WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

THEODORE DAVIS, *Applicant*

vs.

CITY OF MODESTO;
permissibly self-insured, administered by ATHENS ADMINISTRATORS CONCORD,
Defendants

Adjudication Number: ADJ9468922
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 and the Opinion on Decision 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 and the Opinion on Decision, both of which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

I.

Preliminarily, we note that former Labor Code[1] 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, 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.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under 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, Case No. ADJ13440052 was transmitted to the Appeals Board on June 11, 2025. Sixty days from the date of transmission is Sunday, August 10, 2025. The next business day that is 60 days from the date of transmission is Monday, August 11, 2025 (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, August 11, 2025, so that we have timely acted on the petition as required by section 5909(a).

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 June 11, 2025, and the case was transmitted to the Appeals Board on June 11, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 11, 2025.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302; Lab. Code, § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code, §§ 3202.5; 3600(a).)

> The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion.
>
> * * *
>
> The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.
>
> (*Clark, supra*, at pp. 297-298 (internal citations and quotations omitted).)

Notwithstanding the analysis in *Clark*, for certain occupations the Legislature created presumptions that physical injuries are compensable. One such presumption is the cancer presumption found in section 3212.1. As relevant here, section 3212.1 states that:

> (a) This section applies to all of the following:
> (1) Active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments:
> (A) A fire department of a city, county, city and county, district, or other public or municipal corporation or political subdivision.
>
> ….
>
> (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 120 months in any circumstance, commencing with the last date actually worked in the specified capacity.
>
> (Lab. Code, § 3212.1.)

In *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (Appeals Board en banc), the Appeals Board addressed the burdens that section 3212.1 placed on the parties as follows:

> 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.
>
> ...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."
>
> (*Id*., at pp. 1830-1831.)

For the reasons stated in the Report and Opinion on Decision, we agree with the WCJ that applicant met his prima facia burden to prove that the presumption pursuant to section 3212.1 applies based on the preponderance of the evidence (Lab. Code, §§ 3202.5, 5705), i.e., that he was a firefighter, that he was exposed to a known carcinogen, and that he developed prostate cancer. We note that panel qualified medical evaluator (PQME) Thomas Allems, M.D., stated that it was indisputable that firefighters are exposed to carcinogens in smoke and post-fire gasses (Report of Dr. Allems, 1/17/15, at pp. 6-7, Exhibit B) and that there is "limited evidence" of association between cadmium and arsenic with prostate cancer (*id*. at p. 4, emphasis in original). We also note

that these toxins and occupational exposure as a firefighter are included in the 2023 International Agency for Research on Cancer (IARC) tables for prostate cancer. (Joint Exhibit K, at p. 8.)

We also agree with the WCJ that Dr. Allems opinion is not substantial medical evidence on the issue of causation. In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability and it must set forth the reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621.) A medical opinion is not substantial evidence when based on incorrect facts, history or legal theory, or surmise, speculation, conjecture or guess. (*Place v. Workers' Comp Appeals Bd*. (*Place*) (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls (Escobedo*) (2005) 70 Cal.Comp.Cases 604, 620-621.)

We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 11, 2025

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

THEODORE DAVIS
MASTAGNI HOLSTEDT, A.P.C.
MICHAEL SULLIVAN & ASSOCIATES
LAUGHLIN, FALBO, LEVY & MORESI, L.L.P

PAG/bp

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

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

INTRODUCTION

Manner of Injury:	EXPOSURE
Date of Injury:	CT 3/31/14
Body Parts Injured:	PROSTATE ORGAN
Occupation:	FIREFIGHTER
Date of Findings and Award:	5/7/25
Petitioner:	DEFENDANT CITY OF MODESTO
Timeliness of Petition:	TIMELY
Verification of Petition:	VERIFIED

INTRODUCTION

Petitioner, filed a Petition for Reconsideration on 6/2/2025 of The Findings and Award.

PETITIONER'S CONTENTION(S)

Petitioner contends that

1. The WCJ acted without or in excess of her powers.
2. That the evidence does not justify the findings of fact.
3. That the Findings of Fact do not support the Order, Decision, or Award

RESPONSE TO PETITIONER'S CONTENTION

Petitioner is incorrect in her assessment of the findings provided by the WCJ and reconsideration should be denied.

SUMMARY OF FACTS

The applicant credibly testified that he was a firefighter for approximately 36 years. He originally began work at Peninsula Fire Protection District and ended his work there in December 1996. He then began working for the City of Modesto and continues to do so presently.

The applicant was diagnosed with prostate cancer while working at the City of Modesto and received treatment. The matter has been denied by the city of Modesto.

DISCUSSION

This matter has been active since 2014 and during that time there have been five PQME reports from Dr. Allems, four depositions of the PQME and three iterations/updates of the IARC tables (the most recent 2023 table is placed into evidence as EAMS Exhibit K page 8.)

It should also be noted that when the PQME did his first evaluation, the IARC tables did not mention firefighter in any category related to prostate cancer. Since that time, and most recently in the 2023, IARC tables, it has been added into the third column category heading which is titled AGENTS WITH LIMITED EVIDENCE IN HUMANS and specifically names "Firefighters (occupational exposure as a)" specifically impacted category/occupation. EAMS Exhibit K page 8.

Per reporting of the PQME, Dr. Allems has never found a compensable prostate cancer case in a firefighter in his entire career. That is even though he gave many examples and described analysis of cases where prostate cancer was found to be statistically increased in various studies of firefighters. One such study was in San Francisco firefighters where an upsurge of prostate cancer was found to be a 40% increase. Another such study presented by the PQME relates that exposure to cadmium has an increase of prostate cancer statistically.

The applicant had occupational exposure as he was a firefighter for many years. He also testified that the calls were of a higher volume once he started in Modesto. The parties stipulated to, and the testimony received at trial, indicated that the applicant was a firefighter for 36 years. Under the (en banc) Faust v. City of San Diego (2003) 68 Cal. Comp. Cases 1822, it was found that no specific level of actual carcinogenic exposure needs to be shown and there is no requirement that there need be repeated exposures. County of Ventura v. Worker's Compensation appeals Board (Bastian) (2010) 75 Cal. Comp. Cases at p516.

The Labor Code Section 3212.1 presumption of compensability, cannot be rebutted by a showing that there are no studies linking exposure to carcinogen and the development of the type of cancer at issue or by showing that the cancer could have been caused by something else. The defendant must prove that no reasonable link exists; not merely proving that there is no evidence demonstrating a reasonable link Faust v. City of San Diego (2003) 68 Cal. Comp.. Cases 1822 and County of Ventura v. Worker's Compensation appeals Board (Bastian).

This WCJ found that the reporting of Dr. Allems was not substantial evidence and was found contrary to the presumption of compensability. The court also found that Dr. Allems was working off of an" incorrect legal theory" regarding the presumption of compensability. PQME Dr. Allems January 17, 2015 report opines that prostate cancer was not generally considered to be caused by external environmental or occupational carcinogens. However, on page 4 of the same report he specifies that there was an association found between cadmium, which is one of the toxins included in the IARC tables also on page 8 Exhibit K, that firefighters are exposed to in their daily work.

These internal inconsistencies throughout the PQME reporting and his deposition testimonies are fatal to finding his reporting to be substantial evidence. By Labor Code Section 3212.1, the Legislature delivered a legislative mandate stating that firefighters have a cancer presumption. It

is clear that the PQME's beliefs do not allow for such a presumption, and he is, in effect, wiping out the legislative mandate for these Public Employees.

In *Stephens v. WCAB* 36 CCC 610, the court of appeal annulled an order that a prison officer's heart condition was not work related when the doctor ignored LC 3212.2, which provides a rebuttable presumptions of injury for certain public safety officers "It is impermissible for a compensation carrier to 'repeal' this legislation, wiping out the presumption created by section 3212.2, by seeking out a doctor whose beliefs preclude possible application."

RECOMMENDATION

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

Maribeth Arendt
WORKERS' COMPENSATION JUDGE

Served on all parties as shown on the Official Address Record.
See attached Proof of Service. Jaustin 6/11/2025

OPINION ON DECISION

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT:

Based upon the Applicant's testimony and the multiple Medical-Legal reports and deposition testimonies of PQME Thomas Allems, M.D., it is found that the Labor Code Section 3212.1 presumption has not been rebutted by the PQME.

It is found that applicant Theodore Davis, born March 4, 1966 while employed and during the period January 13, 1997, through March 31, 2014, in case ADJ9468922, as a firefighter, in Modesto California, by the City of Modesto Fire Authority, sustained industrial injury arising out of and in the course of his employment to his prostate.

PQME Dr. Allems has produced five medical legal reports dating back to 2014 and most recently in July 2024. As well, he has made himself available to four depositions dating from 2015 and last taken in December 2024. All of the trial exhibits have been thoroughly reviewed. While the sheer volume of reporting, on its own is impressive, it does not persuade the court that the defendant has aptly rebutted the Labor Code Section 3212.1 presumption afforded to firefighters. Per Dr. Allems, he has never found prostate cancer to be industrial in a firefighter. He has found no compensable prostate cancer in firefighters even though he gave many examples and analysis of cases where prostate cancer was found to statistically increased in various studies and analysis of actual firefighters.

PQME Dr. Allems January 17, 2015 report opines that prostate cancer was not generally considered to be caused by external environmental or occupational carcinogens. However, on

page 4 he specifies that there was an association found between cadmium, which is one of the toxins included in the IARC tables that firefighters are exposed to in their daily work. This is inconsistent.

In the last deposition taken on December 12, 2024, PQME Dr. Allems states that he believes that there is limited evidence linking occupational exposure as a firefighter to cancer, he indicated in response to a defense question that there is not sufficient evidence to classify firefighting as a known carcinogenic related occupation. He also stated that there was insufficient evidence to do that very thing. He specified that labor code section 3212.1 is impossible to prove in the negative. It is clear from the PQME statements elicited during this deposition testimony that the PQME was rendering his opinions from the viewpoint of an "incorrect legal theory" and thus his reports/opinions cannot be considered as substantial evidence.

The appeals board found an applicant's prostate cancer to be compensable when the evidence simply demonstrated that there are no studies either to support or rule out the connection between an applicant's exposure to carcinogenic chemicals and his prostate cancer. *County of Orange v. WCAB (Sleep)* (2005) 70 CCC 1499 (writ denied). In the present matter there was no evidence presented that ruled out the connection whatsoever between applicants' exposure to carcinogenic chemicals and his development of prostate cancer.

By way of analogy, In *Stephens v. WCAB* 36 CCC 610, the court of appeal annulled an order that a prison officer's heart condition was not work related when the doctor ignored LC 3212.2, which provides a rebuttable presumptions of injury for certain public safety officers. The appeals board had relied on a doctor who opined that stress and stressful occupations did not cause or relate to acceleration of the applicant's heart condition. The court, however, stated that with LC 3212.2, the Legislature "delivered a legislative mandate: stressful occupations of these classes not only can cause heart trouble, there is a presumption that they do." It added, "It is impermissible for a compensation carrier to 'repeal' this legislation, wiping out the presumption created by section 3212.2, by seeking out a doctor whose beliefs preclude possible application." So, as the doctor assumed an incorrect legal theory, his opinion did not constitute substantial evidence.

In the present matter, PQME Allems was working off of an "incorrect legal theory" which relates to the cancer presumption for firefighters of Labor Code Section 3212.1. The Legislature delivered a legislative mandate stating that firefighters have a cancer presumption. It is clear that the PQME's beliefs do not allow for such a presumption and he is, in effect, wiping out the legislative mandate for these Public Employees.

One study mentioned, discussed prostate cancer and specific firefighter mortality rates. It described a San Francisco firefighters study which designates prostate cancer with a 40% mortality rate higher than that of the general population. This further elucidates that PQME Allems reporting does not rebut the presumption and further identifies his lack of understanding of the presumption itself.

SUBSTANTIAL EVIDENCE

PQME Dr. Allems

While Dr. Allems examined the applicant, reviewed the medical records and gave his analysis, his reporting was based upon a faulty understanding of the firefighter cancer presumption and is thus not considered substantial evidence.

Dr. Allems statistical analysis of the data, the fact that in his career he has never found a firefighters prostate cancer to be industrial, and his insistence that there is not any evidence suggesting that prostate cancer in firefighters is industrial is significant in his defective analysis of the presumption. The court finds that Dr. Allems reporting is faulty and thus not substantial evidence.

Per *Faust v. City of San Diego* (2003) 68 CCC 1822, 1831 (appeals board *en banc*); The employer must 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. The employer cannot meet this burden by simply showing that no evidence has established a reasonable link between the known carcinogen and the cancer — it must affirmatively establish that a reasonable link does not exist. The appeals board stated that 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. The expert evidence should include a review of studies or other evidence that justifies an opinion or conclusion that there is no reasonable link.

The PQME report of Dr. Allems dated July 14, 2024 on page 1 indicates that the IARC of 2023 tabulates possible carcinogens by organ system in which indicates that there is limited evidence of an association between occupational exposure as a firefighter and prostate cancer. Again, this does not indicate that there is an absence of any evidence and/or documentation of prostate cancer. The PQME reporting of Dr. Allems is not considered substantial evidence.

Maribeth Arendt
Workers' Compensation Administrative Law Judge

Served on all parties as shown on the Official Address Record.
See attached Proof of Service. JAustin 5/7/25