ITEM 7

RECONSIDERATION OF PRIOR STATEMENTS OF DECISION FINAL STAFF ANALYSIS

Labor Code Section 3212.1
as Added by Statutes 1982, Chapter 1568

Firefighter's Cancer Presumption
(CSM 4081)

And

Labor Code Section 3212.1
as Amended by Statutes 1989, Chapter 1171

Cancer Presumption – Peace Officers
(CSM 4416)

Reconsideration Directed by Statutes 2006, Chapter 78, Section 8
(Assem. Bill (AB) No. 1805)

06-RL-4081/4416-01

Executive Summary

Background

Statutes 2006, chapter 78, section 8, directs the Commission on State Mandates (Commission) to reconsider the Statements of Decision and parameters and guidelines in *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416) "no later than six months after a final court decision is issued in the case of *CSAC Excess Insurance Authority and City of Newport Beach v. Commission on State Mandates* (Case No. B188169, an appeal in the Second District Court …)." Pursuant to the statute, the Commission's decision will be effective beginning July 1, 2008.[1]

The Statements of Decision in *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416), and the court decision referred to in the statute, *CSAC-EIA v. Commission on State Mandates*, all address the issue whether Labor Code section 3212.1 constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6. Labor Code section 3212.1 provides an evidentiary presumption of industrial causation to certain firefighters and peace officers in workers' compensation cases for cancer-related injuries. On December 20, 2006, the Second District Court of Appeal issued an unpublished decision affirming the Commission's decision on the CSAC Excess Insurance Authority test claim that Labor Code section 3212.1 does not

[1] Exhibit A, page 16.

mandate a new program or higher level of service. Final judgment was entered in the case on May 22, 2007.

Prior Test Claims

Firefighters Cancer Presumption (CSM 4081) involved Labor Code section 3212.1, as it was originally enacted in 1982 (Stats. 1982, ch. 1568), which provided a limited presumption easing the burden of proving industrial causation for specified firefighters that developed cancer during the period of employment. Under the original statute, the firefighter employee could have the benefit of the presumption that the cancer arose out of and in the course of employment if the employee could show that he or she was exposed, while in the service of the department or unit, to a known carcinogen and that the carcinogen was reasonably linked to the disabling cancer.

In February 1984, the Board of Control (the predecessor to the Commission) adopted a decision approving the claim, and in 1985, the Commission adopted parameters and guidelines for the program. Beginning January 1, 1983, reimbursement was authorized under the parameters and guidelines for costs incurred by local agencies for the workers' compensation litigation relating to the cancer claim, increased premiums, and benefits awarded to injured firefighters.

In 1989, Labor Code section 3212.1 was amended by the Legislature (Stats. 1989, ch. 1171) to provide the same presumption of industrial causation to specified peace officers. In 1992, the Commission adopted a Statement of Decision on Labor Code section 3212.1, as amended in 1989, approving the claim. (*Cancer Presumption-Peace Officers* (CSM 4416).) The Commission determined that the statute constituted a reimbursable state-mandated program on the ground that firefighters and peace officers carry out the governmental function of providing public safety services to the public and that the presumption of industrial causation was uniquely granted to local government employees. Parameters and guidelines were adopted in 1993, and authorized reimbursement beginning July 1, 1990, for costs incurred by local agencies for the workers' compensation litigation relating to the cancer claim, increased premiums, and benefits awarded to injured peace officers.

In 1999 and 2000, the Legislature amended Labor Code section 3212.1 again. These amendments became the subject of another test claim filed by CSAC Excess Insurance Authority and the City of Newport Beach (*Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19)).

Under the 1999 amendment to section 3212.1, the employee need only show that he or she was exposed to a known carcinogen while in the service of the employer. The employer still has the right to dispute the employee's claim as it did under prior law. But when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer is shifted to the employer. The 2000 amendment to Labor Code section 3212.1 extended the cancer presumption to peace officers defined in Penal Code section 830.37, subdivisions (a) and (b); peace officers that are members of an arson-investigating unit or are otherwise employed to enforce the laws relating to fire prevention or fire suppression.

The Commission denied the test claim in *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) on the ground that the statute does not mandate a new program or higher level of service on local agencies.

CSAC Excess Insurance Authority v. Commission on State Mandates

The Commission's decision was challenged, along with other Labor Code statutes that granted similar presumptions to local safety employees, in the Second District Court of Appeal in *CSAC Excess Insurance Authority v. Commission on State Mandates*, Case No. B188169. The Second District Court of Appeal issued its unpublished decision in *CSAC Excess Insurance Authority v. Commission on State Mandates*, affirming the Commission's decision that the 1999 and 2000 amendments to Labor Code section 3212.1 do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.[2]

Analysis

As an unpublished opinion, the *CSAC Excess Insurance Authority* decision of the Second District Court of Appeal may not be cited as a binding precedential decision in this reconsideration unless it is relevant under the doctrine of collateral estoppel. Collateral estoppel precludes a party from re-litigating the matters previously litigated and determined in a prior proceeding and makes the decision on the matter in the prior proceeding binding in the subsequent matter. In order for collateral estoppel to apply, several elements must be satisfied, including the determination that the issues presented in both cases are identical, that the party against whom the collateral estoppel is asserted was a party to or in privity with the party in the previous proceeding, and that the party in the previous proceeding had a full and fair opportunity to litigate the issue. Staff finds that collateral estoppel applies to this reconsideration and, thus, the court's holding in *CSAC Excess Insurance Authority*, that the evidentiary presumption of industrial causation provided in Labor Code section 3212.1 to peace officers and firefighters for cancer-related workers' compensation claims, does not mandate a new program or higher level of service, is binding.

Even if a court were to find that collateral estoppel does not apply in this case because the two reconsidered test claims were filed on different versions of Labor Code section 3212.1 than the 1999 and 2000 version of the statute at issue in *CSAC Excess Insurance Authority*, the plain language of the statute does not impose any state-mandated activities or costs on local agencies. Moreover, long-standing published decisions by the California Supreme Court and the Courts of Appeal reaffirm the conclusion that simply because a statute, which establishes a public employee benefit program, may increase the costs to the employer, the statute does not "in any tangible manner increase the level of service provided by those employers to the public" within the meaning of article XIII B, section 6.

Conclusion

Staff finds that, upon reconsideration and effective July 1, 2008, Labor Code section 3212.1, as added and amended by Statutes 1982, chapter 1568 and Statutes 1989,

[2] Exhibit B.

chapter 1171, does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution. Therefore, beginning July 1, 2008, reimbursement is not required for the activities and costs listed in the parameters and guidelines for *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416).

Staff Recommendation

Therefore, staff recommends that the Commission adopt this analysis and deny the *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416) test claims, effective July 1, 2008.

STAFF ANALYSIS

Chronology

02/23/84	Board of Control (predecessor to the Commission) adopts Statement of Decision in *Firefighters Cancer Presumption* (CSM 4081)
10/24/85	Commission adopts parameters and guidelines in *Firefighters Cancer Presumption* (CSM 4081)
03/26/87	Commission amends parameters and guidelines in *Firefighters Cancer Presumption* (CSM 4081)
08/27/92	Commission adopts Statement of Decision in *Cancer Presumption-Peace Officers* (CSM 4416)
01/21/93	Commission adopts parameters and guidelines in *Cancer Presumption-Peace Officers* (CSM 4416)
07/18/06	Statutes 2006, chapter 78 (AB 1805) is enacted requiring the Commission to reconsider the Statements of Decision and parameters and guidelines in CSM 4081 and CSM 4416 no later than six months after the final court decision is issued in *CSAC Excess Insurance Authority and City of Newport Beach v. Commission on State Mandates* (Second District Court of Appeal, Case No. B188169)
12/20/06	Second District Court of Appeal issues unpublished decision in *CSAC Excess Insurance Authority and City of Newport Beach v. Commission on State Mandates*
05/22/07	Judgment Denying Petitions for Writ of Mandate is entered by the court in *CSAC Excess Insurance Authority and City of Newport Beach v. Commission on State Mandates* and case becomes final
08/09/07	Draft staff analysis issued
09/11/07	Final staff analysis issued

Background

Statutes 2006, chapter 78, section 8 directs the Commission to reconsider the Statements of Decision and parameters and guidelines in *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416) as follows:

(a) Notwithstanding any other provision of law, the Commission on State Mandates shall reconsider its statements of decision and parameters and guidelines for both of the following mandates:

(1) Cancer Presumption-Peace Officers (Test Claim Number CSM-4416)

(2) Firefighter's Cancer Presumption (Test Claim Number CSM 4081).

(b) The commission shall complete the reconsiderations required by subdivision (a) no later than six months after a final court decision is issued in the case of *CSAC Excess Insurance Authority and City of Newport Beach v. Commission on State Mandates* (Case No. B188169, an appeal in the Second District Court of Appeal consolidating Los Angeles Superior Court Case No. BS092146 and No. BS095456).

(c) The reconsidered statements of decision required by subdivision (a) shall be effective for these mandates on July 1 after the adoption by the commission.

(d) The Department of Industrial Relations, in consultation with the Department of Finance, shall submit relevant information to the commission in the reconsideration required by subdivision (a).[3]

The Statements of Decision in *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416), and the court decision referred to in the statute, *CSAC-EIA v. Commission on State Mandates,* all address the issue whether Labor Code section 3212.1 constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6. Labor Code section 3212.1 provides an evidentiary presumption of industrial causation to certain firefighters and peace officers in workers' compensation cases for cancer-related injuries.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.[4] Although the workers' compensation law must be "liberally construed" in favor of the injured employee, the burden is normally on the employee to show proximate cause by a preponderance of the evidence.[5] If liability is established, the employee is entitled to compensation for the full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as defined and calculated by the Labor Code.[6]

As early as 1937, the Legislature began to ease the burden of proof for purposes of liability for certain public employees that provide "vital and hazardous services" by establishing a presumption of industrial causation; that the injury arose out of and in the course of employment.[7] The presumptions have the effect of shifting to the employer the burden of proof as to the nonexistence of the presumed fact. Thus, the employer has the burden to prove that the employee's injury did not arise out of or in the course of employment.[8]

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[3] Exhibit A, page 16.

[4] Labor Code section 3600, subdivisions (a)(2) and (3).

[5] Labor Code sections 3202, 3202.5.

[6] Labor Code sections 4451, et seq.

[7] *Zipton v. Workers' Comp. Appeals* Bd. (1990) 218 Cal.App.3d 980, 987. (Ex. D.)

[8] *Id*. at page 988, footnote 4.

Labor Code section 3212.1 was originally enacted in 1982 (Stats. 1982, ch. 1568) to provide a limited presumption easing the burden of proving industrial causation for specified firefighters that developed cancer during the period of employment. Under the original statute, the firefighter employee could have the benefit of the presumption that the cancer arose out of and in the course of employment if the employee could show that he or she was exposed, while in the service of the department or unit, to a known carcinogen and that the carcinogen was reasonably linked to the disabling cancer.

In 1984, the Board of Control (the predecessor to the Commission) considered whether Labor Code section 3212.1, as added in 1982, constituted a state-mandated local program under former Revenue and Taxation Code sections 2201, et seq., in *Firefighters Cancer Presumption* (CSM 4081). In February 1984, the Board of Control adopted a decision, approving the claim, and in 1985, the Commission adopted parameters and guidelines for the program.[9] Beginning January 1, 1983, reimbursement was authorized under the parameters and guidelines for the following reimbursable costs:

- for insured local agencies, reimbursement was authorized for any increases in workers' compensation premium costs;
- for self-insured local agencies, reimbursement was authorized for:
    - staff costs, including legal counsel costs;
    - damage or benefit costs to the employee awarded in the litigation, including costs for temporary and permanent disability payments, life pension benefits, and death benefits; and
- overhead costs.

In 1989, Labor Code section 3212.1 was amended by the Legislature (Stats. 1989, ch. 1171) to provide the same presumption of industrial causation to specified peace officers. In 1992, the Commission adopted a Statement of Decision on Labor Code section 3212.1, as amended in 1989, approving the claim. (*Cancer Presumption-Peace Officers* (CSM 4416).) The Commission determined that the statute constituted a reimbursable state-mandated program on the ground that firefighters and peace officers carry out the governmental function of providing public safety services to the public and that the presumption of industrial causation was uniquely granted to local government employees.[10] Parameters and guidelines were adopted in 1993, and authorized reimbursement beginning July 1, 1990, for the following reimbursable costs:

- for insured local agencies, reimbursement was authorized for increases in premium amounts by at least 50% as a result of the statute, or decreases in dividend amounts by at least 50%;
- for self-insured local agencies, reimbursement was authorized for:
    - staff costs, including legal counsel costs;

[9] Exhibit A, page 345.

[10] Exhibit A, page 601.

- damage or benefit costs to the employee awarded in the litigation, including costs for temporary and permanent disability payments, life pension benefits, and death benefits; and

- overhead costs.[11]

In 1999 and 2000, the Legislature amended Labor Code section 3212.1 again. These amendments became the subject of a test claim filed by CSAC Excess Insurance Authority and the City of Newport Beach (*Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19)). Under the 1999 amendment to section 3212.1, the employee need only show that he or she was exposed to a known carcinogen while in the service of the employer. The employer still has the right to dispute the employee's claim as it did under prior law. But when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer is shifted to the employer. The 2000 amendment to Labor Code section 3212.1 extended the cancer presumption to peace officers defined in Penal Code section 830.37, subdivisions (a) and (b); peace officers that are members of an arson-investigating unit or are otherwise employed to enforce the laws relating to fire prevention or fire suppression.

The Commission denied the test claim in *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19). Although the Commission recognized that the 1999 and 2000 statutes may have resulted in increased costs to a local agency, pursuant to existing case law interpreting article XIII B, section 6, the statute does not mandate a new program or higher level of service on local agencies.[12]

CSAC Excess Insurance Authority v. Commission on State Mandates

The Commission's decision was challenged, along with other Labor Code statutes that granted similar presumptions to local safety employees,[13] in the Second District Court of Appeal in *CSAC Excess Insurance Authority v. Commission on State Mandates*, Case No. B188169.

On December 22, 2006, the Second District Court of Appeal issued its unpublished decision in *CSAC Excess Insurance Authority v. Commission on State Mandates*, affirming the Commission's decision that the 1999 and 2000 amendments to Labor Code section 3212.1 do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. Final judgment in the

[11] Exhibit A, page 647.

[12] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 (*Kern High School Dist.*); *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[13] Labor Code section 3213.2, as added by Statutes 2001, chapter 834 (*Lower Back Injury Presumption for Law Enforcement* (01-TC-25)) and Labor Code section 3212.11, as added by Statutes 2001, chapter 846 (*Skin Cancer Presumption for Lifeguards* (01-TC-27)) were also challenged.

case was entered on May 22, 2007.[14] On pages 10 through 14 of its decision, the Second District Court of Appeal made the following findings of law:

> **[quote cont'd]** We will assume for the sake of argument that the test statutes' presumptions of industrial causation will impose some increased costs on local governments in the form of increased workers' compensation benefit payments to injured local peace officers, firefighters, or lifeguards. The mere imposition of increased costs, however, is not determinative of whether the presumptions mandated a new program or higher level of service within an existing program as stated in article XIII B, section 6. "Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate." (*City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.) Whether the increased costs resulted from a state-mandated program or higher level of service presents solely a question of law as there are no disputed facts. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.)
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> As previously noted, " costs mandated by the state" means " any increased costs which a local agency or school district is required to incur ... as a result of any statute ... which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." (Gov.Code, § 17514.) As the Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, " Looking at the language of section 6 then, it seems clear that by itself the term 'higher level of service' is meaningless. It must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term-programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Id.* at p. 56; see *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1191.)
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> In this case, the test statutes affect the administration of the workers' compensation program. The Supreme Court has held that statutes increasing workers' compensation benefits to reflect cost-of-living increases did not mandate either a new program or higher level of service in an existing program. "Workers' compensation is not a program

[14] Exhibit B.

administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. **[quote cont'd]** Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See Lab.Code, § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at pp. 57-58.)

We similarly conclude that because workers' compensation is not a program administered by local governments, the test statutes' presumptions of industrial causation do not mandate a new program or higher level of service within an existing program, even assuming that the test statutes' presumptions will impose increased workers' compensation costs solely on local entities. Because the test statutes do not involve a program administered by local governments, the increased costs resulting from the presumptions imposed to implement a public policy do not qualify for reimbursement under article XIII B, section 6. (See *City of Sacramento v. State of California, supra,* 50 Cal.3d 51 [state law extending mandatory coverage under state's unemployment insurance law to include state and local governments did not mandate a new program or higher level of service]; *City of Richmond v. Commission on State Mandates, supra,* 64 Cal.App.4th 1190 [state law requiring local governments to provide death benefits to local safety officers under both the Public Employees Retirement System and the workers' compensation system did not mandate a new program or higher level of service].)

Respondents' reliance on *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 is misplaced. In *Carmel Valley,* the appellate court concluded that executive orders requiring local agencies to purchase updated firefighting equipment mandated both a new program and a higher level of service within an existing program because firefighting is "a peculiarly governmental function" (*id*. at p. 537) and the executive orders, to implement a state policy, imposed unique requirements on local governments that did not apply generally to all residents and entities in the state (*ibid*.). In this case, on the other hand, providing workers' compensation benefits is not a peculiarly governmental function and, even assuming the test statutes implemented a state policy of paying increased workers' compensation benefits to local peace officers,

firefighters, and lifeguards, the costs are not reimbursable because they do not arise within an existing program administered by local governments.

Respondents contend that the effect of the test statutes, increased costs, is borne only by local governments. As peace officers, firefighters, and lifeguards are uniquely governmental employees, respondents argue the test statutes do not apply generally to all entities in the state. The question which remains, however, is whether increased costs alone equate to a **[quote cont'd]** higher level of service within the meaning of article XIII B, section 6, even if paid only by local entities and not the private sector. We conclude they do not.

In a similar case, the City of Anaheim sought reimbursement for costs it incurred as a result of a statute that temporarily increased retirement benefits to public employees. The City of Anaheim argued, as do respondents, that since the statute "dealt with pensions for public employees, it imposed unique requirements on local governments that did not apply to all state residents or entities." (*City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1483-1484.) The court held that subvention was not required because the program involved, the Public Employees' Retirement System, is not a program administered by local agencies. Such is the case here with the workers' compensation program. As noted, the program is administered by the state, not the local authorities.

The court also noted: "Moreover, the goals of article XIII B of the California Constitution 'were to protect residents from excessive taxation and government spending ... [and] preclud[e] a shift of financial responsibility for carrying out governmental functions from the state to local agencies.... Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear-neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.' (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 61.) Similarly, City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public." (*City of Anaheim v. State of California, supra*, 189 Cal.App.3d at p. 1484.)

The reasoning applies here. The service provided by the counties represented by the EIA [Excess Insurance Authority] and the city, workers' compensation benefits to its employees, is unchanged. The fact that some employees are more likely to receive those benefits does not equate to an increased level of service within the meaning of article XIII B, section 6. (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at pp. 57-58.)

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Discussion

The courts have found that article XIII B, section 6 of the California Constitution[15] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[16] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[17] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[18]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[19]

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[15] Article XIII B, section 6, subdivision (a), (as amended in November 2004) provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[16] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[17] *County of San Diego v. State of California (County of San Diego)* (1997) 15 Cal.4th 68, 81.

[18] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[19] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[20] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[21] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[22]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[23] -

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[24] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[25]

Issue 1: Commission jurisdiction and effective date of decision.

Administrative agencies, such as the Commission, are entities of limited jurisdiction that have only the powers conferred on them, expressly or by implication, by statute or constitution. The Commission's jurisdiction in this case is based solely on the statute that directed reconsideration; Statutes 2006, chapter 78. Absent this statute, the Commission would have no jurisdiction to reconsider its decisions and parameters and guidelines in *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416).

Section 8 of Statutes 2006, chapter 78, includes the following provision: "The reconsidered statements of decision required by subdivision (a) shall be effective for these mandates on July 1 after the adoption by the commission." Thus, the

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[20] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[22] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[23] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[24] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[25] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Commission's decision on reconsideration is effective and applies to any costs incurred pursuant to Labor Code section 3212.1, as added and amended by Statutes 1982, chapter 1568, and Statutes 1989, chapter 1171, beginning on July 1, 2008.

Issue 2: Does Labor Code section 3212.1, as added and amended in 1982 and 1989, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

Statutes 2006, chapter 78 directed the Commission to reconsider the two test claims on Labor Code section 3212.1 "after" a final court decision is issued in the *CSAC Excess Insurance Authority* case. As an unpublished opinion, the *CSAC Excess Insurance Authority* decision of the Second District Court of Appeal may not be cited as a binding precedential decision in this reconsideration unless it is relevant under the doctrine of collateral estoppel.[26] Collateral estoppel precludes a party from re-litigating the matters previously litigated and determined in a prior proceeding and makes the decision on the matter in the prior proceeding binding in the subsequent matter. In order for collateral estoppel to apply, the following elements must be satisfied: (1) the issue necessarily decided in the previous proceeding is identical to the one that is currently being decided; (2) the previous proceeding terminated with a final judgment on the merits; (3) the party against whom collateral estoppel is asserted is a party to or in privity with a party in the previous proceeding; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue.[27] For the reasons below, staff finds that the elements of collateral estoppel are satisfied in this case. Thus, the court's holding in *CSAC Excess Insurance Authority*, that the evidentiary presumption of industrial causation provided in Labor Code section 3212.1 to peace officers and firefighters for cancer-related workers' compensation claims, does not mandate a new program or higher level of service, is binding and applies to this reconsideration.

For purposes of collateral estoppel, issues are identical when the factual allegations at issue in the previous and current proceeding are the same.[28] The issue presented in the two reconsidered test claims is the same as the issue in the *CSAC-Excess Insurance Authority* case; whether the evidentiary presumption of industrial causation provided by Labor Code section 3212.1 to firefighters and peace officers in cancer-related claims is a reimbursable state-mandated program for local agencies. On May 22, 2007, the *CSAC Excess Insurance Authority* case terminated with a final judgment on the merits. Furthermore, the parties involved in the *CSAC Excess Insurance Authority* case are in privity with the eligible claimants in the reconsidered test claims at issue here. Parties are in privity when one party represents the same legal rights as the parties in the subsequent case.[29] Test claims brought before the Commission are filed on behalf of all local entities in the state eligible to claim reimbursement under the alleged state-mandated program.[30]

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[26] California Rules of Court, Rule 8.1115.

[27] *Roos v. Red* (2006) 130 Cal.App.4th 870, 879-880. (Ex. D.)

[28] *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342. (Ex. D.)

[29] *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90. (Ex. D.)

[30] Government Code sections 17521, 17551, 17553, and 17557.

The test claim at issue in *CSAC Excess Insurance Authority* was filed and litigated by CSAC Excess Insurance Authority, a joint powers authority that provides insurance to 54 counties,[31] and the City of Newport Beach. Thus, the test claim decision of the Commission and the unpublished decision of the Second District Court of Appeal in *CSAC Excess Insurance Authority* apply to all eligible local agencies that employ the peace officers and firefighters identified in Labor Code section 3212.1 that receive the evidentiary presumption of industrial causation. The eligible claimants for the two reconsideration decisions are the same local agencies. Moreover, the parties in the *CSAC Excess Insurance Authority case*, on behalf of the local agencies in the state that employ peace officers and firefighters identified in Labor Code section 3212.1, had a full and fair opportunity to litigate the reimbursement issue before the court. Thus, staff finds that the court's holding in *CSAC Excess Insurance Authority* applies to the *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416) test claims.

Even if a court were to find that collateral estoppel does not apply in this case because the two reconsidered test claims were filed on different versions of Labor Code section 3212.1 than the 1999 and 2000 version of the statute at issue in *CSAC Excess Insurance Authority*, the published cases cited by the Court of Appeal in *CSAC Excess Insurance Authority* are precedential and apply equally to the reconsidered claims here. The case law is clear that even though a statute is addressed only to local government and imposes new costs on them, the statute may not constitute a reimbursable state-mandated program under article XIII B, section 6.[32] It is well-established that local agencies are not entitled to reimbursement for all increased costs, but only those resulting from a new program or higher level of service mandated by the state.[33] The costs identified in the parameters and guidelines for the two test claims are litigation costs and the costs of the benefits awarded to the injured employee.

However, Labor Code section 3212.1, as added and amended in 1982 and 1989, do not mandate local agencies to incur these costs. The statute simply *creates* the presumption of industrial causation for the employee, but does not require a local agency to provide a new or additional service to the public. The relevant language in Labor Code section 3212.1, as it existed following the 1989, states that:

> 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

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[31] *CSAC Excess Insurance Authority v. Commission on State Mandate*s (Dec. 20, 2006, B188169) nonpublished opinion, at page 2. (Ex. B.)

[32] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1190; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[33] *Kern High School Dist., supra,* 30 Cal.4th 727, 735-736.

> 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. (Emphasis added.)

This statute authorizes, but does not require, local agencies to dispute the claims of injured employees. Thus, it is the decision made by the local agency to dispute the claim that triggers any litigation costs incurred. Litigation costs are not mandated by the state.[34]

In addition, the Labor Code section 3212.1, on its face, does not mandate local agencies to pay workers' compensation benefits to injured employees. Even if the statute required the payment of increased benefits, the payment of benefits to employees would still have to constitute a new program or higher level of service. Local agencies, however, have had the responsibility to pay workers' compensation benefits for "any injury or disease arising out of employment" since 1971.[35] Labor Code section 4850 has further provided special compensation benefits to injured peace officers and firefighters since 1983, well before the enactment of the test claim statutes. Thus, the payment of employee benefits is not new and has not been shifted to local agencies from the state.

Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.[36] Rather, the California Supreme Court and other courts of appeal have determined that the following programs required under law are not administered by local agencies to provide a service to the public and, thus, reimbursement under article XIII B, section 6 of the California Constitution is not required: providing workers' compensation benefits to public employees; providing unemployment compensation protection to public employees; increasing Public Employment Retirement System (PERS) benefits to retired public employees; and paying death benefits to local safety officers under the PERS and workers' compensation systems.[37]

More specifically within the context of workers' compensation, the Supreme Court decided *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, and, for the

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[34] *Kern High School Dist., supra*, 30 Cal.4th 727, 742-743. Furthermore, there is no evidence that counties and cities are practically compelled to dispute the claims. The statutes do not impose a substantial penalty for not disputing the claim. (*Kern High School Dist., supra*, 30 Cal.4th at p. 751.)

[35] Labor Code section 3208, as last amended in 1971.

[36] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 877.

[37] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57; *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67; and *City of Richmond v. Commission on State Mandates, supra,* 64 Cal.App.4th 1190, 1195.

first time, defined a "new program or higher level of service" pursuant to article XIII B, section 6. Counties were seeking the costs incurred as a result of legislation that required local agencies to provide the same increased level of workers' compensation benefits to their employees as private individuals or organizations. The Supreme Court recognized that workers' compensation is not a new program and, thus, determined whether the legislation imposed a higher level of service on local agencies.[38] Although the Court defined a "program" to include "laws which, to implement a state policy, impose unique requirements on local governments," the Court emphasized that a new program or higher level of service requires "state mandated increases in the services provided by local agencies in existing programs."

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. *Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."*[39]

The Court continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility *for providing services which the state believed should be extended to the public*.[40]

Applying these principles, the Court held that reimbursement for the increased costs of providing workers' compensation benefits to employees was not required by the California Constitution. The Court stated the following:

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers … In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[41]

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[38] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[39] *Ibid,* emphasis added.

[40] *Id*. at pages 56-57, emphasis added.

[41] *Id.* at pages 57-58, fn. omitted.

Moreover, in 2004, the California Supreme Court, in *San Diego Unified School Dist.*, reaffirmed the conclusion that simply because a statute, which establishes a public employee benefit program, may increase the costs to the employer, the statute does not "in any tangible manner increase the level of service provided by those employers to the public" within the meaning of article XIII B, section 6.[42]

These principles apply even though the presumption is granted uniquely to public safety employees. In the Second District Court of Appeal case of *City of Anaheim*, the city sought reimbursement for costs incurred as a result of a statute that temporarily increased retirement benefits to public employees. The city argued that since the statute "dealt with pensions for *public* employees, it imposed unique requirements on local governments that did not apply to all state residents and entities."[43] The court held that reimbursement was not required because the statute did not impose any state-mandated activities on the city and the PERS program is not a program administered by local agencies as a service to the public.[44] The court reasoned as follows:

> Moreover, the goals of article XIII B of the California Constitution "were to protect residents from excessive taxation and government spending … and preclude a shift of financial responsibility for carrying out governmental functions from the state to local agencies. … Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61.) Similarly, City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public.[45]

The reasoning in *City of Anaheim* applies here. Simply because a statute applies uniquely to local government does not mean that reimbursement is required under article XIII B, section 6.[46]

Finally, the Statement of Decision in *Cancer Presumption-Peace Officers* (CSM 4416) also relied on *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537-538, to approve reimbursement. In *Carmel Valley*, the court found the requirement to provide protective clothing and safety equipment to firefighter employees to be a new program or higher level of service. The regulation at issue in *Carmel Valley*, however, imposed a new requirement on local agencies and was designed

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[42] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 875.

[43] *City of Anaheim, supra,* 189 Cal.App.3d at pp. 1483-1484.

[44] *Id*. at page 1484.

[45] *Ibid*.

[46] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 877, fn. 12; *County of Los Angeles, supra,* 110 Cal.App.4th at page 1190; *City of Richmond, supra,* 64 Cal.App.4th at page 1197.

to provide more effective fire protection to the public.[47] Unlike *Carmel Valley*, Labor Code section 3212.1 does not mandate local agencies to provide a service to the public. The statutes do not increase firefighting services or police protection services to the public. Rather, they create a presumption of industrial causation that benefits public employees in their workers' compensation claims. This Labor Code statute does not constitute a new program or higher level of service even though, as might be argued by the local agencies, the benefit payments may "'generate a higher quality of local safety officers' and thereby, in a general and indirect sense, provide the public with a 'higher level of service' by its employees."[48]

Accordingly, staff finds that Labor Code section 3212.1, as added and amended in 1982 and 1989, does not mandate a new program or higher level of service and, thus, does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

CONCLUSION

Staff finds that, upon reconsideration and effective July 1, 2008, Labor Code section 3212.1, as added and amended by Statutes 1982, chapter 1568 and Statutes 1989, chapter 1171, does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution. Therefore, beginning July 1, 2008, reimbursement is not required for the activities and costs listed in the parameters and guidelines for *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416).

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and deny the *Firefighters Cancer Presumption* (CSM 4081) and *Cancer Presumption-Peace Officers* (CSM 4416) test claims, effective July 1, 2008.

[47] See *San Diego Unified School Dist., supra,* 33 Cal.4th at page 877, where this Court summarizes *Carmel Valley*.

[48] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 876, quoting *City of Richmond, supra*, 64 Cal.App.4th 1190, 1195.