WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AVI AZOULAY, ***Applicant,*** **vs.** **CITY OF ORANGE, permissibly self-insured, adjusted by YORK SERVICES,** ***Defendants.***	**Case No. ADJ8689638** **(Santa Ana District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further study the factual and legal issues.[1] This is our Decision After Reconsideration.

In the Findings of April 21, 2015, the workers' compensation judge (WCJ) found, in relevant part, that applicant, while employed as a juvenile correction officer by the County of Orange during the period of July 1, 2001 through June 11, 2012, did not sustain injury arising out of and during the course of employment in the form of blood-borne infectious disease, scar resulting from surgery, and diverticulitis, that applicant failed to meet his burden of proof on injury, and that Labor Code section 3212.8 does not apply. In addition, the WCJ found that before the acute need for surgery, applicant had no symptoms of constipation related to either narcotic use or his on-duty eating habits, "which would be crucial to the finding of industrial causation," that Dr. Green took a detailed history including applicant's bowel habits and determined there was no industrial causation of the diverticulitis and no connection between the elbow surgery of June 5, 2012 or the taking of pain medication related to the development of diverticulitis, that Dr. Green found no history of either acute or chronic constipation, and that Dr. Green concluded that the diverticular disease that developed could not be related to the applicant's employment.

[1] Former Commissioner and Chairwoman Ronnie G. Caplane signed the Opinion and Order Granting Petition for Reconsideration, but she has since retired from the Appeals Board and a new panel member has been substituted in her place.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contended that because his diverticulitis is a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, the diverticulitis and the resulting scar are presumptive injuries pursuant to Labor Code section 3212.8.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report"). We adopt and incorporate the "Facts" (Section II) set forth in the WCJ's Report. We do not adopt or incorporate the remainder of the Report.

Based upon our review of the record, and based upon the plain or ordinary meaning of the statutory language of Labor Code section 3212.8, we conclude that applicant sustained "injury" by way of a "blood-borne infectious disease" within the meaning of the statute, and that he is entitled to the presumption of industrial causation afforded by the statute. Therefore, we will rescind the WCJ's decision and substitute our decision that applicant sustained industrial injury in the form of blood-borne infectious disease.

BACKGROUND

At trial on March 5, 2015, the parties stipulated that applicant is in the class of persons covered by Labor Code section 3212.8. In addition, the two reports and deposition of Dr. Green, the Agreed Medical Evaluator (AME) in internal medicine, were admitted in evidence.

Dr. Green explained the development of applicant's abdominal illness in his March 19, 2014 report, as follows:

> Avi Azoulay was seen for an Internal Evaluation. Mr. Azoulay has a history of severe abdominal pain beginning on June 11, 2012. The patient had surgery to the left elbow just six days previously on June 5, 2012. The pre-op notes per Dr. Rodrigues as well as notes per Dr. Ghalambor do not indicate pre-existing abdominal problems or constipation. This is important because we know that chronic constipation can lead to increase in the pressure within the colon which then can lead to worsening of diverticular disease and then diverticulitis.
>
> The medical record indicates that the patient presented with abdominal pain to the Urgent Care June 11, 2012. The patient was taken to the hospital where he required surgery due to diverticulitis with actual

ruptures of the diverticula leading to release of bowel contents into the abdominal wall. The patient had a colostomy placed which was then reversed in the autumn of 2012. The patient had a rocky course stating that he was initially hospitalized for eight days and then the second hospitalization was for 12 days. I would like to double-check the hospital records and the notes from the office of Dr. Berman for completeness.

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With regard to apportionment, this goes to the heart of the issue of causation of the injury. Absent, however, the medical records from Dr. Berman and from the hospital, the data does not point to an industrial problem. I state this because the initial CAT scan, June 11, 2012 showed significant diverticula which most likely is a long-term degenerative problem where Mr. Azoulay developed small outpocketings called diverticula in the bowel. The reader should note that these pockets or outpocketing in the bowel wall can be worsened with chronic constipation but there is no indication of either acute or a chronic constipation as a result of either chronic stress as a result of working for the County of Orange nor from the use of Norco or Vicodin which was given postoperatively June 5, 2012. The patient stated in his deposition that he was told by his doctors that diet, stress, and medications can lead to diverticular disease and that is true, but the mechanism where these factors cause worsening of diverticular disease is that of chronic constipation and increased pressure within the bowel wall.

We certainly do see patient who have had chronic narcotic use who then develop diverticular disease due to constipation and we also see patients who are under a lot of stress and have more constipation or patients with poor dieting developing constipation that leads to diverticular disease. This, however, is not the history here. The patient, in other words, has certainly had stress and he has had narcotic use and his diet is certainly, as per his deposition testimony, not the best of diets, but absent a history of either acute or chronic constipation, the diverticular disease that developed that then led to diverticulitis on June 11, 2012 would not be related to the patient's work.

I must reiterate that Dr. Rodrigues in his pre-op did not indicate any constipation and Dr. Ghalambor on June 8, 2012 indicated the patient had a lot of pain and took two Vicodin but did not have constipation and the patient's history to me was that, in fact; leading up to June 11, 2012, he was having one or two bowel movements a day. Thus, the data to this point points to nonindustrial causation and not an industrial injury.

Thus, with regard to apportionment and based upon the data at hand, 100% of the Whole Person Impairment is nonindustrial.

In a supplemental report dated June 18, 2014, Dr. Green reviewed additional medical records. These records included "microbiology notes and infectious disease notes" of Dr. John Lok, apparently dated September 27, 2012, indicating applicant "had an intra-abdominal infection and drainage." Dr. Green also reviewed additional records from Dr. Lok for the time period October and November 2012. These records noted the presence of "infectious disease," related to an abscess that formed after closure of the colostomy that applicant had received following the first surgery for his ruptured diverticula. However, Dr. Green stated that these additional medical records confirmed his March 19, 2014 opinion that applicant "had diverticulitis but there was actually no indication that this was an occupational injury or condition." Notwithstanding the diagnosis in Dr. Lok's records that applicant had "infectious disease" after the surgeries related to his diverticulitis, Dr. Green's reports of March 19, 2014 and June 18, 2014 did not address the issue of whether applicant had a blood-borne infectious disease. However, the issue was addressed in Dr. Green's deposition of December 3, 2014.

In the deposition at pp. 15-16, Dr. Green answered defense counsel's questions about the cause of applicant's illness as follows:

> Q. Let me ask one [more] question.
>
> Doctor, this blood-borne pathogen that Mr. Epperly [applicant's attorney] keeps referring to is – it's my understanding that in this particular case Mr. Azoulay had diverticulitis which was a rupture of the bowel or the diverticular in the bowel that spilled into the abdominal cavity and is that how it entered the bloodstream?
>
> A. Right. That's how it would get into the blood.
>
> Q. Okay. So the fact that it's a blood-borne pathogen kind of misstates the infection?
>
> A. Right. Typically with blood-borne pathogens we think of hepatitis, which is blood to blood transmission, or AIDS, which is blood to blood transmission. Here it got into the blood from the colon. It's a colon infection.
>
> Q. Okay.

A. So it got into the blood – at least the bloody tissue around the colon and then formed a pus pocket and that was removed at the time of the surgery in June of 2012.

Q. Okay. So the infection was not caused by having a pathogen in the blood that led to the infection – the initial infection.

Is that correct?

A. Right, right. If he had bacteria in the blood to start with, he would have been in what is called sepsis.

Q. Okay.

A. Meaning he would have been really sick and he didn't have that.

DISCUSSION

Labor Code section 3212.8 provides, in relevant part, as follows:

> (a) In the case of members of a sheriff's office, of police or fire departments of cities, counties, cities and counties . . . the term "injury" as used in this division, includes a blood-borne infectious disease . . . when any part of the blood-borne infectious disease . . . develops or manifests itself during a period while that person is in the service of that office, staff, division, department, or unit. The compensation that is awarded for a blood-borne infectious disease . . . shall include, but not be limited to, full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workers' compensation laws of this state.
>
> (b)(1) The blood-borne infectious disease . . . so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of the employment or service. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it.
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> ***
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> (c) The blood-borne infectious disease . . . so developing or manifesting itself in those cases shall in no case be attributed to any disease . . . existing prior to that development or manifestation.
>
> (d) For the purposes of this section, "blood-borne infectious disease" means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations.

The statute's presumption of industrial injury for "blood-borne infectious disease" is within the class of presumptions enacted by the Legislature to promote public policy, with the purpose of "provid[ing] additional compensation benefits to employees who provide vital and hazardous services by easing their burden of proof of industrial causation." (*City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 310-311 [70 Cal.Comp.Cases 109], citing *Zipton v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 980, 988, fn. 4 and *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1123-1124.) That Legislative intent is generally determined from the plain or ordinary meaning of the statutory language, unless the language or intent is uncertain, and that all workers' compensation statutes are to be liberally construed in favor of the injured worker. (*County of Kern v. Workers' Comp. Appeals Bd.* (2011) 200 Cal.App.4th 509, 517 [76 Cal.Comp.Cases 1037], internal quotations and citations omitted.)

Consistent with the foregoing principles, and based upon the plain or ordinary meaning of the statutory language, we conclude that applicant sustained "injury" by way of a "blood-borne infectious disease" within the meaning of section 3212.8, and that he is entitled to the presumption of industrial causation afforded by the statute. This conclusion is based upon our consideration of Dr. Green's medical opinion in light of the Legislature's definitions of "injury" and "blood-borne infectious disease" set forth in subdivisions (a) and (d).

At pages 6 and 7 of his December 3, 2014 deposition, Dr. Green responded to applicant's attorney's questions about the statutory definition of "blood-borne infectious disease" as follows:

> Q. And specifically regarding that infection, was Mr. Azoulay's diverticulitis a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans?
>
> A. Well, they're bacteria that can get into the blood. Generally it's bacteria that are in the colon and then what happens is that they cause an infection in these little pockets and then the bacteria then get into the blood and get into the covering of the bowels.
>
> But generally if the bacteria are normally in the blood, it would cause what's called sepsis, which means a blood infection. He actually didn't have a blood infection. He had a bowel infection.

Q. That little phrase I gave you is a quote from the labor code in the blood borne pathogen presumption.

So we kind of need some specificity here on whether or not it was a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans.

A. Well, the answer would be no because it's not like hepatitis, which is blood-borne. It's a – the bacteria can get into the blood, but they come from the bowel.

Q. Okay. In this case is there any evidence it did move from the bowels into the blood?

A. It moved into the blood supply around the colon, but it started in the colon.

Q. And what do you point to [for proof of] that?

A. Well, when he went to surgery they found little pus pockets right around the – where the diverticular, which are these little out pocketings, ruptured and then the surgeon had to clean up the pus that was surrounding the colon and then he had to take out part of the colon where the infection was.

Q. So that would be evidence that it at least around the colon traveled in the bloodstream to some regard?

A. Right, it had to get into the blood.

In relevant part, section 3212.8(d) defines "blood-borne infectious disease" as "a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans[.]" Dr. Green's deposition testimony concerning this definition makes it clear that although the bacterial infection originated in applicant's colon, the bacteria spread to and infected his bloodstream. Whatever the source, there is no question that bacteria are pathogenic microorganisms and that the bacterial infection of applicant's colon resulted in "disease caused by *exposure to pathogenic microorganisms* that are present in human blood that *can cause disease* in humans," as set forth in section 3212.8(d). Applicant's illness falls within the statutory definition of "blood-borne infectious disease" because he was *exposed* to bacteria that *can cause disease* and did cause disease in this case.

We further note that Merriam-Webster's online dictionary states that the medical definition of "blood-borne" is "carried or transmitted by the blood." Therefore, "blood-borne" does not mean "originating in the blood" or "originating in a blood disease like hepatitis," as contended by defendant. Accordingly, the statutory definition does not require that pathogenic microorganisms such as the bacteria at issue here must *originate* in the blood or in a disease of the blood, as apparently believed by Dr. Green. This becomes clear when subdivision (a) of section 3212.8 is read in conjunction with subdivision (d). Subdivision (a) provides that "injury" includes "*any part* of the blood-borne infectious disease...[that] *develops or manifests itself* during a period while that person is in the service[.]" In this case, a "part" of applicant's disease "developed or manifested itself" during his employment, and therefore his illness falls within the definition of "injury" to which the presumption of industrial causation applies under section 3212.8.

Where facts giving rise to the presumption of industrial injury have been proven at the outset, the burden of proof negating the presumption falls upon the employer. (*Gillette v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 312 [36 Cal.Comp.Cases 570].)

The presumption, however, cannot be rebutted by attributing the cause of injury to a pre-existing condition. Subdivision (c) of section 3212.8 includes an anti-attribution clause stating that "[t]he blood-borne infectious disease...so developing or manifesting itself in those cases *shall in no case* be attributed to any disease...existing prior to that development or manifestation." (Emphasis added.) This clause precludes the Board from attributing applicant's blood-borne infectious disease to the diverticulitis which Dr. Miller concluded was the source of applicant's injury.

In *Jackson v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 965, 970-971 [70 Cal.Comp.Cases 1413], the Court of Appeal discussed the effect of the Legislature's inclusion of an anti-attribution clause in Labor Code section 3212.5, which provides a presumption of industrial causation for heart trouble. The Court stated that when an anti-attribution clause is included in a statute that also has a presumption of industrial causation, the effect is to place the burden upon the employer to prove "that some contemporaneous nonwork-related event—for example, a victim's strenuous recreational exertion—was the sole cause of the heart attack." (133 Cal.App.4th 965, 970-971, quoting *Johnson v.*

Workers' Comp. Appeals Bd. (1985) 163 Cal. App. 3d 770, 776 and citing *Parish v. Workers' Comp. Appeals Bd.* (1989) 210 Cal. App. 3d 92, 98.)

In this case, Dr. Green concluded in his reports of March 19, 2014 and June 18, 2014 that applicant did not sustain an industrial injury because the onset of his diverticular disease was a long term degenerative problem and was not caused by "an industrial problem," such as work-related acute or chronic constipation. While Dr. Green focused on applicant's diverticular disease, he did not address the issue of whether applicant had a "blood-borne infectious disease." Because he defined "blood-borne infectious disease" more narrowly than mandated by Section 3212.8, and did not address the issue of whether diverticulitis was the sole cause of the blood-borne infectious disease, Dr. Green's reports could not rebut the presumption.

Dr. Green revealed his misconception of the nature of the presumption under Section 3212.8, when he testified that for applicant to have a blood borne infection he would have had to have bacteria in the blood to start with, such as hepatitis. However, for a "blood-borne infectious disease" to be found compensable under section 3212.8, there is no requirement for the pathogenic microorganisms to originate with a blood-borne disease,. By enacting this statute, the Legislature requires the Board to presume that safety personnel such as applicant already have such exposure due to the nature of their job. Accordingly, Dr. Green's deposition testimony cannot satisfy the employer's burden of proof under the anti-attribution clause that diverticulitis was the exclusive cause of applicant's illness.

In summary, the presumption of industrial injury of Labor Code section 3212.8 reflects the Legislature's acknowledgement that certain safety personnel, including this applicant, have a higher exposure to members of the public who are more likely to have a blood-borne pathogen that is communicable to the safety personnel. As explained by Dr. Green, applicant suffered a massive infection and need for emergency surgery as a consequence of the release of pathogens into his bloodstream, i.e. blood-borne pathogens, following the bursting of his infected diverticulum. We therefore conclude that applicant had a "blood-borne infectious disease" within the meaning of the statute, and that defendant failed to overcome the anti-attribution clause that provides that applicant's injury "*shall in no case* be attributed to any disease…existing prior to that development or manifestation."

Accordingly, we will rescind the WCJ's decision and substitute our finding that applicant sustained industrial injury pursuant to Labor Code section 3212.8. In addition, we will defer the remaining issues including permanent disability. It should be noted that under Labor Code section 4663(e), any permanent disability resulting from the blood-borne infection is not subject to apportionment. The diverticulitis is not industrial and is not covered by the presumption.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of April 21, 2015 are **RESCINDED**, and the following Findings are **SUBSTITUTED** in their place:

FINDINGS

1. Applicant, while employed during the period of July 1, 2001 through June 11, 2012 as a juvenile correction officer Occupational Group Number 490 at Orange, California by the County of Orange, sustained injury arising out of and occurring within the course of employment in the form of blood-borne infectious disease.

2. At the time of injury the employer was permissibly self-insured and adjusted by York Services Group.

3. Labor Code section 3212.8 is applicable. The employer has not rebutted the presumption of industrial causation and has not overcome the anti-attribution clause within the statute.

4. All other outstanding issues, including the determination of benefits, are deferred pending further proceedings and decision by the WCJ, jurisdiction reserved.

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IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and determination of all other outstanding issues by the WCJ, including benefits, consistent with this opinion and decision.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

DEPUTY ANNE SCHMITZ

JOSÉ H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 21 2016

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

AVI AZOULAY
LAW OFFICES OF LAWRENCE R. WHITING
LAW OFFICE OF WOGEE & CYPRIEN

JTL/bea

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AVI AZOULAY, ***Applicant,*** **vs.** **CITY OF ORANGE, permissibly self-insured, adjusted by YORK SERVICES,** ***Defendants.***	**Case No. ADJ8689638** **(Santa Ana District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by applicant with regard to the decision filed on April 21, 2015.

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

For the foregoing reasons,

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

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition(s)* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication Management System (EAMS). Any documents relating to the petition for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

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

WORKERS' COMPENSATION APPEALS BOARD

JOSÉ H RAZO

I CONCUR,

RONNIE G. CAPLANE

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 29 2015

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

AVI AZOULAY
LAW OFFICES OF LAWRENCE R. WHITING
LAW OFFICE OF WOGEE & CYPRIEN

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[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., 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: ADJ8689638

AVI AZOULAY **-vs.-** **COUNTY OF ORANGE RISK MGMT PSI; YORK 1738 SANTA ANA;**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Donna David**

DATE: May 11, 2015

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant has filed a timely petition for reconsideration from the decision, dated April 21, 2015, which found Applicant failed to meet his burden of proof of injury, the **Labor Code Section 3212.8** presumption does not apply.

Petitioner contends the WCJ error by failing to apply **Labor Code Section 3212.8** presumption to the burst diverticulum and resulting infection.

II

FACTS

Petitioner is employed by the County of Orange as a Juvenile Corrections officer and *is in the class of persons covered by* ***Labor Code Section 3212.8*** *(hereafter correctional officers).*

June 11, 2012 applicant developed abdomen symptoms including the inability to have a bowel movement. This problem resulted in the need for surgery for diverticulitis and a resulting infection. An AME was used who found that surgery for an admitted elbow injury on June 5, 2012 (ADJ8241958) did not cause or contribute to the diverticulitis or the resulting infection.

Applicant contends his claim of injury for diverticulitis and scar for an injury during the period July 1, 2001 – June 11, 2012 is compensable pursuant to the blood-borne pathogens presumption. Applicant contends the diverticulitis and resulting scar are presumptive injuries because the need for surgery and resulting scar was caused by exposure to pathogenic microorganisms that are present blood (his blood).

The County of Orange has denied applicant's claim and contends applicant failed to establish injury caused by exposure to blood-borne pathogens. It is asserted that the underlying basic facts necessary to invoke the presumption are not present.

The matter was submitted on the issue of injury/the application of **Labor Code Section 3212.8**. Both parties rely on the opinion of Dr. Green, as the AME. The doctor evaluated the applicant on March 19, 2014 and concluded the diverticulitis and need for surgery was non-industrial. The AME was deposed and reviewed records his opinion remained unchanged.

III

DISCUSSION

Presumption of Industrial Causation—Blood-Borne Infectious Disease§ 3212.8.

The presumption provides, in relevant part:

(a) In the case of members of effected class of employees . . . the term 'injury' as used in this division, includes a blood-borne infectious disease when any part of the blood-borne infectious disease develops or manifests itself during a period while that person is in the service of that office, staff, division, department, or unit. . . .

(b) The blood-borne infectious disease so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of the employment or service. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. . . .

(c) The blood-borne infectious disease so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.

(d) For the purposes of this section, **blood-borne infectious disease' means a disease caused by exposure to pathogenic microorganisms** that are present in human blood that can cause disease in humans, **including those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations (DIR).**

Pursuant to DIR's web site, blood-borne pathogens means pathogenic microorganisms that are present in blood and can cause disease. The pathogens include, but are not limited to, hepatitis B virus (HBV), hepatitis C virus (HCV) and human immunodeficiency virus (HIV).

Exposure to the infectious materials in the workplace can put certain employees such as correctional officers at risk of getting a blood-borne disease. As is apparent blood borne diseases can be transmitted by way of infected bodily fluids. Correctional officers are required to react and contain situations that are vital to public safety without the benefit of a health check of detainees.

The presumption initially addressed only the specific disease of Hepatitis. The current presumption covers blood-borne diseases as defined by DIR. Although blood-borne disease is a much broader classification it does not include an intra-abdominal infection. The presumption is intended to address a very specific hazard of employment to correctional officers versus a health risk of the general population.

Dr. Green took a detailed history including applicant's bowel habits and determined there was no industrial causation of the diverticulitis. There was no connection between the elbow surgery of June 5, 2012 or the taking of pain medication related to the development of diverticulitis. He found the critical fact that there was no history of either acute or chronic constipation; the diverticular disease that developed could not be related to the applicant's employment.

Dr. Green's reports and deposition describe applicant as sustaining a ruptured diverticula which resulted in an **intra-abdominal infection** with the need for surgery. Applicant's diverticula

had ruptured which much like a ruptured appendix; infectious bodily fluids pour into areas where they do not belong. The pus that was surrounding the colon caused part of it to become infected which necessitates its removal.

The AME found applicant had no symptoms of constipation related to either narcotic use or applicants on duty eating habits, which would be crucial to the finding of industrial causation.

Applicant has failed to meet his burden of proof on injury. **Labor Code Section 3212.8** does not apply.

IV

RECOMMENDATION

It is respectfully recommended the Petition for Reconsideration be denied for the reasons stated above.

DATE: May 11, 2015

DONNA DAVID
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
WORKERS' COMPENSATION APPEALS BOARD
SANTA ANA DISTRICT OFFICE

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