

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. SDO 244774**

5 **WALTER FAUST,**

6 *Applicant,*

7 **vs.**

8 **OPINION AND DECISION**
9 **AFTER RECONSIDERATION**
10 **(En Banc)**

11 **CITY OF SAN DIEGO,**
12 **Permissibly Self-Insured,**

13 *Defendant(s).*

14 The Workers' Compensation Appeals Board (Appeals Board)
15 granted reconsideration of the Findings and Orders issued by a
16 workers' compensation administrative law judge (WCJ) on July 15,
17 2002, in which the WCJ found that applicant did not sustain
18 cumulative industrial injury in the form of cancer while employed
19 as a firefighter by the City of San Diego from February 4, 1972
20 through December 27, 1997. Applicant contends that the
21 presumption of Labor Code section 3212.1 is applicable to this
22 claim and that defendant has not met its burden of rebutting the
23 presumption.¹ Defendant filed an answer to the petition for
24 reconsideration.

25 Because of the important legal issues presented, and to
26 secure uniformity of decision in cases arising under section

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¹ All further statutory references are references to the Labor Code unless
 otherwise indicated.

1 3212.1, the Chairman of the Appeals Board, upon a majority vote of
2 the members, reassigned this case to the Appeals Board as a whole
3 for an en banc decision after reconsideration. (Lab. Code, §115.)²

4 We hold that under section 3212.1, as amended in 1999, when
5 an applicant establishes both exposure to a known carcinogen and
6 the manifestation or development of cancer as the section
7 specifies, the cancer is presumed to be an industrial injury. The
8 burden then shifts to the defendant to rebut the presumption
9 (1) by evidence establishing the primary site of the cancer and
10 (2) by evidence establishing that there is no reasonable link
11 between the carcinogen and the cancer. The defendant must prove
12 that no reasonable link exists; it does not rebut the presumption
13 by merely proving that there is no evidence demonstrating a
14 reasonable link.

15 I. BACKGROUND

16 Applicant, Walter Faust, was employed as a firefighter by the
17 City of San Diego from February 1972 until his retirement on
18 July 4, 1998. Applicant's medical condition was diagnosed as
19 prostate cancer in April 1998. He stopped working at that time,
20 underwent surgery in May 1998, and retired on July 4, 1998.³ In
21 June 1998, applicant filed an Application for Adjudication of
22 Claim alleging cumulative industrial injury. On September 25,

23 ² The Appeals Board's en banc decisions are binding precedent on all Appeals
24 Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers'*
25 *Compensation Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6, 67 Cal.
Comp. Cases 236, 239, fn. 6.)

26 ³ We note that the claimed period of cumulative industrial injury was limited
27 to the period February 4, 1972, through December 27, 1997, and was also the
period of injury found by the WCJ.

1 1998, defendant denied liability for the claim of injury in the
2 form of cancer.⁴

3 Both parties obtained qualified medical evaluations.
4 Applicant's qualified medical evaluator (QME), Prakash Jay, M.D.,
5 in the report of February 10, 1999, concluded that applicant's
6 prostate cancer was industrially related. Dr. Jay's report
7 includes applicant's reported history and contains extensive
8 reference to studies concerning the occurrence of prostate cancer
9 in firefighters.

10 Applicant reported his history of exposure to Dr. Jay:

11 "Mr. Walter Faust stated that he was employed
12 by the City of San Diego Fire Department as a
13 fire fighter from February 1972 until his
14 retirement on July 4, 1998. He stopped working
in April 1998 as a result of his prostate
cancer.

15 "Mr. Faust believed that his prostate cancer
16 was contributed to by his cumulative work
17 place exposures to carcinogens. He states that
18 he has been exposed to smoke, combustion
19 products, and carcinogens over many years
20 during the course of his employment as a fire
21 fighter for the City of San Diego Fire
22 Department. Mr. Faust stated that during the
23 course of his employment with the City he has
24 fought many fires. He stated that he had
25 previously fought all types of fires including
structural fires, vehicular fires, ship fires,
wild land fires, dumpster fires, and many
garage fires. He stated that in the early
years of his employment he did not use
respiratory protection on a regular basis. He
stated that many of the garage fires that he
fought involved paint lockers, pesticides, and
various chemicals. He indicated that in
approximately 1990 or 1991 there was a tuna
boat fire in which there were burning

26 ⁴ Applicant's claim of industrial injury to other body parts was resolved by
27 an Award made pursuant to the stipulations of the parties issued by the WCJ on
August 28, 2001.

1 chemicals. He believed that the tuna boat had
2 paint lockers, solvents, and thinners. He
3 stated that in approximately 1973 or 1974 he
4 fought a fire at San Diego Plating. He stated
5 that this was a total burnout with lots of
6 smoke from plating chemicals including various
7 types of metals. He indicated that in 1975
8 there [was] a fire at Dave's Display in which
9 a lot of plastics and costumes were burning.
10 He stated that in approximately 1995 or 1996
11 he fought a fire at a soap factory and
12 indicated that a lot of different chemicals
13 were burning during that fire as well. He
14 stated that in 1978 he fought a fire at the
15 Old Globe Temporary Theater which was
16 constructed with creosote-coated poles. In
17 approximately 1979 or 1980 he fought a fire at
18 a warehouse on Commercial Avenue. He stated
19 that approximately in 1990 there was a Western
20 Metal fire which contained fire from paint and
21 other chemicals. He stated that over the many
22 years during the course of his employment he
23 had fought multiple chemical fires which he
24 responded to at the Tenth Avenue Terminal. He
25 stated that he had fought many fires downtown
26 at old dilapidated hotels and warehouses which
27 involved the burning of chemicals. These were
only some of the examples of the types of
fires that he has fought. Mr. Faust had a list
of multiple other fires that he had fought
over the many years during the course of his
employment. I have attached a copy of the list
to this report." (Qualified Medical Evaluation
in Internal Medicine and Toxicology, Prakash
Jay, M.D., February 10, 1999, pp. 1-2.)

19
20 In his discussion of causation, Dr. Jay cited and discussed
21 medical studies that found significantly increased rates of
22 prostate cancer in firefighters and that discussed the incidence
23 of cancers in firefighters, including a discussion of the
24 synergistic effect of the exposure to multiple carcinogens, and
25 the risks to firefighters of such exposure. (*Id.* at pp. 9-11.)

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1 Dr. Jay stated:

2 "The fact that Mr. Faust has fought all types
3 of fires including chemical fires, vehicular
4 fires, garage fires, and is exposed to smoke
5 and combustion products from plating chemicals
6 including various types of metals, paints,
7 plastics, pesticides, etc., indicates that he
8 has been exposed to numerous carcinogens. The
9 fact that prostate cancer risk is high among
10 other occupations including chemists, textile
11 workers, painters, and rubber tile workers
12 indicates that Mr. Faust has been exposed to
13 similar types of carcinogens that these
14 occupational workers have been exposed to
15 during the course of his employment as a fire
16 fighter." (*Id.* at. pp. 10-11.)

17 Finally, Dr. Jay discussed applicant's exposure to cadmium,
18 "the only well documented chemical carcinogen that is implicated
19 in the causation of prostate cancer." Dr. Jay discussed
20 applicant's exposure to various fires, especially the plating
21 company fire, and concluded that applicant had been exposed to
22 cadmium. On this basis, Dr. Jay concluded that applicant's
23 prostate cancer is industrially related. (*Id.* at. p. 11.)

24 Defendant's QME, Frederick Y. Fung, M.D., in the report of
25 September 29, 1998, concluded that applicant's condition was not
26 related to his employment as a firefighter.

27 Dr. Fung reported applicant's history of exposure:

28 "In terms of exposures, Mr. Faust states that
29 he was first employed of February 4, 1972, by
30 the City of San Diego as a firefighter. He
31 retired about four months ago. During the
32 first three to six months of his employment,
33 he underwent basic firefighter training. After
34 that, he worked at Station 1 for 14 years. He
35 states that during those 14 years, he covered
36 the downtown area and fought fires. He states
37 that he fought furniture and mattress fires,

1 soap factory fires, plating fires, tuna boat
2 fires, airline fires. On one occasion, he also
3 fought a creosote fire as a result of burning
4 telephone poles. He also had a follow up fire
5 control at the Aerospace Museum fire. He
6 states that he was not required to wear
7 personal protective equipment until 1985.
8 Prior to that, it was up to the fire captain's
9 judgement. After that, he worked at Station 21
10 for three years, then Station 36 for two
11 years, and then back to Station 21 for one
12 year. He then worked at Station 9 for 2-3
13 years, and then at Station 3 for less than one
14 year. He states that during his employment at
15 these stations, he fought house fires,
16 business fires and car fires. He states that
17 he had several exposures with general
18 coughing. He was not hospitalized as a result
19 of any of these fires." (Comprehensive
20 Medical-Legal Evaluation, Frederick Y. Fung,
21 M.D., September 29, 1998, p.2.)

22 In the discussion section, Dr. Fung stated further:

23 "Based on the history provided to me, Mr.
24 Faust had exposure while fighting fires.
25 However, he was not ill nor hospitalized for
26 any of the exposures.

27 "Prostate cancers are generally greater in
countries where the population consumes more
animal fat. There are several occupational
groups that have been suspected to have
increase in prostate cancer, although the
association is still controversial. The groups
include exposure to cadmium, ionizing
radiation such as the atomic bomb survivors.
The mechanism of prostate cancer development
is related to male androgenic hormone,
testosterone.

"I have personally conducted a literature
search regarding prostate cancer in
firefighters. Based on the literature search,
there are no documents in the world medical
and scientific literature that associates
prostate cancer and firefighters." (Id. at p.
6, emphasis added.)

1 Dr. Fung concluded, concerning causation:

2 "Based on the history provided to me and
3 evaluation of medical literature regarding
4 prostate cancer, it is my medical opinion that
5 this condition is unrelated to his employment
6 as a firefighter with the City of San Diego.
7 As the literature indicates, this condition is
8 related to the person's hormonal activities.
9 There is no association between exposure by
10 firefighters and prostate cancer." (Id.)

11 On March 9, 1999, Dr. Fung issued a supplemental report in
12 which he reviewed Dr. Jay's report and questioned the adequacy of
13 the medical studies and literature cited by Dr. Jay. In the
14 supplemental report, Dr. Fung addressed and challenged each of the
15 studies cited by Dr. Jay. Dr. Fung concluded:

16 "Based on review of Dr. Jay's medical report,
17 review and analysis of additional medical
18 literature, my understanding of toxicology as
19 a Board Certified Medical Toxicologist, and my
20 understanding of the workplace as a Board
21 Certified Occupational Medicine Specialist, it
22 is my opinion that Mr. Faust's prostate cancer
23 is not related to his occupational exposure as
24 a firefighter for the City of San Diego. My
25 opinion remains the same as that outlined in
26 my original report dated 9/29/98, that his
27 cancer has not been caused, aggravated or
accelerated by his employment exposure."
(Supplemental Medical/Legal Evaluation,
Frederick Fung, M.D., p.3.)

21 At the hearings of March 7, 2002 and April 24, 2002,
22 applicant testified that he was employed for 26 years as a
23 firefighter for the City of San Diego. He described the types of
24 fires he fought and the burning materials to which he believes he
25 was exposed, including fires in commercial districts, residential
26 garages, dumping sites, canyons, warehouses, and hotels, and
27 materials such as automobiles, pesticides, paints, chemicals,

1 textiles, metals, resins, and appliances. Applicant did not
2 regularly wear breathing apparatus before 1983 or 1984. He
3 believed that he had been exposed to cadmium in some fires, but
4 was not certain of this. (Minutes of Hearing and Summary of
5 Evidence, March 7, 2002, pp. 3-5; Minutes of Hearing and Summary
6 of Evidence, April 24, 2002, pp. 2-4.)

7 Frank Rodriguez, a firefighter who worked together with
8 applicant for six years, testified that both he and applicant were
9 exposed to burning and burnt materials, including: burnt rubber
10 from vehicle and garage fires; burnt inks, magazines, resins,
11 paints, textiles, and ceramics in fighting structural fires; burnt
12 batteries from vehicles and appliances; the products of canyon and
13 dump fires; and soot. (Minutes of Hearing and Summary of
14 Evidence, April 24, 2002, pp. 4-6.)

15 Robert Needham, an employee of the San Diego Plating Company,
16 testified that sulfuric acid and muriatic acid were used in the
17 cleaning process of metals. The engine plating line was made up
18 of rinse tanks, soap tanks, nickel plating, copper plating, and
19 chrome plating. Needham testified: "The company usually sent out
20 the cadmium plating. Cadmium was used in certain types of
21 plating. The plating process was used to control corrosion of
22 metals. The corrosion proofing would break down in hot fires."
23 (*Id.* at pp. 6-7.)

24 On July 15, 2002, the WCJ issued the Findings and Orders,
25 finding that applicant did not sustain cumulative industrial
26 injury in the form of cancer while employed by the City of San
27 Diego from February 4, 1972 through December 27, 1997. In

1 reaching the decision, the WCJ recognized the presumption of
2 section 3212.1, but concluded that it had been rebutted by Dr.
3 Fung's opinion. The WCJ cited *Place v. Workers' Comp. Appeals Bd.*
4 (1970) 3 Cal. 3d 372, 378, 35 Cal. Comp. Cases 525, 529, as
5 authority for relying on Dr. Fung's opinion in reaching the
6 decision.

7 **II. DISCUSSION**

8 A firefighter who is exposed to a known carcinogen and
9 develops or manifests cancer while employed (or for a specified
10 period after the termination of employment) is entitled to the
11 presumption that the cancer is industrially caused.⁵ The
12 presumption may be rebutted (1) by evidence that the primary site
13 of the cancer has been established and (2) by evidence that
14 exposure to the recognized carcinogen is not reasonably linked to
15 the disabling cancer. (Lab. Code, §3212.1.)

16 **A. FORMER SECTION 3212.1**

17 Prior to the 1999 amendment of section 3212.1, an applicant
18 had the burden of establishing the prerequisites for applying the
19 presumption of injury under the section. The applicant was
20 required to demonstrate industrial exposure to a known carcinogen
21 and that the exposure was reasonably linked to

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26 ⁵ For brevity, we generally refer only to firefighters in our opinion.
27 However, section 3212.1 is also applicable to peace officers who are primarily
engaged in active law enforcement activities.

1 the disabling cancer.⁶

2 Before the 1999 amendment, the Court of Appeal in *Riverview*
3 *Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith)* (1994)
4 23 Cal. App. 4th 1120, 59 Cal. Comp. Cases 180, held that the term
5 "reasonable link," as used in section 3212.1, had a plain meaning
6 that is clear on its face. Two things are reasonably linked if
7 there is a logical connection between them. Thus, firefighters
8 were not required to show that industrial exposure to carcinogens
9 proximately caused their cancer, but they were required to show
10 something more than a mere coincidence of exposure and cancer,

11 _____
12 ⁶ Prior to the 1999 amendment, section 3212.1 provided:

13 "In the case of active firefighting members of fire departments of
14 cities, counties, cities and counties, districts, or other public
15 or municipal corporations or political subdivisions, and active
16 firefighting members of the fire departments of the University of
17 California and the California State University, whether these
18 members are volunteers, partly paid, or fully paid, and in the case
19 of active firefighting members of the Department of Forestry and
20 Fire Protection, or of any county forestry or firefighting
21 department or unit, whether volunteers, partly paid, or fully paid,
22 and peace officers as defined in Section 830.1 and subdivision (a)
23 of Section 830.2 of the Penal Code who are primarily engaged in
24 active law enforcement activities, the term 'injury' as used in
25 this division includes cancer which develops or manifests itself
26 during a period while the member is in the service of the
27 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, and that the carcinogen is
reasonably linked to the disabling cancer.

"The compensation which is awarded for cancer shall include full
hospital, surgical, medical treatment, disability indemnity, and
death benefits, as provided by this division.

"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 other evidence, but unless so controverted, the appeals board is
bound to find in accordance with it. 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 60 months in any circumstance,
commencing with the last date actually worked in the specified
capacity."

The 1999 amendment added subdivision designations. Subdivision (d) replaced
the third paragraph of this section.

1 i.e., a logical connection between the two. The Court stated that
2 the legislative history showed that the purpose of the workers'
3 compensation presumption statutes is to ease the burden of proof
4 for certain safety workers. If the Legislature had intended
5 "reasonable link" to be the equivalent of "proximate cause,"
6 section 3212.1 would be mere surplusage and would not have been
7 enacted. Accordingly, if the evidence supported a reasonable
8 inference that the occupational exposure contributed to the
9 worker's cancer, then a reasonable link was shown, and the
10 disputable presumption of industrial causation could be invoked.
11 However, in this case, the Court held that the applicant failed to
12 establish a reasonable link because he did not demonstrate
13 occupational exposure prior to the latency period. (*Riverview Fire*
14 *Protection Dist. v. Workers' Comp. Appeals Bd. (Smith)*, *supra.*)⁷

15 Establishment of this linkage was a question of fact, to be
16 determined by a preponderance of the evidence. (*Zipton v.*
17 *Workers' Comp. Appeals Bd.* (1990) 218 Cal. App. 3d 980, 55 Cal.
18 Comp. Cases 78 [Analysis of legislative history and application of
19 section 3212.1 before the 1999 amendment].)

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22 ⁷ A "latency period" has been described as: (1) "the period between the time of
23 exposure to the disease-causing agent and the time when the disease has
24 progressed to the point at which it can be diagnosed" (*Hamilton v. Asbestos*
Corp., Ltd. (2000) 22 Cal.4th 1127,1135); (2) the period "between exposure to a
25 toxic substance in the work environment and the development of clinically
26 diagnosable symptoms" (*Palestini v. General Dynamics Corp.* (2002) 99
27 Cal.App.4th 80, 96); (3) "[t]he time from exposure to a chemical carcinogen to
the appearance of a clinically-detectable cancer" and "the time of initial
exposure to onset of cancer" (*Riverview Fire Protection Dist. v. Workers' Comp.*
Appeals Bd., *supra.*, 23 Cal.App.4th at p. 1129, 59 Cal. Comp. Cases at p. 186);
and (4) the "period between injurious exposure and subsequent development of
disease." (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Pisciotta)*
(1983) 145 Cal.App.3d 480, 484, 48 Cal. Comp. Cases 559, 562.)

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1 The 1999 amendment requires that the applicant establish that
2 he or she is a firefighter or peace officer who falls within the
3 ambit of section 3212.1(a). The applicant must further demonstrate
4 exposure to a known carcinogen as defined in published standards
5 and that the cancer has developed or manifested itself during the
6 period when the applicant was in active service or for a specified
7 period, not to exceed 60 months from the last day of work in the
8 specified capacity, if the applicant's service has terminated.
9 (Lab. Code, §3212.1(b)&(d).) Therefore, the applicant is no
10 longer required to establish a reasonable link between the
11 exposure and the cancer.

12 Accordingly, the presumption of compensability arises and the
13 burden shifts to the defendant when the applicant has made this
14 showing. The defendant may rebut the presumption (1) by evidence
15 that the primary site of the cancer has been established and (2)
16 by evidence that exposure to the recognized carcinogen is not
17 reasonably linked to the disabling cancer.

18 **C. APPLICANT'S BURDEN UNDER PRESENT SECTION 3212.1**

19 An applicant must present evidence to establish the
20 presumption that his or her cancer is industrial. Such evidence
21 will include the following.

22 The applicant must establish employment as a firefighter, and
23 the dates of the employment. This may be shown by stipulation of
24 the parties, testimony, or documentary evidence.

25 Before the presumption may be applied, section 3212.1(b)
26 requires that applicant demonstrate that he or she was exposed to
27 an identified known carcinogen. (*Holtgrave v. Workers' Comp.*

1 *Appeals Bd.* (2003) 68 Cal. Comp. Cases 953 (writ den.).) The
2 applicant must establish that the exposure was to a "known
3 carcinogen" with evidence, generally documentary, that the
4 carcinogen is defined as such by the International Agency for
5 Research on Cancer, or otherwise so "defined by the director."
6 (Lab. Code, §3212.1(b).) The carcinogens "defined by the
7 director" are those regulated by the director of the Department of
8 Industrial Relations. (Lab. Code, §9004; Cal. Code Regs., tit. 8,
9 §§5208, 5209, 5210, 5217, 5218.)

10 The applicant must also demonstrate actual exposure to the
11 established known carcinogen during the period of employment as a
12 firefighter. This may be shown by the applicant's testimony or
13 other credible evidence that may include expert testimony. The
14 applicant is not required to show that the exposure is the
15 proximate cause of the injury. (*Riverview Fire Protection Dist. v.*
16 *Workers' Comp. Appeals Bd. (Smith)*, *supra.*)

17 No specific level of actual exposure needs to be shown; a
18 minimal exposure is enough to satisfy the applicant's burden.
19 (*Leach v. West Stanislaus Cty. Fire Protection Dist.* (2001) 29
20 Cal. Workers' Comp. Rptr. 188, 189 (Appeals Board Panel).)

21 The applicant must also show the development or manifestation
22 of the cancer, during the statutory time period, by medical
23 evidence that must include the date of development or
24 manifestation.

25 Manifestation of the cancer includes the showing of symptoms
26 that are related to the disease, whether or not they are diagnosed
27 as cancer at the time they arise. The date of manifestation may

1 be significantly earlier than the date of diagnosis, especially in
2 cases where the illness has an "indolent" or slow course. (*County*
3 *of El Dorado v. Workers' Comp. Appeals Bd. (Klatt)* (2000) 65 Cal.
4 *Comp. Cases* 1437,1439 (writ den.).)

5 The burden of proving these initial elements lies with the
6 applicant. When the applicant has shown: (1) that he or she was
7 employed in an included capacity; (2) that he or she has been
8 exposed to a known carcinogen during the employment; and (3) that
9 he or she has developed or manifested cancer within the statutory
10 time frames, then he or she has made a prima facie showing that
11 the cancer is presumptively compensable.

12 **D. DEFENDANT'S BURDEN UNDER CURRENT SECTION 3212.1**

13 The burden of rebutting the presumption now shifts to the
14 defendant. To rebut the presumption, the defendant must establish
15 by evidence two elements: (1) that the primary site of the cancer
16 has been identified; and (2) that the carcinogen is not reasonably
17 linked to the disabling cancer.

18 First, the defendant must establish the primary site of the
19 cancer. (Lab. Code, §3212.1(d).) The establishment of the primary
20 site requires competent medical evidence. (See *Zipton v. Workers'*
21 *Comp. Appeals Bd., supra.*)

22 Second, the defendant has the burden of showing that the
23 carcinogen to which the applicant has demonstrated exposure is not
24 reasonably linked to the disabling cancer, i.e., the defendant
25 must provide evidence to establish that there is no reasonable
26 link. Medical or similar expert scientific evidence is necessary
27 to show that there is no reasonable link between the exposure and

1 the cancer.

2 A defendant may establish that there is no reasonable link
3 between the applicant's exposure and his or her illness by
4 establishing the absence of a link between the exposure and the
5 cancer, including establishing that the latency period of the
6 manifestation of the specific cancer excludes the exposure as the
7 cause of the applicant's cancer. (*Law v. Workers' Comp. Appeals*
8 *Bd.* (2003) 68 Cal. Comp. Cases 497, 499 (writ den.); *Leach v. West*
9 *Stanislaus Cty. Fire Protection Dist., supra.*)

10 The defendant's burden is to prove by medical probability
11 that there is no reasonable link between the applicant's
12 demonstrated exposure to known carcinogens during the employment
13 and the development of cancer. (*City of Anaheim v. Workers' Comp.*
14 *Appeals Bd. (Pettitt)* (2002) 67 Cal. Comp. Cases 1609 (writ
15 den.).) It is not enough for the defendant to show that no
16 evidence has established a reasonable link between the known
17 carcinogen and the cancer. Instead, the defendant must establish
18 by evidence of reasonable medical probability that a reasonable
19 link does not exist.

20 Accordingly, evidence showing that no reasonable link has
21 been demonstrated to exist between the carcinogen or carcinogens
22 to which the firefighter has been exposed and the development of
23 the cancer, is not adequate to rebut the presumption of industrial
24 causation. To rebut the presumption, the evidence must explicitly
25 demonstrate that medical or scientific research has shown that
26 there is no reasonable inference that exposure to the specific
27 known carcinogen or carcinogens is related to or causes the

1 development of the cancer.

2 Expert evidence should include a review of studies or other
3 evidence that justifies an opinion or conclusion that there is no
4 reasonable link. The studies should be attached to the report as
5 a foundation for the opinion.

6 Evidence, such as medical literature, that does not relate
7 the exposure to the cancer is not evidence that no link exists.
8 To find otherwise would improperly place the burden of showing
9 industrial causation on the applicant. Therefore, the fact that
10 there are no epidemiological studies showing an increased
11 incidence in firefighters of the particular type of cancer
12 suffered by the applicant does not rebut the presumption.

13 Evidence that may rebut the presumption may include evidence
14 that there is no reasonable link between the primary site of the
15 cancer and the carcinogen to which the applicant was exposed,
16 because the period between the exposure and the manifestation is
17 not within the cancer's latency period, as established by medical
18 evidence. (*Leach v. West Stanislaus Cty. Fire Protection Dist.*,
19 *supra*; see also *County of El Dorado v. Workers' Comp. Appeals Bd.*
20 (*Klatt*), *supra*.) In *Leach*, the applicant's colon cancer was
21 diagnosed less than five years after his employment began. The
22 defendant presented medical evidence that the latency period for
23 colon cancer was at least ten years. The Appeals Board panel
24 found that the defendant had successfully rebutted the presumption
25 of industrial causation with this evidence.

26 If the defendant does not meet its burden of proving both
27 requisite elements, i.e., the primary site of the cancer and the

1 lack of a reasonable link between the exposure and the cancer,
2 then the defendant has not rebutted the presumption of
3 compensability and an industrial injury must be found. (Lab. Code,
4 §3212.1(d).)⁸

5 III. CONCLUSION

6 In summary, in a case where an applicant has invoked the
7 presumption of section 3212.1, the applicant has the initial
8 burden of showing (1) that he or she was employed in an included
9 capacity; (2) that he or she has been exposed to a known
10 carcinogen during the employment; and (3) that he or she has
11 developed or manifested cancer. When the applicant has made this
12 showing, the burden shifts to the defendant to rebut the
13 presumption by evidence that: (1) the primary site of the cancer
14 has been identified; and (2) that the carcinogen is not reasonably
15 linked to the disabling cancer.

16 An analysis using the above criteria must be completed before
17 a decision is reached on the presumptive compensability of the
18 claim in the present case. Here, the WCJ relied on the opinion of
19 one physician in preference to another, without analyzing the
20 evidence using the method required by section 3212.1, as set forth
21 above. It is generally well settled that the WCJ has the power to
22 choose among conflicting medical reports and to select those that
23 are deemed most appropriate. (*Jones v. Workers' Comp. Appeals Bd.*

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25 ⁸ We note that a defendant's successful rebuttal of the presumption of
26 compensability does not bar the firefighter's claim of industrially related
27 cancer. However, in the absence of the presumption, it becomes the
applicant's burden to establish industrial causation by a reasonable medical
probability. (See *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal. 2d
408, 416, 33 Cal. Comp. Cases 660, 665.)

1 (1968) 86 Cal. 2d 476, 33 Cal. Comp. Cases 221.) The relevant and
2 considered opinion of one doctor may constitute substantial
3 evidence even though inconsistent with other reports in the
4 record. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 372,
5 378, 35 Cal. Comp. Cases 525, 529; *Smith v. Workers' Comp. Appeals*
6 *Bd.* (1969) 71 Cal. 2d 588, 592, 34 Cal. Comp. Cases 424, 427;
7 *Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal. App. 3d
8 916, 921, 40 Cal. Comp. Cases 799, 801.) However, in a case such
9 as this, where a statutory presumption is applicable, a systematic
10 analysis must be applied to the evidence presented. The WCJ
11 cannot resolve the issue of reasonable link by selecting one
12 physician in preference to another, even if each of the
13 conflicting medical reports contains substantial evidence that
14 appears to be of equal caliber. A mere difference of opinion
15 between physicians is not sufficient to rebut the presumption.

16 Therefore, as the Appeals Board's decision after
17 reconsideration, we will rescind the Findings and Orders issued
18 July 15, 2002, and return the matter to the WCJ for analysis of
19 the evidence in accordance with the principles set forth above,
20 and for new decision thereafter.

21 For the foregoing reasons,

22 **IT IS ORDERED**, as the Appeals Board's decision after
23 reconsideration, that the Findings and Orders issued July 15,
24 2002, is **RESCINDED**, and the matter is returned to the workers'

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1 compensation administrative law judge for further proceedings and
2 new decision.

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4 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

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MERLE C. RABINE, Chairman

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8

WILLIAM K. O'BRIEN, Commissioner

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JAMES C. CUNEO, Commissioner

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JANICE JAMISON MURRAY, Commissioner

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14

FRANK M. BRASS, Commissioner

15
16

A. JOHN SHIMMON, Commissioner

17
18

RONNIE G. CAPLANE, Commissioner

19
20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **December 11, 2003**

22 **SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE**
23 **OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS.**

24 *cs/tab*