthermore, PQME Dr. Fishman stated that benzene and diesel exposures represent known carcinogens capable of causing cancer. (*Id.* at p. 10:17-19; 11:8-11.)

Regarding objective pathological findings, PQME Dr. Fishman noted decedent developed rectal cancer at an extremely young age. (*Id.* at p. 26:17-22.) The record demonstrates decedent possessed Lynch syndrome, a genetic chromosome mutation that alters cellular repair mechanisms, promotes cancer formation, and increases the likelihood of rectal cancer. (*Id.* at pp. 11:13-25 to

12:1-12.) PQME Dr. Fishman stated that decedent underwent chemotherapy combined with radiation for head and neck cancer, specifically tongue cancer. (*Id.* at p. 21:5-14.) This aggressive therapy caused a weakened physiological state and required the surgical insertion of a gastrostomy feeding tube to provide proper nutrition due to an inability to swallow. (*Id.* at pp. 19:13-18; 28:17-20.) Medical records documented a finding of tachycardia during an emergency room visit. (*Id.* at p. 16:12-21.) However, PQME Dr. Fishman diagnosed this as sinus tachycardia secondary to sepsis and the deterioration of decedent's condition from metastatic cancer, rather than an independent heart arrhythmia. (*Id.* at pp. 16:23-25 to 17:1-8; 18:1-9.) Although the death certificate listed the tongue cancer as a cause of death, PQME Dr. Fishman explicitly disagreed, testifying the tongue cancer remained in remission and did not contribute to mortality. (*Id.* at pp. 18:11-25 to 19:1-3.) He concluded the progression of the metastatic colon cancer caused the death. (*Id.* at p. 18:1-5.)

Addressing the presumption of compensability, PQME Dr. Fishman verified the evidentiary requirements applied to decedent as a firefighter under section 3212.1. (*Id.* at p. 7:19-21.) Relying on his medical assessment of these highly complex facts, PQME Dr. Fishman opined that defendant rebutted the presumption, though he deferred the ultimate legal determination to the WCJ. (*Id.* at pp. 7:25 to 8:1-10; 14:14-19.) PQME Dr. Fishman also evaluated *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 299 [80 Cal.Comp.Cases 489] recognizing the very minimal threshold for industrial contribution required to establish causation in a death case. (*Id.* at pp. 6:19-23; 24:17-25 to 25:1-4.) Additionally, he incorporated *City of Jackson v. Workers' Comp. Appeals Bd.* (*Rice*) (2017) 11 Cal.App.5th 109, 115-17 [82 Cal.Comp.Cases 437] into his analysis to validate considering decedent's Lynch syndrome genetic mutation when evaluating why decedent developed colon cancer prematurely. (*Id.* at pp. 6:24-25 to 7:1-4; 26:2-22.) However, he acknowledged that genetic mutations are not the exclusive cause of cancer. He acknowledged that individuals with a genetic mutation, such as Lynch Syndrome, do not necessarily develop cancer solely due to that condition, allowing for the possibility of other intervening factors. (*Id.* at p. 12:13-23.) Furthermore, he affirmed that the presence of specific markers, comparing Lynch Syndrome to HPV 16 viral infections, does not guarantee cancer development, explicitly stating, "none of it is 100 percent." (*Id.* at pp. 13:24-25 to 14:1-2.)

The WCJ issued her F&O dated February 26, 2021 finding that decedent did not sustain injury AOE/COE to his neck/tongue and colon/rectal in the form of cancer. In her Opinion on Decision, the WCJ reasoned that the presumption of compensability in section 3212.1 applied but that defendant successfully rebutted it because the evidence demonstrated "no reasonable link" between the carcinogens and the cancers. (Opinion on Decision, pp. 3-4.)

In her Report, the WCJ stated as follows:

> With the history of non-industrial colon cancer, the Court finds the defendant demonstrated applicant's terminal colon cancer was caused by Lynch Syndrome, not by an industrial factor.
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> Dr. Fischman . . . state[d that] "[t]he decedent's tongue cancer HPV-16 status was determined to be positive."
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> The . . . panel qualified medical examiner, Dr. Fischman [sic], . . . not[ed that] the HPV virus was located *within* the tumor itself, leading the doctor to believe it was nonindustrial in nature.
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> * * *
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> The court found defendant successfully rebutted the presumption of Labor Code § 3212.1, and there is no finding of injury arising out of or in the course of employment for Mr. Ellenberger's neck/tongue cancer, colon/rectal cancer, and subsequent death.

(Report, pp. 6-8.)

It is from this F&O that applicants seek reconsideration.

DISCUSSION

Section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury "arising out of and in the course of employment." (Lab. Code, § 3600.) An applicant seeking workers' compensation death benefits for a deceased employee has the burden of proving industrial causation. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) However, in order to prove industrial causation, an applicant need only show that industrial factors were a contributing cause of the injury, requiring only showing that industrial causation was "not zero" with all reasonable doubts to be resolved in their favor. (*Clark*, *supra*, 61 Cal.4th at pp. 299, 302; *Ruiz v. Carter &*

Carter, APLC [2026 Cal. Wrk. Comp. P.D. LEXIS 7, *9]; *Serrano v. Big Idea Holdings, LLC* [2025 Cal. Wrk. Comp. P.D. LEXIS 384, *12]; *Fishel v. Rick's Lube and Complete Auto* [2025 Cal. Wrk. Comp. P.D. LEXIS 255, *19]; *De Bartolo v. S. Cal. Pizza Co.* [2023 Cal. Wrk. Comp. P.D. LEXIS 85, *10]; *Cervantes v. Reycon Construction* [2022 Cal. Wrk. Comp. P.D. LEXIS 378, *9].)[3]

Pursuant to section 3212.1, a firefighter exposed to a known carcinogen who develops or manifests cancer is entitled to a presumption of industrial causation. The presumption is rebuttable (1) by evidence establishing the primary site of the cancer and (2) by evidence that exposure to the recognized carcinogen is not reasonably linked to the disabling cancer.

Section 3212.1, as amended in 2010[4] and operative prior to January 1, 2026, provides, in relevant part:

> (a) This section applies to all of the following:
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> * * *
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> (1) Active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments:
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> (A) A fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision.
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> * * *
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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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[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

[4] The William Dallas Jones Cancer Presumption Act of 2010 amended section 3212.1(d) to extend the maximum post-employment time period within which the "developing or manifesting of a cancer" must occur in order for the presumption to apply from 60 months to 120 months and that the longer period now applies in all pending cases regarding of the dates of employment or date of the "developing or manifesting of the cancer." (*Lozano v. Workers' Comp. Appeals Bd.* (2015) 236 Cal.App.4th 992, 998-999 [80 Cal.Comp.Cases 407].)

> (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.

(Former Lab. Code, § 3212.1.)

Manifestation occurs when an employee first has symptoms, even in the absence of a diagnosis. (*City of Los Angeles County v. Workers' Comp. Appeals Bd.* (*Darling*) (2000) 70 Cal.Comp.Cases 1147 (writ den.); *County of El Dorado v. Workers' Comp. Appeals Bd.* (*Klatt*) (2000) 65 Cal.Comp.Cases 1437, 1438 (writ den.).)

In *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (Appeals Board en banc), the Appeals Board addressed the respective burdens placed on the parties by the 1999 amendments to section 3212.1.

In *Faust*, the Appeals Board set forth an applicant's burden as follows:

> Before the presumption may be applied, section 3212.1(b) requires that applicant demonstrate that [the employee] . . . was exposed to an identified known carcinogen. The applicant must establish that the exposure was to a "known carcinogen" with evidence, generally documentary, that the carcinogen is defined as such by the International Agency for Research on Cancer, or otherwise so "defined by the director." The carcinogens "defined by the director" are those regulated by the director of the Department of Industrial Relations.
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> The applicant must also demonstrate actual exposure to the established known carcinogen during the period of employment as a firefighter. This may be shown by the applicant's testimony or other credible evidence that may include expert testimony. The applicant is not required to show that the exposure is the proximate cause of the injury.
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> No specific level of actual exposure needs to be shown; a minimal exposure is enough to satisfy the applicant's burden.
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> The applicant must also show the development or manifestation of the cancer, during the statutory time period, by medical evidence that must include the date of development or manifestation.
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> * * *

> The burden of proving these initial elements lies with the applicant. When the applicant has shown: (1) that [the employee] . . . was employed in an included capacity; (2) that [the employee] . . . has been exposed to a known carcinogen during the employment; and (3) that [the employee] . . . has developed or manifested cancer within the statutory time frames, then he or she has made a prima facie showing that the cancer is presumptively compensable.

(*Faust*, *supra*, 68 Cal.Comp.Cases at pp. 1830-1831, citations omitted.)

Finally, in considering section 3212.1, we must also consider sections 5500.5 and 5412. Section 5500.5(a) addresses the temporal period of occupational exposure, while section 5412 establishes a specific date of injury that may, but does not necessarily, coincide with the end of the industrial exposure period under section 5500.5. In an occupational exposure injury case, the period of exposure to the industrial hazard informs the determination of causation, while section 5412 establishes the date of injury based on the concurrence of disability and knowledge, thereby defining the applicable period of employer liability. Thus, determining liability under section 5500.5(a) may require an analysis of the date of injury under section 5412. (*See County of Riverside v. Workers' Comp. Appeals Bd.* (*Sylves*) (2017) 10 Cal.App.5th 119, 126 [82 Cal.Comp.Cases 301].)

Here, decedent, while employed as a wildland firefighter and Fire Captain between October 1, 1997 and August 18, 2014, sustained unprotected, cumulative occupational exposure to IARC Group 1 carcinogens, including benzene, vinyl chloride, and diesel fumes. On January 5, 1998, physicians diagnosed him with Stage III rectal cancer. He subsequently developed HPV-16-positive squamous cell carcinoma of the right base of the tongue and recurrent metastatic rectal cancer. Therefore, the evidentiary requirements are satisfied for the application of the cancer presumption of compensability pursuant to section 3212.1.

Having demonstrated actual exposure based on the above discussion, the burden then shifted to defendant to rebut the presumption. To rebut the presumption, defendant must establish: (1) that it has identified the primary site of the cancer; and (2) that there is no reasonable link between the carcinogen and the disabling cancer.

It is clear from the medical evidence that the primary sites for the cancers are decedent's neck and tongue and colon and rectum.

However, as set forth in *Faust*:

> [T]he defendant has the burden of showing that the carcinogen to which the applicant has demonstrated exposure is not reasonably linked to the disabling cancer, i.e., the defendant must provide evidence to establish that there is no

> reasonable link. Medical or similar expert scientific evidence is necessary to show that there is no reasonable link between the exposure and the cancer.
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> A defendant may establish that there is no reasonable link between the . . . [employee's] exposure and his or her illness by establishing the absence of a link between the exposure and the cancer, including establishing that the latency period of the manifestation of the specific cancer excludes the exposure as the cause of the applicant's cancer.
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> The defendant's burden is to prove by medical probability that there is no reasonable link between the . . . [employee's] demonstrated exposure to known carcinogens during the employment and the development of cancer. It is not enough for the defendant to show that no evidence has established a reasonable link between the known carcinogen and the cancer. Instead, the defendant must establish by evidence of reasonable medical probability that a reasonable link does not exist.
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> Accordingly, evidence showing that no reasonable link has been demonstrated to exist between the carcinogen or carcinogens to which the firefighter has been exposed and the development of the cancer, is not adequate to rebut the presumption of industrial causation. ***To rebut the presumption, the evidence must explicitly demonstrate that medical or scientific research has shown that there is no reasonable inference that exposure to the specific known carcinogen or carcinogens is related to or causes the development of the cancer***.

(*Faust*, *supra*, 68 Cal.Comp.Cases at pp. 1831-1832, citations omitted and emphasis added.)

In *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298 [70 Cal.Comp.Cases 109], the Court of Appeal endorsed the Appeals Board's holding in *Faust* and discussed how a defendant might rebut the section 3212.1 presumption:

> Thus, under the current version of section 3212.1, an employer demonstrates the absence of a reasonable link if it shows no connection exists between the carcinogenic exposure, or that any such possible connection is so unlikely as to be absurd or illogical. Contrary to the City's argument, the statute does not require the employer to prove "the absence of any possible link." The statute requires proof no reasonable link exists. A link that is merely remote, hypothetical, statistically improbable, or the like, is not a reasonable link. ***The employer need not prove the absence of a link to a scientific certainty; instead, it must simply show no such connection is reasonable, i.e., can be logically inferred***.

(*Garcia*, *supra*, 126 Cal.App.4th at p. 316, emphasis added.)

Finally, 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 the cancer is not within the cancer's latency period." (*Id.* at p. 317.)

Here, PQME Dr. Fishman failed to proffer substantial medical evidence sufficient to rebut the statutory presumption of compensability articulated in section 3212.1. Although he accurately identified the precise anatomical sites of the malignancies and appropriately recognized both the genetic mutation and the viral pathogen, his reports and subsequent deposition testimony conspicuously fail to articulate the precise significance he attributed to those nonindustrial factors. Specifically, the evidentiary record remains devoid of any clear explanation as to whether he considered the aforementioned biological factors categorically sufficient to establish that absolutely no reasonable link existed between decedent's documented occupational exposure to known carcinogens and the subsequent development of his cancers. Because his medical opinion on AOE/COE fails to resolve the critical distinction between an exclusive nonindustrial cause and a more probable alternative explanation that nonetheless accommodates a concurrent industrial contribution, the medical analysis categorically fails to satisfy the stringent statutory standard mandated for rebuttal.

Specifically, with regard to the squamous cell carcinoma located at the right base of the tongue, the underlying medical record indisputably confirmed that decedent sustained unprotected environmental exposure to IARC Group 1 carcinogens, including benzene, vinyl chloride, and diesel exhaust, throughout his extensive tenure as a wildland firefighter. PQME Dr. Fishman documented the presence of HPV-16 and properly associated this viral infection with the development of oropharyngeal carcinoma. However, his medical discussion fails to establish whether he definitively concluded that the viral infection precluded any reasonable biological contribution from decedent's prolonged occupational exposures. This analytical distinction is important because section 3212.1 places the affirmative burden upon defendant to produce evidence addressing whether a reasonable link remains between the identified occupational carcinogens and the disabling malignancies. PQME Dr. Fishman failed to explain whether the documented occupational exposures could have synergistically contributed to the carcinogenesis or manifestation of the oral malignancy notwithstanding the concurrent presence of the viral pathogen. As a result, his medical opinion does not support a judicial determination that the viral etiology is medically incompatible with an industrial contribution and therefore does not constitute substantial evidence sufficient to carry the evidentiary burden.

A similar deficiency undermines PQME Dr. Fishman's analysis of the signet ring cell adenocarcinoma of the rectum. His opinion focused heavily on the brief interval between

decedent's October 1, 1997 employment commencement and the January 5, 1998 initial cancer diagnosis, as well as his genetic predisposition associated with HNPCC. PQME Dr. Fishman concluded that this short latency period affirmatively rebutted the statutory presumption. However, the medical record does not clearly establish the medical basis for that conclusion or explain why the initial latency period should control the analysis of occupational causation in a cumulative injury claim. More importantly, the analysis treats the brief interval preceding the January 5, 1998 diagnosis as though it ended the relevant occupational exposure. It did not. Decedent continued working and encountering unprotected environmental carcinogens for approximately 16 years before the malignancy manifested again in 2014. Thus, relying on the initial latency period to rebut the presumption concerning the 2014 recurrence disregards the continued occupational exposure that followed the January 5, 1998 diagnosis and artificially truncates the cumulative trauma period to only a fraction of decedent's employment.

Additionally, PQME Dr. Fishman's characterization of decedent's HNPCC and HPV-16 as absolute, superseding nonindustrial causes is fundamentally inconsistent with the governing legal framework. While PQME Dr. Fishman appropriately recognized the profound genetic and viral predicates intrinsic to Lynch Syndrome and the squamous cell carcinoma, his causal extrapolation misapprehends the highly deferential threshold of compensability applicable in death cases, which mandates only that the industrial causation factor be greater than zero. He failed to provide a scientifically grounded explanation regarding how the presence of the genetic mutation and the viral infection affected the potential for decedent's ongoing occupational exposures to contribute to, accelerate, or otherwise exacerbate the malignancy. Furthermore, he neglected to address whether the genetic mutation and the environmental carcinogens operated concurrently to produce the terminal conditions. Indeed, he conceded in his deposition that genetic mutations do not exclusively cause cancer, acknowledging that no medical probability reaches 100%. Defendant bore the affirmative legal obligation to demonstrate that the totality of the cumulative exposure did not reasonably contribute to the terminal conditions, an obligation it plainly failed to satisfy.

Ultimately, the equivocal record concerning the foundational facts of the cumulative injury undermines the reliability of PQME Dr. Fishman's opinions. Without an adequate factual foundation concerning the relevant exposure history and disease progression, his conclusions rest in part on speculation and do not provide the medical reasoning necessary to constitute substantial evidence. This deficiency bears directly on the applicable burden of proof because the record does

not adequately establish the medical or legal basis for his conclusion that the evidence overcomes the statutory presumption. Accordingly, the record does not establish the absence of a reasonable link between the occupational carcinogens and decedent's cancers as required under section 3212.1.

Finally, we will find that the requisite concurrence of disability and knowledge pursuant to section 5412 occurred on May 13, 2016, the date upon which applicants submitted their application for adjudication of claim (death claim). The formal filing of this initial pleading, in the absence of any other evidence to the contrary, served to officially anchor the requisite awareness alongside the underlying disability, thereby establishing May 13, 2016 as the operative date of injury in this matter.

Accordingly, as our Decision After Reconsideration, we rescind the WCJ's F&O and issue a new decision finding injury AOE/COE, that defendant failed to rebut the presumption pursuant to section 3212.1, and defer issues of temporary disability alleged from August 19, 2014 to June 20, 2015, death benefits, dependency, and CalPERS Special Death Benefit.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 1, 2021 Findings and Order is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Richard Ellenberger, while employed during the period August 18, 2013 to August 18, 2024, as a Fire Captain, at Ventura, California, by the State of California/California Department of Forestry and Fire Prevention, sustained injury arising out of and in the course of employment to his neck, tongue, colon/rectum in the form of cancer resulting in his death on July 20, 2015.

2. The issues of temporary disability alleged from August 19, 2014 to June 20, 2015, death benefits, dependency, and CalPERS Special Death Benefit are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 5, 2026

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

JENNIFER ELLENBERGER
ORACLE LAW FIRM
STATE COMPENSATION INSURANCE FUND

DLP/md

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