

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 Case No. ADJ1402736 (OXN 0142896)

5 **SANDY BASTIAN,**

6 *Applicant,*

7 vs.

8
9 **COUNTY OF VENTURA, permissibly self-**
10 **insured and administered by HAZELRIGG**
11 **MANAGEMENT SERVICES,**

12 *Defendants.*

**OPINION AND DECISION
AFTER
RECONSIDERATION**

13 We previously granted defendant's petition for reconsideration of the March 30, 2009
14 Finding of Fact and Decision of the workers' compensation administrative law judge (WCJ) who
15 found that applicant, while employed as a fire fighter by defendant during the period February 2,
16 1998 through November 1, 2005, sustained industrial injury in the form of cancer pursuant to the
17 presumption provided in Labor Code section 3212.1.¹

18 Defendant contends that the presumption of industrial causation provided in section 3212.1
19 should not apply because the parties' Agreed Medical Examiner (AME), Randolph Noble, M.D.,
20 opined that applicant's breast cancer is non-industrial, and that applicant did not meet her burden
21 of proving that she was exposed to a carcinogen known to cause cancer in the course of her
22 employment.

23
24 ¹ All further statutory citations are to the Labor Code. Section 3212.1(d) provides in pertinent part that for firefighters
25 like applicant, "The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in
26 the course of the employment. This presumption is disputable and may be controverted by evidence that the primary
27 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 in any circumstance,
commencing with the last date actually worked in the specified capacity."

1 An answer was received along with the WCJ's Report and Recommendation on Petition for
2 Reconsideration (Report).

3 As our decision after reconsideration we affirm the WCJ's March 30, 2009 decision.
4 Although genetic testing showed that applicant had an increased risk of incurring breast cancer, the
5 record establishes that she was exposed to carcinogens in the course of her employment as a
6 firefighter and defendant did not meet its burden of showing that the workplace exposure was "not
7 reasonably linked" to the development of the cancer as required to overcome the section 3212.1
8 presumption of industrial causation.

9 Applicant was employed as a firefighter by the County of Ventura from February 1998 to
10 November 2005, when she was diagnosed with bilateral breast cancer. She filed a claim for
11 workers' compensation benefits, alleging that she was exposed to carcinogens in the course of her
12 employment. Dr. Noble was selected by the parties to provide medical reporting as their AME.
13 Following development of the record at the direction of the WCJ, the issue of industrial causation
14 in light of the section 3212.1 presumption was taken under submission on December 9, 2008.
15 Thereafter, the WCJ issued his March 30, 2009 decision finding industrial causation of applicant's
16 breast cancer, as described above.

17 Defendant asserts in its petition that the presumption of industrial causation contained in
18 section 3212.1(d) is rebutted by the reporting of Dr. Noble. Although it is true that Dr. Noble
19 opined that the section 3212.1 presumption of industrial causation does not apply, he explained
20 that his conclusion is based solely upon the lack of a study showing a link between a female's work
21 as a firefighter and the subsequent development of breast cancer, as shown by his admission that he
22 would immediately change his opinion about the applicability of the section 3212.1 presumption if
23 he were shown such a study. The qualified opinion provided by Dr. Noble is not substantial
24 medical evidence that applicant's exposure to carcinogens on the job "is not reasonably linked" to
25 her cancer, as required by section 3212.1 as construed by the Appeals Board in its en banc opinion
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27

1 *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (*Faust*).² Because the absence of a
2 study showing a link between a women's exposure to carcinogens and the later development of
3 breast cancer does not rebut the section 3212.1 presumption of industrial causation, the March 30,
4 2009 decision of the WCJ finding industrial causation pursuant to that presumption is correct.

5 Section 3212.1(d) creates a rebuttable presumption of industrial injury for cancers that
6 develop in firefighters exposed to a known carcinogen in the course of their service. In order to
7 obtain the benefit of the presumption, an applicant must show: 1) employment as a professional
8 firefighter; 2) exposure to a known carcinogen during that employment; and 3) development of the
9 cancer while so employed or within the time following employment as allowed in section 3212.1.
10 (Lab. Code, § 3212.1; *Faust, supra*.) To defeat the section 3212.1(d) presumption after an
11 applicant has shown its applicability, a defendant must show: 1) that the primary site of the cancer
12 has been established; and 2) that applicant's work-related exposure to the carcinogen was not
13 reasonably linked to the cancer. (*Ibid.*; *County of Monterey v. Workers' Comp. Appeals Bd.*
14 (*Robinson*) 67 Cal.Comp.Cases 463 (writ denied) (*Robinson*).) It is this last requirement of
15 showing that applicant exposure to carcinogens was "not reasonably linked" to her breast cancer
16 that defendant failed to prove. (Lab. Code, § 3212.1(d).)

17 Defendant does not dispute that applicant was employed as a professional firefighter and
18 admits that she developed cancer while so employed, which satisfies the first two requirements for
19 applying section 3212.1 as described in *Faust*. However, defendant argues in its petition for
20 reconsideration that applicant did not meet the third *Faust* requirement because she did not
21 sufficiently prove that she was exposed to a known carcinogen while employed as a firefighter.
22 Our review of the record shows otherwise. The Minutes of Hearing from January 16, 2008,
23 describe the following testimony by applicant at trial, which was consistent with her earlier
24 deposition testimony:

25 "The applicant was a firefighter and has been exposed to
26 carcinogens. To the best of her knowledge, there were two specific

27 ² Appeals Board en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs.,
tit.8, §10341; *Gee v Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].)

1 instances. One was a tire fire in Oxnard, doing mop up. The other
2 was the Montana wildland fires where she was riding in an open cab
3 for approximately 36 hours. Her hair and skin all smelled of diesel.
4 As a result, they filled out an exposure report.

5 "She was also involved in wild land fires – approximately ten of
6 them – structure fires, and rubbish fires. She's also been exposed to
7 diesel fuel, and she has breathed that in on numerous occasions. She
8 has also been exposed to the normal exposures of Benzene and
9 different plastics."

10 Dr. Noble supported applicant's testimony that she was exposed to carcinogens while
11 fighting fires. During his September 22, 2008 deposition he confirmed his testimony in his earlier
12 deposition and answered yes to the question, "And you have no doubt that during the course and
13 scope of her employment, the applicant was exposed to carcinogens that are known to cause
14 cancer; correct?"³ Defendant did not present any evidence to dispute Dr. Noble's conclusion about
15 applicant's exposure to carcinogens in the course of her employment. Moreover, defendant offered
16 no evidence to rebut applicant's testimony, and her credibility as noted by the WCJ in his Report is
17 unchallenged. The trier of fact is charged with the responsibility in the first instance to determine
18 the credibility of witnesses and the weight of the evidence. (*Garza v. Worker's Comp. Appeals Bd.*
19 (1970) 3 Cal.3d 312, [35 Cal.Comp.Cases 500]; *Clendaniel v Industrial Acc. Com.* (1941) 17 Cal.
20 2d 659 [6 Cal.Comp.Cases 85].) We find nothing in the record to question the WCJ's conclusion
21 that applicant was a credible witness.

22 Notwithstanding the record showing that applicant was exposed to carcinogens while at
23 work, defendant argues that her testimony is not specific enough, and that she did not prove
24 "repeated" exposures to carcinogens. These arguments are also contradicted by the record and the
25 provisions of section 3212.1. During her testimony, applicant identified two specific instances
26 where she was exposed to carcinogens, and specifically identified benzene and diesel fumes.⁴ No
27 special expertise is required to identify the diesel fumes as described by applicant, and Dr. Noble

³ Quotations from the transcript of Dr. Noble's deposition are converted from upper case to lower case.

⁴ Benzene is listed as carcinogenic and diesel engine exhaust is listed as probably carcinogenic by the International Agency for Research (IARC), the agency identified in section 3212.1(b) as an authoritative source on the issue. (IARC Web site <<http://monographs.iarc.fr/ENG/Classification/crthall.php>> [as of December 2, 2009].)

1 confirmed the reasonableness of applicant's testimony when he agreed that professional firefighters
2 are invariably exposed to carcinogens while fighting fires. (See *Holtgrave v Workers' Comp.*
3 *Appeals Bd.* (2003) 68 Cal.Comp.Cases 953 (writ denied).) In the absence of any substantive
4 rebuttal of this evidence by defendant, the WCJ properly concluded that applicant was, in fact,
5 exposed to one or more known carcinogens while working as a firefighter. Defendant's argument
6 that the testimony does not establish that applicant's exposure to carcinogens was "repeated" does
7 not change the fact that such exposures occurred. Section 3212.1 does not require evidence of
8 "repeated" exposures.

9 Having determined that applicant carried her burden under *Faust* to support application of
10 the section 3212.1 presumption of industrial causation, we turn to defendant's contention that
11 applicant's cancer was proven to be non-industrial. In making this argument, defendant relies upon
12 the reporting of Dr. Noble. However, our review of the physician's entire reporting and deposition
13 testimony shows that he did not conclude that applicant's work-related exposure to carcinogens
14 was "not reasonably linked" to her cancer, as required by section 3212.1 and *Faust*. Instead, he
15 only opined that he was not prepared to say that the section 3212.1 presumption of industrial
16 causation applied because he had not seen any studies that definitively showed a link between a
17 female firefighter's exposure to carcinogens on the job and the later development of breast cancer.

18 In his report of July 24, 2007, Dr. Noble addressed the presumption of section 3212.1 as
19 follows:

20 "I am familiar with the Labor Code and the concept of occupational
21 presumption for Firefighters with various cancers. While it is my
22 present opinion that Ms. Bastian's breast cancer is totally non-
23 industrial in etiology, it is also my opinion that any medical literature
24 showing an excess of breast cancer incidence or mortality in women
25 professional Firefighters would cause me to change my opinion as
26 regards causation. Should an article be identified in the medical
27 literature demonstrating an increased risk of breast cancer in women
Firefighters or in women exposed to common hydrocarbon products
encountered by Firefighters, then my opinion would change favoring
industrial causation. The total absence of any medical literature
demonstrating an excess incidence or mortality from breast cancer in
female Firefighters or female workers exposed to hydrocarbon
products and Ms. Bastian's abnormal BRCA-2 gene has caused my

1 opinion to be non-industrial causation for her breast cancers."
2 (Emphasis in original.)

3 In his September 22, 2008 deposition Dr. Noble confirmed that his opinion regarding the
4 applicability of the section 3212.1 presumption was based only upon the fact that he had not seen a
5 study that linked the exposure of female firefighters to carcinogens to the development of breast
6 cancer, as follows:

7 "Q [Y]ou cannot state that the exposure to the carcinogens in no
8 way caused, contributed, or accelerated the development of breast
9 cancer; correct?...

10 A Yes. I've asked and answered that question, and the problem is
11 this: the medical literature isn't set up to do studies to answer the
12 questions that you're posing even though the law seems to give an
13 indication that there's a presumption unless studies can absolutely
14 show that there's no relationship. And, unfortunately, the law has no
15 relationship with medical science.

16 It is not possible for medical science to address the issue as written
17 by the law. I have taken upon myself to review the literature for
18 breast cancer for women. I'm unable to find anywhere in the
19 medical literature any relationship between exposure to carcinogens
20 and breast cancer for women...

21 Q And in using these search engines to see if there is any
22 relationship between breast cancer and the carcinogens the applicant
23 might be exposed to, I think you testified that essentially you can't
24 prove the 'no hypothesis.' You can't prove that it has no
25 relationship because there's not studies that show that; correct?

26 A Yes. And that's the same for every other type of cancer. There
27 are no studies that address the 'no hypothesis;' however, the law is
written to address the 'no hypothesis,' and there ain't no such thing
in the medical literature. All we can do is review the total medical
literature for all different kinds of chemicals and occupations and
exposures and see if anything comes up.

And I mentioned in my report that, *if we find any medical literature,*
I would be pleased to change my opinion and provide industrial
causation." (Emphasis added.)

As discussed by the Appeals Board in *Faust*, the mere *absence* of a study showing a link
between exposure to carcinogens and the development of a certain type of cancer does *not* rebut the
presumption of industrial causation contained in section 3212.1(b). As the Appeals Board wrote in

Faust:

1 "[T]he defendant has the burden of showing that the carcinogen to
2 which the applicant has demonstrated exposure is not reasonably
3 linked to the disabling cancer, i.e., the defendant must provide
4 evidence to establish that there is no reasonable link. Medical or
5 similar expert scientific evidence is necessary to show that there is
6 no reasonable link between the exposure and the cancer.

7 "A defendant may establish that there is no reasonable link between
8 the applicant's exposure and his or her illness by establishing the
9 absence of a link between the exposure and the cancer, including
10 establishing that the latency period of the manifestation of the
11 specific cancer excludes the exposure as the cause of the applicant's
12 cancer.

13 "The defendant's burden is to prove by medical probability that there
14 is no reasonable link between the applicant's demonstrated exposure
15 to known carcinogens during the employment and the development
16 of cancer. It is not enough for the defendant to show that no
17 evidence has established a reasonable link between the known
18 carcinogen and the cancer. Instead, the defendant must establish by
19 evidence of reasonable medical probability that a reasonable link
20 does not exist.

21 "Accordingly, evidence showing that no reasonable link has been
22 demonstrated to exist between the carcinogen or carcinogens to
23 which the firefighter has been exposed and the development of the
24 cancer, is *not* adequate to rebut the presumption of industrial
25 causation. To rebut the presumption, the evidence must explicitly
26 demonstrate that medical or scientific research has shown that there
27 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 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." (Emphasis in original, citations
deleted.)

1 In short, the presumption of industrial causation contained in section 3212.1 is *not* rebutted
2 by showing that there are no studies showing a link between exposure to a carcinogen and the
3 development of the type of cancer at issue, or by showing that the cancer could have been caused
4 by something else. (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126
5 Cal.App.4th 298 [70 Cal.Comp.Cases 109]; *Faust, supra*; *Robinson, supra*.) Dr. Noble's opinion
6 about what is legally required for section 3212.1 to apply was incorrect. Instead, section 3212.1
7 requires that the defendant must prove that the cancer is "not reasonably linked" to the exposure in
8 order to rebut the presumption of industrial causation. (*Ibid.*) Defendant did not meet that
9 requirement on this record and the section 3212.1 presumption of industrial causation applies.

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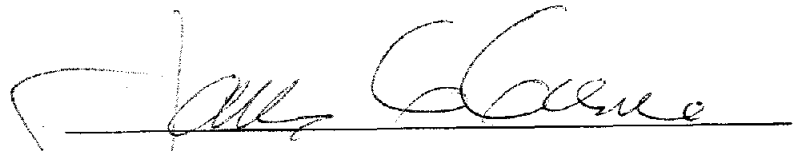
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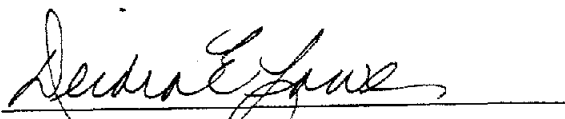
1 For the foregoing reasons,


2 **IT IS ORDERED** as the Decision After Reconsideration of the Appeals Board that the
3 March 30, 2009 Finding of Fact and Decision of the workers' compensation administrative law
4 judge is **AFFIRMED**.

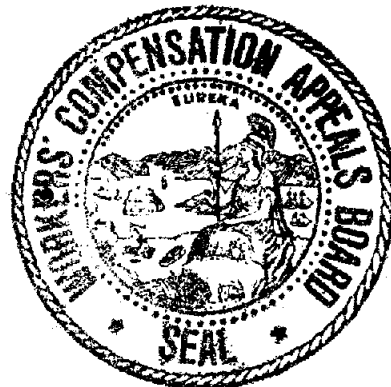
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6 **WORKERS' COMPENSATION APPEALS BOARD**

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10 **JAMES C. CUNEO**

11 **I CONCUR,**

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15 **DEIDRA E. LOWE**

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19 **ALFONSO J. MORESI**



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

22 **JAN 04 2010**

23 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
24 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

25 **Sandy Bastian**
26 **Lewis, Marenstein et. al.**
27 **Graves & Bourassa**

JFS/ljp 

BASTIAN, Sandy