



1 that, while employed by City of Atwater as a fire captain during a cumulative period ending July 10,  
2 2008, applicant sustained industrial injury in the form of breast cancer causing permanent disability of  
3 18%. Applicant testified, "in 2008 the City of Atwater put their fire services out to bid, and eventually  
4 the California Department of Forestry and Fire [Protection] [(Cal Fire)] won the bid and took over  
5 responsibilities for providing fire services to the City of Atwater." (Minutes of Hearing and Summary of  
6 Evidence of June 19, 2018 trial at p. 4.) As of April 13, 2009, applicant began working for the Cal Fire,  
7 essentially performing the same duties as when he was employed by the City of Atwater. (Minutes of  
8 Hearing and Summary of Evidence of June 19, 2018 trial at p. 4.)

9 Applicant was again diagnosed with breast cancer in 2016. (Minutes of Hearing and Summary of  
10 Evidence of June 19, 2018 trial at p. 5.) In the instant matter, applicant seeks workers' compensation  
11 benefits from the State of California relating to the current manifestation of his breast cancer.

12 As an active firefighting member of the Department of Fire and Fire Protection, applicant was  
13 subject to Labor Code section 3212.1, which states in pertinent part:

14 (a) This section applies to all of the following:

15 (1) Active firefighting members, whether volunteers, partly paid, or fully  
16 paid, of all of the following fire departments:

17 \*\*\*

18 (C) The Department of Forestry and Fire Protection.

19 \*\*\*

20 (b) The term "injury," as used in this division, includes cancer, including  
21 leukemia, that develops or manifests itself during a period in which any  
22 member described in subdivision (a) is in the service of the department or  
23 unit, if the member demonstrates that he or she was exposed, while in the  
24 service of the department or unit, to a known carcinogen as defined by  
25 the International Agency for Research on Cancer, or as defined by the  
26 director.

27 \*\*\*

(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

1 extended to a member following termination of service for a period of  
2 three calendar months for each full year of the requisite service, but not  
3 to exceed 120 months in any circumstance, commencing with the last  
4 date actually worked in the specified capacity.

5 In *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (Appeals Bd. en banc), we  
6 discussed the 3212.1 presumption in depth, and explained that it was applicant's initial burden to  
7 establish that they came into the class of employees covered by the statute, that the cancer manifested  
8 itself during the employee's period of service or during the applicable extension period, that they were  
9 exposed to an identified known carcinogen as defined by the International Agency for Research on  
10 Cancer (IARC) or the Director of the Department of Industrial Relations. (*Faust*, 68 Cal.Comp.Cases at  
11 pp. 1830-1831.) The burden then shifts to defendant to rebut the presumption. In order to successfully  
12 rebut the presumption, the defendant must establish the primary site of the cancer and show that "the  
13 carcinogen to which the applicant has demonstrated exposure is not reasonably linked to the disabling  
14 cancer." (*Id.* at p. 1831.)

15 Here, applicant carried his initial burden. As noted above, as an active firefighting member of  
16 Cal Fire, applicant was clearly within the class of employees coming under the scope of section 3212.1.  
17 Applicant's breast cancer manifested itself in 2016 while he was still in active service with Cal Fire.  
18 Applicant gave a history to Dr. Lonky of being exposed to formaldehyde while at work. Applicant did  
19 not present evidence that formaldehyde is a known carcinogen "as defined by the International Agency  
20 for Research on Cancer, or as defined by the director." As we noted in *Faust*, "The applicant must  
21 establish that the exposure was to a 'known carcinogen' with evidence, generally documentary, that the  
22 carcinogen is defined as such by the International Agency for Research on Cancer, or otherwise so  
23 'defined by the director.'" (*Faust*, 68 Cal.Comp.Cases at p. 1830.) Nevertheless, we take judicial notice  
24 pursuant to Evidence Code section 452(h) that formaldehyde is listed as a "Group 1" carcinogen by the  
25 IARC on its own website. (<<https://monographs.iarc.fr/list-of-classifications>> [as of May 6, 2020].)  
26 "Group 1" is defined as "carcinogenic to humans," as distinguished from Group 2A (probably  
27 carcinogenic to humans), Group 2B (possibly carcinogenic to humans), and Group 3 (not classifiable as  
to its carcinogenicity to humans). (<<https://monographs.iarc.fr/agents-classified-by-the-iarc/>> [as of

1 April 29, 2020].) Thus, Group 1 agents, such as formaldehyde are “known carcinogens” for the purposes  
2 of section 3212.1.<sup>1</sup>

3 The burden then passed to defendant to show the primary site of the cancer, and that the  
4 carcinogen that the applicant was exposed to is “not reasonably linked” to the cancer. Here, the primary  
5 site of the cancer was the breast. (November 17, 2017 report at p. 23.) Although Dr. Lonky opined that  
6 chemical exposure, such as exposure to formaldehyde could be the cause of the cancer, his reporting and  
7 testimony explain that applicant’s exposure to carcinogens, while employed at Cal Fire, were not  
8 reasonably linked to the current manifestation of his cancer.

9 The Court of Appeal has held that one way to rebut the presumption is “to demonstrate it is  
10 highly unlikely the cancer was industrially caused because the period between the exposure and the  
11 manifestation of the cancer is not within the cancer’s latency period.” (*City of Long Beach v. Workers’*  
12 *Comp. Appeals Bd. (Garcia)* 126 Cal.App.4th 298, 317 [70 Cal.Comp.Cases 109].) “Further, the nature  
13 of the manifestation, or other medical evidence, may be sufficient to show the lack of connection.” (*Id.*)  
14 Rebuttal of the cancer presumption does not require showing an absence of no possible link, but rather  
15 that a link is not reasonable. “A link that is merely remote, hypothetical, statistically improbable, or the  
16 like, is not a reasonable link.” (*Id.* at p. 316.)

17 In this matter, Dr. Lonky opined that applicant’s current manifestation of breast cancer was a  
18 recurrence and further development of his first cancer, writing in his November 17, 2017 report:

19 As discussed in the report of Dr. Leonard, who previously saw Mr. Blais  
20 for his initial evaluations, the latency period for the development of  
21 breast cancer would be estimated at approximately between 10 and 20  
22 years. According to what I have read in the literature, this is an  
23 approximation, but, with reasonable medical probability, accurate.

24 \*\*\*

25 With regard to his current dilemma, it is my opinion he has presented  
26 now with progression of the original cancer. There is no reason to  
27 believe his employment for the Department of Forestry, which began in

<sup>1</sup> While Dr. Lonky spoke generally about harmful chemicals that applicant may have been exposed to as a firefighter, section 3212.1 requires the applicant to specify known carcinogens. Applicant gave a history of exposure to “smoke and fumes,” “dusts,” “burned debris,” and “smoke from the burning of plastic material.” (November 17, 2017 report at p. 24.) Other than formaldehyde, applicant did not present evidence that any of these other exposures were to “known carcinogens” for the purposes of section 3212.1.

1 2009, has had any effect on his previously existing breast cancer.  
2 According to Mr. Blais, there was a period of remission, but still  
evidence of tumor, when he finished his initial course of chemotherapy.

3 It is my opinion it is highly medically probable that this original tumor  
4 has now reawakened, metastasized to the lung, bone, and pleural space,  
and created a pleural effusion, which was malignant and required  
5 drainage.

6 (November 17, 2017 report at pp. 24, 27.)

7 At his March 16, 2018 deposition, Dr. Lonky testified that, prior to the recurrence of his cancer,  
8 applicant "was in remission from the mastectomy, but there were markers that were still positive. If  
9 that's true, that means we don't see it yet. Okay? It's like cancer waiting to reappear. It's sitting in  
10 those cells, it's giving biochemical markers. It's asleep, it's dormant, but it ain't dead. We know it  
11 wasn't dead because you don't get second tumors, just doesn't happen. It's the same tumor." (March 16,  
12 2018 deposition at p. 12.) At his deposition, Dr. Lonky repeated with regard to the latency period that "it  
13 is highly likely probable that the average period is somewhere in [sic] 10 to 20 years." (March 16, 2018  
14 deposition at p. 13.) While Dr. Lonky admitted that "everything is an average," he testified that "if you  
15 have people that have an exposure to a carcinogen and they get cancer the next year, it's unlikely that  
16 those two are related. It's really highly unlikely." (March 16, 2018 deposition at pp. 13-14.)

17 At his deposition, Dr. Lonky was questioned regarding the fact that the tissue removed in  
18 applicant's July 17, 2008 mastectomy revealed two positive lymph nodes (November 17, 2017 report at  
19 p. 9), and testified that the recurrence was "just waiting to happen" (March 16, 2018 deposition at p. 18.)  
20 "Nodes being positive is already the tip off that it was elsewhere. So this breast cancer was in his nodes  
21 and those nodes were just a sign that where was it going to come next.... It goes to lung, it goes to bone.  
22 That's its favorite place to go. That's where it went." (March 16, 2018 deposition at p. 19.)

23 Dr. Lonky testified that applicant's recurrence could not have been a new cancer, because beyond  
24 the latency period he had already discussed in his report, "He didn't develop a new tumor and have it  
25 metastasize in one year, it just didn't happen." (March 16, 2018 report at p. 22.) "To metastasize takes  
26 years with doubling times." (March 16, 2018 report at p. 24.)

27 Here, Dr. Lonky's testimony shows that there was no reasonable link between any exposure

1 because of the aggregate factors of (1) latency period between exposure and manifestation, (2) the  
2 required period between an initial tumor and metastasis, (3) the fact that lymph nodes removed during the  
3 2008 mastectomy were positive for breast cancer, (4) the fact that no new tumor in the other breast was  
4 ever discovered (after the first was removed) (March 16, 2008 deposition at p. 23), and (5) the usual  
5 clinical presentation of recurrent metastatic breast cancer. All of these factors taken together are  
6 sufficient to show a lack of connection between the exposure and the cancer due to “the nature of the  
7 manifestation, or other medical evidence....” (*Garcia, supra*, 126 Cal.App.4th at p. 317.)

8 Applicant objects to the closing of discovery at the mandatory settlement conference on March  
9 22, 2018. By that point Dr. Lonky had already issued his November 17, 2017 report (served on  
10 December 21, 2017) and applicant’s counsel exercised his right to examine Dr. Lonky at a March 16,  
11 2018 deposition. Applicant complains that “many of the statements made by Dr. Lonky and reached in  
12 our [sic] PQME reports could not be discussed with the oncologist who treated claimant for a number of  
13 years after the 2008 discovery of breast cancer.” (Petition at p. 4.) However, applicant never made any  
14 showing of any attempts to procure any report addressing industrial causation from treating oncologist  
15 Merla E. Puray, M.D., whose last report in evidence is dated January 19, 2017. (See Exhibit 1.)  
16 Applicant made no showing that he made any attempt for Dr. Puray to review Dr. Lonky’s November 17,  
17 2017 report (served on December 21, 2017) between January and the late March mandatory settlement  
18 conference. In any case, we note that Dr. Puray diagnosed applicant with “recurrent metastatic breast  
19 cancer,” which is entirely consistent with Dr. Lonky’s analysis that this was a recurrent cancer.  
20 (December 13, 2016, December 27, 2016, and January 19, 2017 reports of Merla E. Puray, M.D  
21 [Exhibits 1, 2, and 3] at p. 1.)

22 Accordingly, we will affirm the WCJ’s decision.

23 / / /

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25 / / /

26 / / /

27 / / /

1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals  
3 Board that the Findings of Fact and Order of August 21, 2018 is **AFFIRMED**.

4  
5 **WORKERS' COMPENSATION APPEALS BOARD**

6 **DEIDRA E. LOWE**

7 /s/ \_\_\_\_\_

8  
9 **I CONCUR,**

**CHAIR**

10 **KATHERINE ZALEWSKI**

11 /s/ \_\_\_\_\_

12  
13 **MARGUERITE SWEENEY**

14 /s/ \_\_\_\_\_

15  
16 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

17 **MAY 13 2020**

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

20 **LAW OFFICES OF GARY J. HILL**  
21 **ROBERT A. BLAIS**  
22 **STATE COMPENSATION INSURANCE FUND**

23  
24  
25 **DW/oo**

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **ROBERT BLAIS, JR.,**

5 *Applicant,*

6 vs.

7 **CA DEPARTMENT OF FORESTRY AND  
8 FIRE PROTECTION; STATE  
9 COMPENSATION INSURANCE FUND,**

10 *Defendants.*

Case No. ADJ10840422  
(Fresno District Office)

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION**

11 Reconsideration has been sought with regard to the decision filed on August 21, 2018.

12 Taking into account the statutory time constraints for acting on the petitions, and based upon our  
13 initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to  
14 further study the factual and legal issues in this case. We believe that this action is necessary to give us a  
15 complete understanding of the record and to enable us to issue a just and reasoned decision.  
16 Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter  
17 determine to be appropriate.

18 For the foregoing reasons,

19 **IT IS ORDERED** that Reconsideration is **GRANTED**.

20 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in  
21 the above case, all further correspondence, objections, motions, requests and communications *relating to*  
22 *the petitions* shall be filed only with the Office of the Commissioners of the Workers' Compensation  
23 Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA  
24 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall *not*  
25 be submitted to the district office from which the WCJ's decision issued or to any other district office of  
26 the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication  
27 Management System (EAMS). Any documents relating to the petitions for reconsideration lodged in



1 violation of this order shall neither be accepted for filing nor deemed filed.

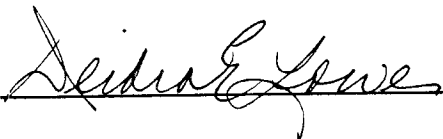
2 All trial level documents not related to the petition for reconsideration shall continue to be e-filed  
3 through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper  
4 form.<sup>1</sup> If, however, a proposed settlement is being filed, the petitioners for reconsideration should  
5 promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending  
6 before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

7 **WORKERS' COMPENSATION APPEALS BOARD**

8  
9  **CHAIR**

10  
11 **CATHERINE ZALEWSKI**

12 **I CONCUR,**

13 

14 **DEIDRA E. LOWE**

15 **CONCURRING, BUT NOT SIGNING**

16  
17 **MARGUERITE SWEENEY**

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

19 **NOV 15 2018**

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

22 **ROBERT BLAIS, JR.**  
23 **LAW OFFICES OF GARY J. HILL**  
24 **STATE COMPENSATION INSURANCE FUND**

25 **abs**

26 <sup>1</sup> Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g.,  
27 petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements,  
etc.)

STATE OF CALIFORNIA  
Division of Workers' Compensation  
Workers' Compensation Appeals Board

CASE NUMBER: ADJ10840422

ROBERT BLAIS JR

-vs.-

CAL DEPT OF FORESTRY  
AND FIRE PROTECTION;  
SCIF STATE EMPLOYEES  
ROHNERT PARK;

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE:  
DATE OF INJURY:

Debra Sandoval  
CT THROUGH 9/30/16

REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION

I  
INTRODUCTION

1. Applicant's Occupation: Fire Captain  
Age at Injury: 58  
Date of Injury: CT through 9/30/16  
Parts of Body Alleged Injured: Various organs and bones  
Manner in Which Injury Alleged Occurred: Exposure to carcinogens pursuant to cancer presumption under L.C. §3212.1
2. Identity of Petitioner: Applicant  
Timeliness: The Petition was timely filed on 9/17/18  
Verification: The Petition was Verified.
3. Date of Award: 8/21/18
4. Petitioner contends:
  - a. Defendant failed to rebut the cancer presumption under Labor Code section 3212.1.
  - b. Applicant should have been allowed additional time for discovery to allow Applicant's treating physician to review and comment upon the PQME's deposition testimony.

## II

### FACTS

Applicant began working as a fire fighter for the City of Atwater in 1995. He became a fire captain in 1999. In April of 2009, the California Department of Forestry and Fire took over providing fire services for the City of Atwater but Applicant's job duties never changed. In July of 2008, he was diagnosed with breast cancer. He filed a cumulative trauma claim for the period from September 29, 1995 through July 10, 2008, (ADJ7192434) against the City of Atwater. His breast cancer was treated with a right full mastectomy followed by chemotherapy. Applicant returned to his usual employment as a fire captain in April 2009. His cumulative trauma claim was settled by Stipulated Award on December 9, 2014, with provision for future medical treatment.

Applicant had no clinical evidence of recurrence of his cancer in December of 2014. (*Exh. 7, Dr. Puray report 12/5/14.*) In July 2016, Applicant developed a chronic cough. On November 28, 2016, he underwent a left thoracentesis with drainage of pleural fluid. Cytology confirmed metastatic adenocarcinoma consistent with breast primary, based on IHC findings. (*Exh. 3, Dr. Puray report 12/13/16.*) At that time he also underwent bronchoscopy and biopsy of lymph nodes which also showed metastatic adenocarcinoma. His oncologist diagnosed him with recurrent metastatic breast cancer with bone metastases, bilateral pleural metastases, hilar and mediastinal lymphadenopathy. (*Ibid.*)

Applicant filed a cumulative trauma claim through 9/30/16 against the California Department of Forestry and Fire Protection. On November 17, 2017, Applicant underwent a PQME evaluation by Dr. Stewart Lonky. Dr. Lonky opined that Applicant was exposed to numerous carcinogenic agents during the course of his employment as a firefighter/fire captain and that these agents, more likely than not, played a role in causing his breast cancer. He also opined Applicant was currently

suffering from a progression of his original cancer with no reason to believe his employment for the Department of Forestry had any effect on the previously existing breast cancer. (*Exh. C, Dr. Lonky report 11/17/17, pg. 27*)

The matter proceeded to an AOE/COE trial and the undersigned found Applicant's metastatic breast cancer is a recurrence of the prior injury through 7/10/08 (ADJ7192434) for which he had received a Stipulated Award and that Applicant did not sustain a separate injury arising out of and occurring in the course of employment with Department of Forestry and Fire Protection. It is from this Finding and Order that Applicant seeks Reconsideration.

### III

#### DISCUSSION

Applicant contends that the undersigned failed to address the issue of Applicant's right to discovery and the premature closure of discovery over his timely objection to Defendant's Declaration of Readiness to Proceed. During informal discussions with the parties prior to opening of the record, the undersigned pointed out to Applicant's attorney that the time in which to file a Petition for Removal of WCJ Sims' Order closing discovery and setting the matter for trial had passed and at that time the Order was a final Order. It was also pointed out to Applicant's attorney that the trial judge always had the discretion to re-open discovery if it was determined that the medical records did not constitute substantial medical evidence or if the evidence submitted was insufficient to allow a determination of the issues submitted. Based upon these discussions, Applicant's attorney agreed to strike the issue regarding close of discovery. When the Stipulations and Issues were read into the record both parties agreed, on the record, that they were correctly stated.

Applicant contends that the burden has shifted to Defendant to prove that the cancer that developed in 2016 was not a new and independent cancer and that such cannot be determined with reasonable medical probability without examination of DNA markers.

Before the burden shifts to Defendant, Applicant must show that he has developed or manifested cancer. In this case since Applicant has already established that he developed or manifested breast cancer as a result of his prior employment by the City of Atwater, he must show that he has developed or manifested a new or different cancer from the one for which he previously received a Stipulated Award.

In determining whether Applicant has met his initial burden, the entire medical record must be taken as a whole. Nowhere in Dr. Lonky's deposition testimony does he suggest that an examination of DNA markers is necessary for a determination as to whether or not Applicant's 2016 metastatic cancer diagnosis is or is not a natural progression of his prior 2008 breast cancer. Dr. Lonky testified unequivocally that with reasonable medical probability the two are related but that a DNA fingerprint would be needed for medical certainty. (*Exh. D, Dr. Lonky deposition, 3/16/18, pg. 24:9-14.*)

Dr. Lonky supports his opinion by explaining that the cancer cells removed from Applicant's lung were metastatic breast cancer cells not lung cancer cells and Applicant's remaining left breast showed no signs of having developed a cancer mass. (*Id. 20:1-7.*) In order to develop metastatic cancer there must first be a mass that grows into a blood vessel or a lymphatic channel which then breaks off and is carried to a different location. The fact that Applicant had two lymph nodes positive for cancer cells at the time of his original mastectomy is significant because it shows that the original cancer had already invaded the lymph system. When there have been positive nodes removed it is almost certain that there were other lymph nodes with cancer cells in them.

Chemotherapy is then used to try to wipe out the remaining cancer cells but it is not unusual for some to survive which then grow and develop into metastatic cancer sites. (*Id.* 25:11 – 26:24.) Based on the totality of the medical evidence, Dr. Lonky concluded that Applicant's current diagnosis was not from a new breast cancer, it was from the old breast cancer. (*Id.* 26:19-24)

Since there was no new manifestation or development of cancer Applicant has failed to meet his initial burden of proof under Labor Code section 3212.1 and the burden does not shift to Defendants to rebut the presumption.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

DATE:

9/28/18



**Debra Sandoval**

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

FILED AND SERVED ON PARTIES LISTED ON THE ATTACHED  
OFFICIAL ADDRESS RECORD (EXCLUDING EMPLOYER).  
ON: SEPTEMBER 28, 2018  
BY: MCASTILLO 