Hodges v. State, 2023 Cal. Wrk. Comp. P.D. LEXIS 72

Workers' Compensation Appeals Board (Board Panel Decision)

March 20, 2023 Opinion Filed

W.C.A.B. No. ADJ11721215

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 72 *

Glen Hodges, Applicant v. State of California, PSI, Defendant

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Defendant's Petition for Reconsideration is *granted*, the December 28, 2022 Findings and Award is *rescinded*, and a new Findings of Fact is *substituted*.

Core Terms

cancer, carcinogen, melanoma, exposure, Reconsideration, industrial injury, IARC, site, rebut a presumption, firefighter, childhood, radiation, rebutted

Headnotes

Presumption of Industrial Causation—Cancer—Firefighters—Rebuttal of Presumption—WCAB, granting reconsideration, rescinded WCJ's decision that applicant, while employed as firefighter during cumulative period ending 2/20/2017, suffered industrial injury in form of melanoma based on application of *Labor Code § 3212.1* cancer presumption, and found instead that while applicant met his initial burden to raise *Labor Code § 3212.1* cancer presumption, it was rebutted by qualified medical evaluator's opinion that applicant's

melanoma was not reasonably linked to his industrial sun exposure given medical studies showing that adult sun exposure does not cause melanoma, and based on applicant's history of significant childhood and adolescent sun exposure, history of tanning bed use, and family history of melanoma, which are all non-industrial risk factors, and on fact that applicant's sun exposure to site of cancer on upper back was minimal because upper back was covered by clothing. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[2], [4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c], [7].]

Counsel

[*1] For applicant—Whiting, Cotter & Hurlimann

For defendant—State Compensation Insurance Fund

Panel: Chair Katherine A. Zalewski; Deputy Commissioner Patricia A. Garcia; Commissioner Jose H. Razo

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of December 28, 2022, wherein it was found that, while employed as a firefighter during a cumulative period ending February 20, 2017, applicant sustained industrial injury in the forms of actinic keratosis and melanoma. In finding industrial injury in the form of melanoma, the WCJ found that applicant successfully raised the cancer presumption codified at *Labor Code section 3212.1*, and that defendant failed to rebut the presumption.

Defendant contends that the WCJ erred in finding industrial injury in the form of melanoma, arguing that applicant failed to make a prima facie case sufficient to raise the cancer presumption, and alternatively arguing that the presumption was rebutted. We have received an Answer from applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

[*2] As explained below, while applicant met his initial burden to raise the *section 3212.1* presumption, it was rebutted by the reporting and testimony of qualified medical evaluator dermatologist Michael E. Borok, M.D. Accordingly, we will grant reconsideration, and amend the WCJ's decision to reflect that applicant did not sustain industrial injury in the form of melanoma.

As an active firefighter employed by the Department of Forestry and Fire Protection, applicant was subject to *Labor Code section 3212.1*, which states in pertinent part:

> (a) This section applies to all of the following:
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> (1) Active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments:
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> ***
>
> (C) The Department of Forestry and Fire Protection.
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> ***
>
> (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.
>
> ***
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> (d) The cancer so **[*3]** 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.

In *Faust v. City of San Diego (2003) 68 Cal.Comp.Cases 1822 (Appeals Bd. en banc)*, we discussed the 3212.1 presumption in depth, and explained that it was applicant's initial burden to establish that they came into the class of employees covered by the statute, that the cancer manifested itself during the employee's period of service or during the applicable extension period, that they were exposed to an identified known carcinogen as defined by the International Agency for Research on Cancer (IARC) or the Director of the Department **[*4]** of Industrial Relations. (*Faust, 68 Cal.Comp.Cases at pp. 1830-1831*.) The burden then shifts to defendant to rebut the presumption. In order to successfully rebut the presumption, the defendant must establish the primary site of the cancer and show that "the carcinogen to which the applicant has demonstrated exposure is not reasonably linked to the disabling cancer." (*Id. at p. 1831*.)

As noted above, active firefighters employed by the Department of Forestry and Fire Protection are explicitly within the class of employees coming under the scope of *section 3212.1*. Applicant's melanoma manifested itself while he was still in active service. In his trial brief applicant alleges exposure to the known carcinogens "ultraviolet light from sunlight" and "polycyclic aromatic hydrocarbons." (Trial Brief at p. 2.) Applicant did not present evidence that the alleged carcinogens he was exposed to were known carcinogens "as defined by the International Agency for Research on Cancer, or as defined by the director." As we noted in *Faust*, "The applicant must establish that the exposure was to a 'known carcinogen' with evidence, generally documentary, that the carcinogen is defined as such by the International Agency for Research on Cancer, or otherwise so 'defined by the **[*5]** director.'" (*Faust, 68 Cal.Comp.Cases at p. 1830*.) We take judicial notice pursuant to *Evidence Code section 452(h)* that "solar radiation (see Ultraviolet radiation (wavelengths 100-400 nm, encompassing UVA, UVB, and UVC)" is listed as a "Group 1" carcinogen by the IARC on its own website. (<*https://monographs.iarc.who.int/list-of-classifications* > [as of March 17, 2023].) "Group 1" is defined as "carcinogenic to humans," as distinguished from Group 2A (probably carcinogenic to humans), Group 2B (possibly carcinogenic to humans), and Group 3 (not classifiable as to its carcinogenicity to humans). (<*https:// https://monographs.iarc.who.int/agents-classified-by-the-iarc* > [as of March 17, 2023].) Thus, sun exposure is a "known carcinogen" for the purposes of *section 3212.1*. Applicant produced no evidence, and our own research did not disclose any evidence that the umbrella term "polycyclic aromatic hydrocarbons" was classified as a "known carcinogen" by either IARC or the Director of the Department of Industrial Relations. Therefore, our analysis is confined solely to applicant's exposure to solar radiation.

The burden then passed to defendant to show the primary site of the cancer, and that the applicant's industrial exposure was "not reasonably linked" to the **[*6]** cancer. Here, the primary site of the cancer is the skin on the right upper back. (July 1, 2020 deposition of Dr. Borok at p. 9.) Dr. Borok opined that the melanoma was not reasonably linked to applicant's industrial sun exposure. (September 1, 2021 deposition at pp. 10-11.)

In order to rebut the *section 3212.1*, "the employer must prove the absence of a reasonable link between the cancer and industrial exposure to the carcinogen. A mere showing of an absence of medical evidence that the carcinogen has been shown to cause the particular cancer contracted by the employee is not sufficient to rebut the presumption." (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia) (2005) 126 Cal.App.4th 298, 305-306 [23 Cal. Rptr. 3d 782, 70 Cal.Comp.Cases 109]*.) However, "the statute does not require the employer to prove 'the

absence of *any possible* link.' (Italics added.) The statute requires proof no reasonable link exists. A link that is merely remote, hypothetical, statistically improbable, or the like, is not a reasonable link. The employer need not prove the absence of a link to a scientific certainty; instead, it must simply show no such connection is reasonable, i.e., can be logically inferred." (*Id. at p. 316*.)

"If medical studies are available showing that particular cancers have been shown *not* to be caused by certain carcinogens, such evidence, **[*7]** if credited, would suffice [in meeting defendant's burden]." (*Id. at p. 317*.)

In this case, in his initial May 8, 2019 report, Dr. Borok cited to the textbook Dermatology, which stated that studies showed that adult sun exposure did not cause melanoma. Dr. Borok writes, "Looking under environmental risk factors in the section on ultraviolet radiation on page 1994 it talks about how ultraviolet radiation is acting as a risk factor for melanoma where it is noted greater cumulative sun exposure during the adulthood and sunburns during the immediate preceding years are not associated with an elevation in melanoma risk." (May 8, 2019 report at p. 16.) Photocopies of this textbook were attached to the May 18, 2019 report (the first two pages after the signature). The textbook states, "Furthermore, case-control studies demonstrated that melanoma risk was closely associated with the number of melanocytes nevi and with the occurrence of sunburns in childhood. Interestingly, sunburns during childhood and adolescence significantly elevated the risk for melanoma development, but additional sunburns during adulthood did not contribute to any further risk elevation. This was in agreement with previous findings **[*8]** that melanoma risk is mainly acquired during childhood."

Indeed, Dr. Borok noted the applicant's history of significant childhood and adolescent sun exposure, his history of using tanning beds (a known carcinogen according to the IARC [<*https://monographs.iarc.who.int/list-of-classifications* > [as of March 17, 2023]), and a family history of melanoma and pointed to these factors as the probable cause of applicant's melanoma. (May 8, 2019 report at p. 16.) In *Sameyah v. Los Angeles County Employees Retirement Assn. (2010) 190 Cal.App.4th 199, 215 [75 Cal.Comp.Cases 1384, 117 Cal. Rptr. 3d 893]*), it was held that in the proper case a lack of reasonable link with industrial carcinogenic exposure could be shown by identifying a probable non-industrial cause of the cancer.

Finally, a defendant may rebut the presumption with evidence that "the quantity of the carcinogen to which the employee was exposed, or length of time of the exposure, was too small or too brief to have any detrimental effect." (*Garcia, 126 Cal.App.4th at pp. 317-318*.) Here, Dr. Borok opined that because the site of the cancer was always covered at least by a t-shirt while he was on the job, any exposure to the sun would be too small to have a detrimental effect. (May 8, 2019 report at p. 16.)

Thus, the *Labor Code section 3212.1* presumption was rebutted by the aggregate factors of (1) medical studies showing that adult **[*9]** sun exposure does not cause melanoma, (2) the fact that there was evidence of significant childhood and adolescent sun exposure, a history of tanning bed use, and a family history of melanoma, which are known non-industrial risk factors of melanoma, and (3) the fact that applicant's sun exposure to the site of the cancer was minimal due to applicant's back being covered at least by a t-shirt. We therefore grant reconsideration and amend the WCJ's decision to reflect that applicant did not sustain industrial injury in the form of melanoma.

For the foregoing reasons,

IT IS ORDERED that that Defendant's Petition for Reconsideration of the Findings and Award of December 28, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of December 28, 2022 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Glen Hodges, age 44 on the date of injury, while employed during the period December 6, 2006, though February 20, 2017, as a firefighter, Occupational Group No. 490, by the State of California, at County of

Riverside, California, sustained injury arising out of and in the course **[*10]** of employment in the form of actinic keratosis.

2. At the time of injury, the employer was legally uninsured.

3. It is found that the applicant has not sustained compensable industrial injury in the form of melanoma.

4. In finding no industrial injury in the form of melanoma, it is found that defendant rebutted the cancer presumption pursuant to *Labor Code Section 3212.1*.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Deputy Commissioner Patricia A. Garcia

Commissioner Jose H. Razo

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