



WORKERS' COMPENSATION COMMENTARY



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POLICE AND FIRE CANCER PRESUMPTION

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[The following article deals with the subject of the presumption of compensability concerning cancer that originally applied only to firefighters who came into frequent contact with carcinogenic substances in their fire suppression work. Recently, the presumption was extended to police officers and re-worked to make it easier for fire and police personnel to obtain workers' compensation benefits when they develop cancer.]

On December 11, 2003, the Workers' Compensation Appeals Board, *en banc*, handed down a decision in the case of *Walter Faust v. City of San Diego* (68 CCC 1822), defining the relative burdens of the parties with regard to the new changes to the cancer presumption affecting law enforcement and firefighters.

The Board demonstrated the ability to describe the burden placed on each party seemingly as though there was some degree of parity between each side without (presumably) falling down laughing. The truth is that the burden falls overwhelmingly on the employer.

If the Legislature wanted to grant safety members a conclusive presumption concerning cancer or, for that matter, concerning anything that may go wrong on the job, (*along with the raise that they get when they go on temporary disability*), why can't they just be honest enough to be explicit about their intentions?

Do I sound frustrated? Exceptionally!

The only saving grace in this situation is that there is more brain-power outside of the Legislature and the Board than there is inside... there always has been... and always will be. If good quality medical opinions can be acquired and both strong and logical arguments can be focused on the terms used by the Legislature to describe the defense burden, contesting these cases is not necessarily a lost cause, no matter what the lawmakers and the public employees' unions think!

Walter Faust was employed by the City of San Diego as a firefighter from 1972 to 1998. He was diagnosed with prostate cancer in April 1998, and retired on July 4, 1998 (*having stopped work upon the diagnosis of the cancer*). The applicant turned to Prakish Jay, M.D., following the denial of injury on the part of the employer.

Mr. Faust testified as to his exposure to many fires, including structural fires, vehicular fires, ship fires, wild land fires, dumpster fires, and garage fires. He did not use a respirator during his early employment, but did so later. A number of the fires that he fought involved paint lockers, pesticides, and chemicals. He was present at a tuna boat fire where paint lockers, solvents, and thinners were involved. He was also involved in a fire involving a plating company, and also in one involving a plastics manufacturer.

Dr. Jay recited this history, including exposure to the combustion from plating chemicals, noting that prostate cancer risk is high among chemists, textile workers, painters, and rubber tile workers. He finally pointed out his conclusion that the applicant had been exposed to cadmium at the plating company, and cadmium is "the only well-documented chemical carcinogen that is implicated in the causation of prostate cancer."

The defense physician, Dr. Fung, acknowledged that exposure to cadmium and radiation has been linked to prostate cancer, but causation otherwise is regarded as virtually exclusively related to hormones. He further specified that "[b]ased on [his] literature search, there are no documents in the world medical and scientific literature that associates prostate cancer and firefighters."

One of Mr. Faust's co-employees testified as to exposure to the various types of fires. An employee of the plating company testified that cadmium plating was rarely done at their company, but was outsourced.

The Workers' Compensation judge determined that Dr. Fung's opinion had overcome the presumption.

The Board first discussed the language incorporated in the original Labor Code Section 3212.1, where the applicant had the burden to demonstrate two things: 1) Exposure to a known carcinogen (a specific carcinogen); and that 2) Exposure to that carcinogen was reasonably linked to the cancer.

The presumption was rarely applied prior to the recent changes, however, because scientific research (rather than political clout and campaign contributions) established that there were only certain types of exposures that

were linked to certain kinds of cancer.

In the orgy of adulation that followed 9/11, however, the safety members' unions' allies in the Legislature passed an amendment to Labor Code Section 3212.1 that modified the burdens of proof in such a way that not only were they reversed, but the relative weight was increased to the point where the burden on the employer, in accordance with the interpretation of the Appeals Board, results in a 100 to 1 ratio of difficulty to the applicant's burden.

The applicant, according to the Appeals Board in its interpretation of the statute, is required to establish three elements: 1) Employment as a safety member (firefighter or law enforcement officer); 2) Demonstrate that he or she was exposed to an identified known carcinogen during the period of employment; and 3) The cancer developed or manifested itself during the statutory timeframe. *The applicant is not required to show that the exposure is the proximate cause of the cancer.* The Board further points out that there is no threshold level of actual exposure that the applicant needs to demonstrate, that a minimal exposure is enough to satisfy the applicant's burden.

So now, we can see that all an employee must do is show that he or she has cancer, was exposed to some carcinogen (even to a minimal degree), and developed cancer while employed as a police officer or firefighter (or shortly thereafter). The burden then shifts to the employer to rebut the presumption.

To do that, the employer must establish two things:

- 1) That the primary site of the cancer was identified.

Now, that is a reasonable burden.

A careful evaluation by a good quality pathologist can establish this. It is the second part of the equation that is absurd.

2) The carcinogen must be established not to be reasonably linked to the disabling cancer.

How is an employer to go about this? They must prove the negative proposition that a particular carcinogen that may have been proven to cause multiple kinds of cancer that the applicant does not have cannot reasonably cause the cancer that the applicant does have... and do so on a scientific basis! The absurdity of this proposition is astonishing.

It is a well-established and ancient maxim in the law that a presumption is not evidence, that there must be some evidence underlying the subject to which the presumption applies. This modification of Labor Code Section 3212.1, however, comes as close to manufacturing evidence by legislative fiat as the writer has ever seen. Well, what are we to do?

First. We do not think the WCAB's interpretation should be considered the final word on this subject. We would suggest that when the term "exposure" is used, there must be an implied understanding that something larger than a miniscule exposure is contemplated...otherwise, just breathing in Southern California would qualify. Hopefully, the Court of Appeals will recognize and modify this excessive burden.

Second. We must educate the defense medical examiners about the changes in this area of the law. It is clear, from my review of a number of defense medical reports, that the doctors have been slow to pick up these changes. *This is, of course on the defense side, not the applicant's side.* The doctors must know how to write their reports and argue

their respective points, even when we are talking about indulging in a legal [*and medical/scientific*] fiction. Otherwise, their opinions will be entirely disregarded.

Third. It is important to have a clear history of when the cancer manifests itself. Most cancers have a lengthy latency period; (*for example, between ten and twenty years*), between the time of exposure and the time symptoms appear. Showing that the work exposure occurred too recently or long before the latency period commenced presents the most viable defense.

Fourth. We also must challenge the small amount of evidence applicants need to prove exposure to a "known carcinogen". Allowing them to satisfy this burden by merely testifying they were present at a car or trash can fire should not be enough. Such evidence only proves they were exposed to burning plastic, rubber, etc., but not necessarily to a specific, known carcinogen. We believe that the terminology used by the Legislature that the carcinogen must be "known" would imply a "specific" carcinogen or combination of carcinogens.

We believe that some of these cases can be challenged and defeated with a careful analysis. The potential large exposure created by these types of claims justifies a vigorous defense that might at least prompt an equitable settlement. It will always be an uphill battle, keeping in mind that we are dealing with a political presumption more than a legal presumption.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.