

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

DOUG MCCULLOUGH (dec.), *Applicant*

vs.

**MODESTO FIRE DEPARTMENT, administered by ATHENS;
SALIDA FIRE PROTECTION DEPARTMENT DISTRICT,
both permissibly self-insured, *Defendants***

**Adjudication Number: ADJ17388371
Lodi District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on July 28, 2025, and 60 days from the date of transmission is September 26, 2025. This decision is issued by or on September 26, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on July 21, 2025, and the case was transmitted to the Appeals Board on July 28, 2025. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under Labor Code section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on July 28, 2025.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by Labor Code section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on July 28, 2025.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 25, 2025

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

**MAKENZIE MCCULLOUGH
BRYAN MCCULLOUGH
KRISTA MCCULLOUGH, GAL
DUARTE, URSTOEGER & RUBLE
MULLEN & FILIPPI
LAUGHLIN, FALBO, LEVY & MORESI**

JMR/abs

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

REPORT AND RECOMMENDATION ON PETITION
FOR RECONSIDERATION
&
NOTICE OF TRANSMISSION TO THE APPEALS BOARD

INTRODUCTION

Issue:	Disagreement with Findings & Order
Date of Findings and Award:	12 June 2025
Petitioner:	Defendant
Timeliness of Petition:	Timely
Verification of Petition:	Verified

INTRODUCTION

The defendant, Modesto Fire Department, is now seeking reconsideration of the 12 June 2025, Finding of Fact and Order finding two penalties are due to the applicant pursuant to Labor Code Section 5814.3. The Petition for Reconsideration (“Petition”) is verified and timely. A timely verified Answer has been filed by the applicant. It is recommended that the defendant’s Petition should be denied in its entirety.

RELEVANT FACTS¹

The following documents are relevant to the issues at the trial for penalties that occurred on 3 April 2025:

- Application for Adjudication was filed 3 March 2023
- Application for Death Benefits was filed 30 March 2023
- Denial letter for injury issued 15 May 2023²
- Denial of death claim issued 2 June 2023³
- Petition for Penalty for Unreasonably Delayed Benefits Per LC§5414.3 was filed 6 July 2023 by the applicant’s counsel

The instant matter came on the trial calendar the first time 25 July 2024, at which time the parties stipulated to or the Court found the following:

¹ The exhibits were not continuously numbered and should be corrected so that in the *Minutes of Hearing and Summary of Evidence dated 3 April 2025*, Applicant’s 1 should be Applicant’s 3, and Defendant’s A-D should be BE, further all the subsections for the defendant’s exhibits should have been listed as numbers.

² Applicant’s 1A

³ Applicant’s 1B

- Doug McCullough was employed as a fire captain during the period 1 January 1994 through 18 November 2022 for Salida Fire Protection District, and Modesto Fire Department.
- The applicant died 19 March 2023 due to esophageal cancer that metastasized to the liver.
- The applicant elected against Modesto Fire Department.
- The applicant is survived by his children, Brian McCullough (18) and Mackenzie McCullough (14), as total dependents.
- The applicant was also survived by Krista McCullough, his legal spouse, and determined to be a partial dependent.
- The applicant was found to have satisfied its burden of proof on the application of Labor Code Section 3212.1; there was no evidence offered to rebut the presumption.

At the initial trial it was determined that the applicant was entitled to the benefit of the presumption contained in Labor Code Section 3212.1. After the defendant's Petition for Reconsideration was denied. The matter came back on the trial calendar for determination of the applicant's penalty petition. It was determined at the subsequent trial that the applicant was entitled to two penalties pursuant to Labor Code Section 5814.3, one for unreasonable delay of payment of *inter vivos* benefits, and one for delay of payment of death benefits; both related to the unreasonable denial of the applicant's claims⁴. The defendant filed a Petition for Reconsideration disputing the finding of penalties. The applicant filed a timely, verified Answer to Defendant's Petition for Reconsideration.

PETITIONER'S CONTENTIONS

The defendant contends the following:

- It was error to state the presumption was not raised at the initial trial.
- It was error to find that the defendant had all information needed to determine applicability of the presumption at the time of the denials
- When the claim was denied, the applicant had not made a prima facie showing as required by LC section 3212.1.
- There was no unreasonable rejection of liability.

RESPONSE TO PETITIONER'S CONTENTIONS

To clarify, the application of the presumption was one of the legal questions to be determined at the initial trial. However, the defendant failed to offer any evidence or frame any

⁴ Findings of Fact and Order 12 June 2025, Finding of Fact 5.

issue regarding rebuttal of the presumption. Thus, all the information needed to determine whether the presumption applied was available to the defendant at the time of the denial: the applicant's employer and job title, the existence of exposure to a known carcinogen on repeated occasions, and that he manifested cancer while working. It was appropriate to find the defendant unreasonably denied the applicant's *inter vivos* and death claims. The defendant provided a conclusory statement that there was no unreasonable delay, which does not make it so.

DISCUSSION

At the outset it should be noted that certain occupations are provided with a presumption of industrial causation as a matter of public policy. Thus, the presumptions contained in Labor Code Section 3212 et seq shift the burden of proof to the defendant to show why the injured worker is not afforded the benefit of the presumption, thereby rebutting the presumption shifting the burden of proof back to the applicant regarding causation. The purpose of the penalty provision specifically associated with denial of presumption cases was to encourage employers to accept those cases that on their face comply with the presumption. The rationale for enacting the provision was due to the general behavior of many employers to deny cases for the class of employees covered by the presumptions and force determinations at the Workers' Compensation Appeals Board ("WCAB"). The legislative history of Labor Code Section 5814.3 suggests that the penalty provisions would encourage employers to pick up the "easy" cases. The instant case is one of those cases. The denial letters provided⁵ state that the reason for the denial is, "the medical evidence obtained to date does not find causation". The denial is in contravention of the provisions of the presumption. At the time of the denial the defendant knew the applicant was a fire captain in their employment, had records of the various exposures suffered by the applicant while responding to events, and medical reporting from Sutter Gould from 29 December 2022 stating the applicant was diagnosed with "extensive metastatic esophageal cancer"⁶. Thus, failure to accept liability was unreasonable.

There are numerous ways to rebut the presumption, granted, the presumption in Labor Code Section 3212.1 is exceptionally hard to rebut. However, there was no evidence submitted at the first trial to rebut the presumption. The defendant is suggesting that the latency period is the basis for denying the claims. However, the defendant's reasoning is faulty. At the time of the denials there was no discussion or identification that the latency period would change the liability of Modesto Fire Department. Further, the defendant's argument that the latency period shifts responsibility for the industrial injury to Salida Fire Protection District and absolves Modesto Fire Department from responsibility is incorrect. Moving the latency period in this case has to do with the issues of contribution and reimbursement between the employers. The stipulated period of industrial injury is a cumulative trauma from 1 January 1994 through 18 November 2022. The legal date of injury for the cumulative trauma is the date upon which disability and determination that the injury is related to work occurs. In this case, that would put the legal date of injury squarely in the lap of Modesto Fire Department since the two requirements did not occur until 2022. The latency period merely shows when the applicant was first exposed to cancer causing substances and when the disease process might have begun. The latency period, without any of the other aspects of a cumulative trauma injury, allows the defendant with the last in time exposure to bring

⁵ Applicant's 1A and 1B as identified in the Minutes of Hearing and Summary of Evidence dated 3 April 2025.

⁶ Defendant's Cf as identified in the Minutes of Hearing and Summary of Evidence dated 3 April 2025.

in additional employers to share the responsibility for the presumptive injury. The last-in-time employer, where both factors have come together, is responsible for benefits to be paid to the applicant. Then, after benefits are paid to the applicant, the employer can seek contribution and reimbursement from additional employers subject to the presumption in accordance with the latency period.

CONCLUSION

The defendant's arguments are not persuasive. The decision to deny the applicant's claim when all the information necessary to determine the application thereof was in the possession of the defendant constituted unreasonable delay of *inter vivos* benefits and death benefits.

RECOMMENDATION

Based on the foregoing, it is respectfully recommended that the Petition for Reconsideration be denied.

NOTICE OF TRANSMISSION:

Pursuant to Labor Code, Section 5909, the parties and the appeals board are hereby notified that this matter has been transmitted to the appeals board on date set out below.

Dated: 21 July 2025

Deborah A. Whitcomb
WORKERS' COMPENSATION JUDGE