CALIFORNIA COMPENSATION CASES

Walter Faust, Applicant v. City of San Diego, PSI, Defendant

W.C.A.B. No. SDO 244774--WCJ Ronald Smitter (SDO); WCAB En Banc: Chairman Rabine, Commissioners O'Brien, Cuneo, Murray, Brass, Shimmon, Caplane

Workers' Compensation Appeals Board (en banc)

68 Cal. Comp. Cas 1822; 2003 Cal. Wrk. Comp. LEXIS 585

Opinion Filed December 11, 2003

CORE TERMS: cancer, exposure, carcinogen, firefighter, prostate cancer, exposed, fought, site, chemical, rebut, plating, linked, manifestation, disabling, appeals board, station, burning, cadmium, paint, industrial causation, latency period, reconsideration, occupational, garage, metal, cumulative industrial injury, writ den, firefighting, rebutted, medical evidence

DISPOSITION:
[1]**
Disposition: The Findings and Orders issued July 15, 2002, are *rescinded* and the matter *returned* to the WCJ for further proceedings and new decision.

HEADNOTE: Presumption of Industrial Causation--Cancer--Firefighters--WCAB established guidelines for applying presumption of Labor Code § 3212.1, as amended in 1999, and remanded for WCJ to apply guidelines to applicant firefighter's claimed injury in form of prostate cancer, when WCAB guidelines specified that applicant could invoke presumption by establishing exposure to known carcinogen and manifestation or development of cancer under that statute, and burden would then shift to defendant to rebut presumption by establishing primary site of cancer and establishing that there was no reasonable link between carcinogen and applicant's cancer. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.113[4][b], [p].]

OPINIONBY: Chairman Merle C. Rabine

OPINION:
OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

The Workers' Compensation Appeals Board (Appeals Board) granted reconsideration of the Findings and Orders issued by a workers' compensation administrative law judge (WCJ) on July 15, 2002, in which the WCJ found that applicant **[**2]** did not sustain cumulative industrial injury in the form of cancer while employed as a firefighter by the City of San Diego from February 4, 1972 through December **[*1823]** 27, 1997. Applicant contends that the presumption of Labor Code section 3212.1 is applicable to this claim and that defendant has not met its burden of rebutting the presumption. n1

----------Footnotes----------

All further statutory references are references to the Labor Code unless otherwise indicated.

----------EndFootnotes----------

Defendant filed an answer to the petition for reconsideration.

Because of the important legal issues presented, and to secure uniformity of decision in cases arising under section 3212.1, the Chairman of the Appeals Board, upon a majority vote of the members, reassigned this case to the Appeals Board as a whole for an en banc decision after reconsideration. (Lab. Code, § 115.) n2

----------Footnotes----------

The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., **[**3]** tit. 8, § 10341; *Gee v. Workers' Compensation Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6, [118 Cal. Rptr. 2d 105] 67 Cal. Comp. Cases 236, 239, fn. 6.)

----------EndFootnotes----------

We hold that under section 3212.1, as amended in 1999, when an applicant establishes both exposure to a known carcinogen and the manifestation or development of cancer as the section specifies, the cancer is presumed to be an industrial injury. The burden then shifts to the defendant to rebut the presumption (1) by evidence establishing the primary site of the cancer and (2) by evidence establishing that there is no reasonable link between the carcinogen and the cancer. The defendant must prove that no reasonable link exists; it does not rebut the presumption by merely proving that there is no evidence demonstrating a reasonable link.

I. BACKGROUND

Applicant, Walter Faust, was employed as a firefighter by the City of San Diego from February 1972 until his retirement on July 4, 1998. Applicant's medical condition was diagnosed as prostate cancer in April 1998. He stopped working **[**4]** at that time, underwent surgery in May 1998, and retired on July 4, 1998. n3

----------Footnotes----------

We note that the claimed period of cumulative industrial injury was limited to the period February 4, 1972, through December 27, 1997, and was also the period of injury found by the WCJ.

----------EndFootnotes----------

In June 1998, applicant filed an Application for Adjudication of Claim alleging cumulative industrial injury. On September 25, 1998, defendant denied liability for the claim of injury in the form of cancer. n4

----------Footnotes----------

Applicant's claim of industrial injury to other body parts was resolved by an Award made pursuant to the stipulations of the parties issued by the WCJ on August 28, 2001.

----------EndFootnotes----------

Both parties obtained qualified medical evaluations. Applicant's qualified medical evaluator (QME), Prakash Jay, M.D., in the report of February 10, 1999, concluded that applicant's

prostate cancer was industrially related. **[**5]** Dr. Jay's report includes applicant's reported history and contains extensive reference to studies concerning the occurrence of prostate cancer in firefighters.

Applicant reported his history of exposure to Dr. Jay:

> "'Mr. Walter Faust stated that he was employed by the City of San Diego Fire Department as a fire fighter from February 1972 until his retirement **[*1824]** on July 4, 1998. He stopped working in April 1998 as a result of his prostate cancer."

> "'Mr. Faust believed that his prostate cancer was contributed to by his cumulative work place exposures to carcinogens. He states that he has been exposed to smoke, combustion products, and carcinogens over many years during the course of his employment as a fire fighter for the City of San Diego Fire Department. Mr. Faust stated that during the course of his employment with the City he has fought many fires. He stated that he had previously fought all types of fires including structural fires, vehicular fires, ship fires, wild land fires, dumpster fires, and many garage fires. He stated that in the early years of his employment he did not use respiratory protection on a regular basis. He stated that many of **[**6]** the garage fires that he fought involved paint lockers, pesticides, and various chemicals. He indicated that in approximately 1990 or 1991 there was a tuna boat fire in which there were burning chemicals. He believed that the tuna boat had paint lockers, solvents, and thinners. He stated that in approximately 1973 or 1974 he fought a fire at San Diego Plating. He stated that this was a total burnout with lots of smoke from plating chemicals including various types of metals. He indicated that in 1975 there [was] a fire at Dave's Display in which a lot of plastics and costumes were burning. He stated that in approximately 1995 or 1996 he fought a fire at a soap factory and indicated that a lot of different chemicals were burning during that fire as well. He stated that in 1978 he fought a fire at the Old Globe Temporary Theater which was constructed with creosote-coated poles. In approximately 1979 or 1980 he fought a fire at a warehouse on Commercial Avenue. He stated that approximately in 1990 there was a Western Metal fire which contained fire from paint and other chemicals. He stated that over the many years during the course of his employment he had fought multiple chemical fires **[**7]** which he responded to at the Tenth Avenue Terminal. He stated that he had fought many fires downtown at old diapidated hotels and warehouses which involved the burning of chemicals. These were only some of the examples of the types of fires that he has fought. Mr. Faust had a list of multiple other fires that he had fought over the many years during the course of his employment. I have attached a copy of the list to this report." (Qualified Medical Evaluation in Internal Medicine and Toxicology, Prakash Jay, M.D., February 10, 1999, pp. 1-2.)"

In his discussion of causation, Dr. Jay cited and discussed medical studies that found significantly increased rates of prostate cancer in firefighters and that discussed the incidence of cancers in firefighters, including a discussion of the synergistic effect of the exposure to multiple carcinogens, and the risks to firefighters of such exposure. (*Id.* at pp. 9-11.) **[*1825]**

Dr. Jay stated:

> "'The fact that Mr. Faust has fought all types of fires including chemical fires, vehicular fires, garage fires, and is exposed to smoke and combustion products from plating chemicals including various types of metals, paints, plastics, **[**8]** pesticides, etc., indicates that he has been exposed to numerous carcinogens. The fact that prostate cancer risk is high among other occupations including chemists, textile workers, painters, and rubber tile workers indicates that Mr. Faust has been exposed to similar types of carcinogens that these occupational workers have been exposed to during the course of his employment as a fire fighter." (*Id.* at. pp. 10-11.)"

Finally, Dr. Jay discussed applicant's exposure to cadmium, "the only well documented chemical carcinogen that is implicated in the causation of prostate cancer." Dr. Jay discussed applicant's exposure to various fires, especially the plating company fire, and concluded that applicant had been exposed to cadmium. On this basis, Dr. Jay concluded that applicant's prostate cancer is industrially related. (*Id.* at. p. 11.)

Defendant's QME, Frederick Y. Fung, M.D., in the report of September 29, 1998, concluded that applicant's condition was not related to his employment as a firefighter.

Dr. Fung reported applicant's history of exposure:

> "'In terms of exposures, Mr. Faust states that he was first employed of February 4, 1972, by the City of San Diego **[**9]** as a firefighter. He retired about four months ago. During the first three to six months of his employment, he underwent basic firefighter training. After that, he worked at Station 1 for 14 years. He states that during those 14 years, he covered the downtown area and fought fires. He states that he fought furniture and mattress fires, soap factory fires, plating fires, tuna boat fires, airline fires. On one occasion, he also fought a creosote fire as a result of burning telephone poles. He also had a follow up fire control at the Aerospace Museum fire. He states that he was not required to wear personal protective equipment until 1985. Prior to that, it was up to the fire captain's judgement. After that, he worked at Station 21 for three years, then Station 36 for two years, and then back to Station 21 for one year. He then worked at Station 9 for 2-3 years, and then at Station 3 for less than one year. He states that during his employment at these stations, he fought house fires, business fires and car fires. He states that he had several exposures with general coughing. He was not hospitalized as a result of any of these fires." (Comprehensive Medical-Legal Evaluation, Frederick **[**10]** Y. Fung, M.D., September 29, 1998, p.2.)"

In the discussion section, Dr. Fung stated further: **[*1826]**

> "'Based on the history provided to me, Mr. Faust had exposure while fighting fires. However, he was not ill nor hospitalized for any of the exposures."

"'Prostate cancers are generally greater in countries where the population consumes more animal fat. There are several occupational groups that have been suspected to have increase in prostate cancer, although the association is still controversial. The groups include exposure to cadmium, ionizing radiation such as the atomic bomb survivors. The mechanism of prostate cancer development is related to male androgenic hormone, testosterone."

"'I have personally conducted a literature search regarding prostate cancer in firefighters. *Based on the literature search, there are no documents in the world medical and scientific literature that associates prostate cancer and firefighters.*" (*Id.* at p. 6, emphasis added.)"

Dr. Fung concluded, concerning causation:

"'Based on the history provided to me and evaluation of medical literature regarding prostate cancer, it is my medical opinion **[**11]** that this condition is unrelated to his employment as a firefighter with the City of San Diego. As the literature indicates, this condition is related to the person's hormonal activities. There is no association between exposure by firefighters and prostate cancer." (*Id.*)"

On March 9, 1999, Dr. Fung issued a supplemental report in which he reviewed Dr. Jay's report and questioned the adequacy of the medical studies and literature cited by Dr. Jay. In the supplemental report, Dr. Fung addressed and challenged each of the studies cited by Dr. Jay. Dr. Fung concluded:

"'Based on review of Dr. Jay's medical report, review and analysis of additional medical literature, my understanding of toxicology as a Board Certified Medical Toxicologist, and my understanding of the workplace as a Board Certified Occupational Medicine Specialist, it is my opinion that Mr. Faust's prostate cancer is not related to his occupational exposure as a firefighter for the City of San Diego. My opinion remains the same as that outlined in my original report dated 9/29/98, that his cancer has not been caused, aggravated or accelerated by his employment exposure." (Supplemental Medical/Legal **[**12]** Evaluation, Frederick Fung, M.D., p.3.)"

At the hearings of March 7, 2002 and April 24, 2002, applicant testified that he was employed for 26 years as a firefighter for the City of San Diego. He described the types of fires he fought and the burning materials to which he believes he was exposed, including fires in commercial districts, residential garages, dumping sites, canyons, warehouses, and hotels, and materials such as automobiles, pesticides, paints, chemicals, textiles, metals, resins, and appliances. Applicant did not regularly wear breathing apparatus before 1983 or 1984. He believed that he **[*1827]** had been exposed to cadmium in some fires, but was not certain of this. (Minutes of Hearing and Summary of Evidence, March 7, 2002, pp. 3-5; Minutes of Hearing and Summary of Evidence, April 24, 2002, pp. 2-4.)

Frank Rodriguez, a firefighter who worked together with applicant for six years, testified that both he and applicant were exposed to burning and burnt materials, including: burnt rubber from vehicle and garage fires; burnt inks, magazines, resins, paints, textiles, and ceramics in fighting structural fires; burnt batteries from vehicles and appliances; the products **[**13]** of canyon and dump fires; and soot. (Minutes of Hearing and Summary of Evidence, April 24, 2002, pp. 4-6.)

Robert Needham, an employee of the San Diego Plating Company, testified that sulfuric acid and muriatic acid were used in the cleaning process of metals. The engine plating line was made up of rinse tanks, soap tanks, nickel plating, copper plating, and chrome plating. Needham testified: "The company usually sent out the cadmium plating. Cadmium was used in certain types of plating. The plating process was used to control corrosion of metals. The corrosion proofing would break down in hot fires." (*Id.* at pp. 6-7.)

On July 15, 2002, the WCJ issued the Findings and Orders, finding that applicant did not sustain cumulative industrial injury in the form of cancer while employed by the City of San Diego from February 4, 1972 through December 27, 1997. In reaching the decision, the WCJ recognized the presumption of section 3212.1, but concluded that it had been rebutted by Dr. Fung's opinion. The WCJ cited *Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 372, 378 [475 P.2d 656, 90 Cal. Rptr. 424], 35 Cal. Comp. Cases 525, 529, **[**14]** as authority for relying on Dr. Fung's opinion in reaching the decision.

II. DISCUSSION

A firefighter who is exposed to a known carcinogen and develops or manifests cancer while employed (or for a specified period after the termination of employment) is entitled to the presumption that the cancer is industrially caused. n5

----------Footnotes----------

For brevity, we generally refer only to firefighters in our opinion. However, section 3212.1 is also applicable to peace officers who are primarily engaged in active law enforcement activities.

----------EndFootnotes----------

The presumption may be rebutted (1) by evidence that the primary site of the cancer has been established and (2) by evidence that exposure to the recognized carcinogen is not reasonably linked to the disabling cancer. (Lab. Code, § 3212.1.)

A. FORMER SECTION 3212.1

Prior to the 1999 amendment of section 3212.1, an applicant had the burden of establishing the prerequisites for applying the presumption of injury under the section. The applicant was required to demonstrate industrial exposure to **[**15]** a known carcinogen and that the exposure was reasonably linked to the disabling cancer. n6

---------- Footnotes ----------

Prior to the 1999 amendment, section 3212.1 provided:

> "'In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California and the California State University, whether these members are volunteers, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit, whether volunteers, partly paid, or fully paid, and peace officers as defined in Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code who are primarily engaged in active law enforcement activities, the term 'injury' as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, if the member demonstrates that he or she **[**16]** 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, and that the carcinogen is reasonably linked to the disabling cancer."
>
> "'The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division."
>
> "'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 other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. 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.'"

The 1999 amendment added subdivision designations. Subdivision (d) replaced the third paragraph of this section.

----------EndFootnotes----------

[17]**
[*1828]

Before the 1999 amendment, the Court of Appeal in *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith)* (1994) 23 Cal. App. 4th 1120 [28 Cal. Rptr. 2d 601], 59 Cal. Comp. Cases 180, held that the term "reasonable link," as used in section 3212.1, had a plain meaning that is clear on its face. Two things are reasonably linked if there is a logical connection between them. Thus, firefighters were not required to show that industrial exposure to carcinogens proximately caused their cancer, but they were required to show something more than a mere coincidence of exposure and cancer, i.e., a logical connection between the two. The Court stated that the legislative history showed that the purpose of the workers' compensation presumption statutes is to ease the burden of proof for certain safety workers. If the Legislature had intended "reasonable link" to be the equivalent of "proximate cause," section 3212.1 would be mere surplusage and would not have been enacted. Accordingly, if the evidence supported a reasonable inference that the occupational exposure contributed to the worker's cancer, **[**18]** then a reasonable link was shown, and the disputable presumption of industrial causation could be invoked. However, in this case, the Court held that the applicant failed to establish a reasonable link because he did not demonstrate occupational exposure prior to the latency period. (*Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith), supra.*) n7

----------Footnotes----------

A "latency period" has been described as: (1) "the period between the time of exposure to the disease-causing agent and the time when the disease has progressed to the point at which it can be diagnosed" (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1135 [998 P.2d 403; 95 Cal. Rptr. 2d 701]); (2) the period "between exposure to a toxic substance in the work environment and the development of clinically diagnosable symptoms" (*Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 96 [120 Cal. Rptr. 2d 741, 67 Cal. Comp. Cases 754]); **[**19]** (3) "[t]he time from exposure to a chemical carcinogen to the appearance of a clinically-detectable cancer" and "the time of initial exposure to onset of cancer" (*Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd., supra*, 23 Cal.App.4th at p. 1129, 59 Cal. Comp. Cases at p. 186); and (4) the "period between injurious exposure and subsequent development of disease." (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Pisciotta)* (1983) 145 Cal.App.3d 480, 484 [193 Cal. Rptr. 471], 48 Cal. Comp. Cases 559, 562.)

----------EndFootnotes----------

[*1829]

Establishment of this linkage was a question of fact, to be determined by a preponderance of the evidence. (*Zipton v. Workers' Comp. Appeals Bd.* (1990) 218 Cal. App. 3d 980 [267 Cal. Rptr. 431], 55 Cal. Comp. Cases 78 [Analysis of legislative history and application of section 3212.1 before the 1999 amendment].)

B. PRESENT SECTION 3212.1

In 1999, however, the Legislature **[**20]** amended section 3212.1 to provide, in relevant part:

> ""(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. * * * "

"'(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 60 months **[**21]** in any circumstance, commencing with the last date actually worked in the specified capacity."

"'(e) The amendments to this section enacted during the 1999 portion of the 1999-2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial.'"

[*1830]

The 1999 amendment requires that the applicant establish that he or she is a firefighter or peace officer who falls within the ambit of section 3212.1(a). The applicant must further demonstrate exposure to a known carcinogen as defined in published standards and that the cancer has developed or manifested itself during the period when the applicant was in active service or for a specified period, not to exceed 60 months from the last day of work in the specified capacity, if the applicant's service has terminated. (Lab. Code, § 3212.1(b)&(d).) Therefore, the applicant is no longer required to establish a reasonable link between the exposure and the cancer.

Accordingly, the presumption of compensability arises and the **[**22]** burden shifts to the defendant when the applicant has made this showing. The defendant may rebut the presumption (1) by evidence that the primary site of the cancer has been established and (2) by evidence that exposure to the recognized carcinogen is not reasonably linked to the disabling cancer.

C. APPLICANT'S BURDEN UNDER PRESENT SECTION 3212.1

An applicant must present evidence to establish the presumption that his or her cancer is industrial. Such evidence will include the following.

The applicant must establish employment as a firefighter, and the dates of the employment. This may be shown by stipulation of the parties, testimony, or documentary evidence.

Before the presumption may be applied, section 3212.1(b) requires that applicant demonstrate that he or she was exposed *to* an identified *known carcinogen*. (*Holtgrave v. Workers' Comp. Appeals Bd.* (2003) 68 Cal. Comp. Cases 953 (writ den.).) 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." **[**23]** (Lab. Code, § 3212.1(b).) The carcinogens "defined by the director" are those regulated by the director of the Department of Industrial Relations. (Lab. Code, § 9004; Cal. Code Regs., tit. 8, § § 5208, 5209, 5210, 5217, 5218.)

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. (*Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith), supra.*)

No specific level of actual exposure needs to be shown; a minimal exposure is enough to satisfy the applicant's burden. (*Leach v. West Stanislaus Cty. Fire Protection Dist.* (2001) 29 Cal. Workers' Comp. Rptr. 188, 189 (Appeals Board Panel).)

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. **[*1831]**

Manifestation of the cancer includes **[**24]** the showing of symptoms that are related to the disease, whether or not they are diagnosed as cancer at the time they arise. The date of manifestation may be significantly earlier than the date of diagnosis, especially in cases where the illness has an "indolent" or slow course. (*County of El Dorado v. Workers' Comp. Appeals Bd. (Klatt)* (2000) 65 Cal. Comp. Cases 1437, 1439 (writ den.).)

The burden of proving these initial elements lies with the applicant. When the applicant has shown: (1) that he or she was employed in an included capacity; (2) that he or she has been exposed to a known carcinogen during the employment; and (3) that he or she 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.

D. DEFENDANT'S BURDEN UNDER CURRENT SECTION 3212.1

The burden of rebutting the presumption now shifts to the defendant. To rebut the presumption, the defendant must establish by evidence two elements: (1) that the primary site of the cancer has been identified; and (2) that the carcinogen is not reasonably linked to the disabling cancer.

First, **[**25]** the defendant must establish the primary site of the cancer. (Lab. Code, § 3212.1(d).) The establishment of the primary site requires competent medical evidence. (See *Zipton v. Workers' Comp. Appeals Bd., supra.*)

Second, the 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.

A defendant may establish that there is no reasonable link between the applicant'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. (*Law v. Workers' Comp. Appeals Bd.* (2003) 68 Cal. Comp. Cases 497, 499 (writ den.); *Leach v. West Stanislaus Cty. Fire Protection Dist., supra.*)

The defendant's **[**26]** burden is to prove by medical probability that there is no reasonable link between the applicant's demonstrated exposure to known carcinogens during the employment and the development of cancer. (*City of Anaheim v. Workers' Comp. Appeals Bd. (Pettitt)* (2002) 67 Cal. Comp. Cases 1609 (writ den.).) 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.

Accordingly, evidence showing that no reasonable link has been demonstrated to exist between the carcinogen or carcinogens to which the firefighter has been **[*1832]** 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.

Expert evidence should include a review of studies or other **[**27]** evidence that justifies an opinion or conclusion that there is *no reasonable link*. The studies should be attached to the report as a foundation for the opinion.

Evidence, such as medical literature, that does not relate the exposure to the cancer is *not* evidence that no link exists. To find otherwise would improperly place the burden of showing industrial causation on the applicant. Therefore, the fact that there are no epidemiological studies showing an increased incidence in firefighters of the particular type of cancer suffered by the applicant does not rebut the presumption.

Evidence that may rebut the presumption may include evidence that there is no reasonable link between the primary site of the cancer and the carcinogen to which the applicant was exposed, because the period between the exposure and the manifestation is not within the cancer's latency period, as established by medical evidence. (*Leach v. West Stanislaus Cty. Fire Protection Dist., supra*; see also *County of El Dorado v. Workers' Comp. Appeals Bd. (Klatt), supra.*) In *Leach*, the applicant's colon cancer was diagnosed less than five years after his employment began. **[**28]** The defendant presented medical evidence that the latency period for colon cancer was at least ten years. The Appeals Board panel found that the defendant had successfully rebutted the presumption of industrial causation with this evidence.

If the defendant does not meet its burden of proving both requisite elements, i.e., the primary site of the cancer and the lack of a reasonable link between the exposure and the cancer, then the defendant has not rebutted the presumption of compensability and an industrial injury must be found. (Lab. Code, § 3212.1(d).) n8

----------Footnotes----------

We note that a defendant's successful rebuttal of the presumption of compensability does not bar the firefighter's claim of industrially related cancer. However, in the absence of the presumption, it becomes the applicant's burden to establish industrial causation by a reasonable medical probability. (See *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal. 2d 408, 416 [445 P.2d 313, 71 Cal. Rptr. 697], 33 Cal. Comp. Cases 660, 665.)

----------EndFootnotes----------

[29]**

III. CONCLUSION

In summary, in a case where an applicant has invoked the presumption of section 3212.1, the applicant has the initial burden of showing (1) that he or she was employed in an included capacity; (2) that he or she has been exposed to a known carcinogen during the employment; and (3) that he or she has developed or manifested cancer. When the applicant has made this showing, the burden shifts to the defendant to rebut the presumption by evidence that: (1) the primary site of the cancer has been identified; and (2) that the carcinogen is not reasonably linked to the disabling cancer. **[*1833]**

An analysis using the above criteria must be completed before a decision is reached on the presumptive compensability of the claim in the present case. Here, the WCJ relied on the opinion of one physician in preference to another, without analyzing the evidence using the method required by section 3212.1, as set forth above. It is generally well settled that the WCJ has the power to choose among conflicting medical reports and to select those that are deemed most appropriate. (*Jones v. Workers' Comp. Appeals Bd.* (1968) 86 Cal. 2d 476 [*sic* **[**30]** , should be 68 Cal. 2d 476] [439 P.2d 648, 67 Cal. Rptr. 544], 33 Cal. Comp. Cases 221.) The relevant and considered opinion of one doctor may constitute substantial evidence even though inconsistent with other reports in the record. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 372, 378 [475 P.2d 656, 90 Cal. Rptr. 424], 35 Cal. Comp. Cases 525, 529; *Smith v. Workers' Comp. Appeals Bd.* (1969) 71 Cal. 2d 588, 592 [455 P.2d 822, 78 Cal. Rptr. 718], 34 Cal. Comp. Cases 424, 427; *Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal. App. 3d 916, 921 [126 Cal. Rptr. 182], 40 Cal. Comp. Cases 799, 801.) However, in a case such as this, where a statutory presumption is applicable, a systematic analysis must be applied to the evidence presented. The WCJ cannot resolve the issue of reasonable link by selecting one physician in preference to another, even if each of the conflicting medical reports contains **[**31]** substantial evidence that appears to be of equal caliber. A mere difference of opinion between physicians is not sufficient to rebut the presumption.

Therefore, as the Appeals Board's decision after reconsideration, we will rescind the Findings and Orders issued July 15, 2002, and return the matter to the WCJ for analysis of the evidence in accordance with the principles set forth above, and for new decision thereafter.

For the foregoing reasons,

IT IS ORDERED, as the Appeals Board's decision after reconsideration, that the Findings and Orders issued July 15, 2002, is **RESCINDED**, and the matter is returned to the workers' compensation administrative law judge for further proceedings and new decision.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

Merle C. Rabine, Chairman
William K. O'Brien, Commissioner
James C. Cuneo, Commissioner
Janice Jamison Murray, Commissioner
Frank M. Brass, Commissioner
A. John Shimmon, Commissioner
Ronnie G. Caplane, Commissioner **[*1834]**

Legal Topics:

For related research and practice materials, see the following legal topics:
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