

# WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SANDY BASTIAN,

Case No. ADJ1402736 (OXN 0142896)

*Applicant,*

vs.

**COUNTY OF VENTURA, permissibly self-insured and administered by HAZELRIGG MANAGEMENT SERVICES,**

*Defendants.*

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

We previously granted defendant's petition for reconsideration of the March 30, 2009

Finding of Fact and Decision of the workers' compensation administrative law judge (WCJ) who found that applicant, while employed as a fire fighter by defendant during the period February 2, 1998 through November 1, 2005, sustained industrial injury in the form of cancer pursuant to the presumption provided in Labor Code section 3212.1.<sup>1</sup>

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

<sup>1</sup> All further statutory citations are to the Labor Code. Section 3212.1(d) provides in pertinent part that for firefighters like applicant, "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 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

1       *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (*Faust*).<sup>2</sup> 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

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27       <sup>2</sup> 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?”<sup>3</sup> 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  
where she was exposed to carcinogens, and specifically identified benzene and diesel fumes.<sup>4</sup> No  
special expertise is required to identify the diesel fumes as described by applicant, and Dr. Noble

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<sup>3</sup> Quotations from the transcript of Dr. Noble’s deposition are converted from upper case to lower case.

27 <sup>4</sup> 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

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

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

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

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

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

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

A Yes. And that's the same for every other type of cancer. There 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

Faustus

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  
28       carcinogen or carcinogens is related to or causes the development of  
29       the cancer.

30       “Expert evidence should include a review of studies or  
31       other evidence that justifies an opinion or conclusion that there is *no*  
32       *reasonable link*. The studies should be attached to the report as a  
33       foundation for the opinion.

34       “Evidence, such as medical literature, that does not relate the  
35       exposure to the cancer is *not* evidence that no link exists. To find  
36       otherwise would improperly place the burden of showing industrial  
37       causation on the applicant. Therefore, the fact that there are no  
38       epidemiological studies showing an increased incidence in  
39       firefighters of the particular type of cancer suffered by the applicant  
40       does not rebut the presumption.” (Emphasis in original, citations  
41       deleted.)

1        In short, the presumption of industrial causation contained in section 3212.1 is *not* rebutted  
2 by showing that 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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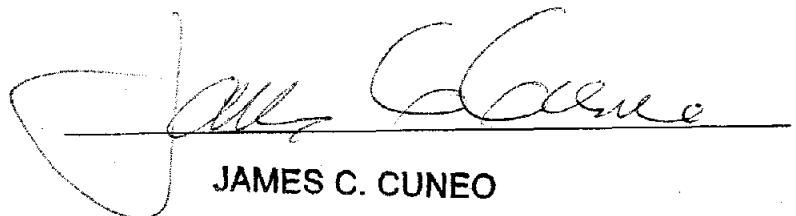
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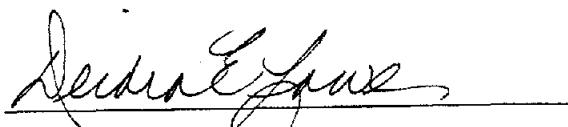
1 For the foregoing reasons,

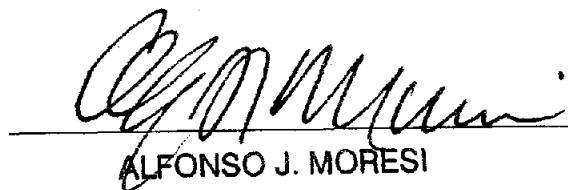
2 **IT IS ORDERED** as the Decision After Reconsideration of the Appeals Board that the  
3 March 30, 2009 Finding of Fact and Decision of the workers' compensation administrative law  
4 judge is **AFFIRMED**.

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6 **WORKERS' COMPENSATION APPEALS BOARD**

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11 JAMES C. CUNEO

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13 **I CONCUR,**

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15 DEIDRA E. LOWE

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17 ALFONSO J. MORESI

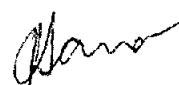


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21 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

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**

28 **JFS/jp**   
29 **BASTIAN, Sandy**