BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Labor Code Section 3212.8; Statutes 2000, Chapter 490, Statutes 2001; Chapter 833 Filed on February 27, 2003, By Santa Monica Community College District, Claimant.	**Case No.**: 02-TC-17 *Hepatitis Presumption (K-14)* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on September 27, 2007)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 27, 2007. Mr. Keith Petersen represented and appeared for the claimant. Ms. Carla Castañeda and Ms. Donna Ferebee appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis at the hearing by a vote of 7 to 0 to deny this test claim.

Summary of Findings

This test claim was filed on February 27, 2003, by Santa Monica Community College District regarding a statute that addresses an evidentiary presumption in workers' compensation cases given to certain members of school district police departments that develop hepatitis and other blood-borne infectious diseases. The test claim statute is Labor Code section 3212.8.

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.

Labor Code section 3208, which was last amended in 1971, defines "injury" for purposes of workers' compensation as "any injury or disease arising out of the employment." This definition of "injury" includes hepatitis and any blood-borne infectious disease.

The test claim statute, provides an evidentiary presumption to certain members of school district police departments that develop or manifest hepatitis and other blood-borne infectious diseases during the period of employment. This evidentiary presumption shifts the burden of proof to the

public school district to show that the hepatitis did not arise out of or in the course of the police officer's employment with the district.

The Commission finds that the express language of Labor Code section 3212.8 does not impose any state-mandated requirements on school districts. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury did not arise out of and in the course of employment remains entirely with the school district. 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.

The Commission concludes that Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6.

BACKGROUND

This test claim addresses an evidentiary presumption in workers' compensation cases given to certain members of school district police departments that develop hepatitis and other blood-borne infectious diseases.

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.[1] 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.[2] 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.[3]

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.[4] 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.[5]

Labor Code section 3208, which was last amended in 1971, defines "injury" for purposes of workers' compensation as "any injury or disease arising out of the employment." This definition of "injury" includes hepatitis and any blood-borne infectious disease.

Test Claim Statute

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

[2] Labor Code sections 3202, 3202.5.

[3] Labor Code sections 4451, et seq.

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

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

Labor Code section 3212.8 was added in 2000, and provides that, for the purposes of workers' compensation, "injury" includes hepatitis for certain members of police, sheriff's, and fire departments when any part of the hepatitis develops or manifests itself during the period of employment. In such cases, the hepatitis shall be presumed to arise out of and in the course of employment.[6] This presumption may be rebutted, however, the employer cannot rebut this presumption by attributing the hepatitis to any disease existing prior to its development or manifestation.[7] In 2001, Labor Code section 3212.8 was amended by replacing "hepatitis" with "blood-borne infectious disease," and thus, providing a rebuttable presumption for more blood related "injuries."[8]

Related Test Claims and Litigation

Although not having precedential effect, the Second District Court of Appeal, in an unpublished decision for *CSAC Excess Insurance Authority v. Commission on State Mandates*, Case No. B188169, upheld the Commission's decisions to deny related workers' compensation test claims entitled *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19), *Lower Back Injury Presumption for Law Enforcement* (01-TC-25), and *Skin Cancer Presumption for Lifeguards* (01-TC-27), which addressed the issues raised in the current test claim.

The test claim entitled *Cancer Presumption for Law Enforcement and Firefighters*, addressed Labor Code section 3212.1, as amended by Statutes 1999, chapter 595, and Statutes 2000, chapter 887. Labor Code section 3212.1 provides a rebuttable presumption of industrial causation to certain law enforcement officers and firefighters that develop cancer, including leukemia, during the course of employment. 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 test claim entitled *Lower Back Injury Presumption for Law Enforcement*, addressed Labor Code section 3213.2, as added by Statutes 2001, chapter 834. Labor Code section 3213.2 provides a rebuttable presumption of industrial causation to certain publicly employed peace officers who wear a duty belt as a condition of employment and, either during or within a specified period after termination of service, suffer a lower back injury.

The test claim entitled *Skin Cancer Presumption for Lifeguards*, addressed Labor Code section 3212.11, as added by Statutes 2001, chapter 846. Labor Code section 3212.11 provides a rebuttable presumption of industrial causation to certain publicly employed lifeguards who develop skin cancer during or immediately following their employment.

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[6] Statutes 2000, chapter 490.

[7] *Ibid*.

[8] Statutes 2001, chapter 833.

The Commission denied each test claim finding that pursuant to existing case law interpreting article XIII B, section 6, the statutes do not mandate new programs or higher levels of service on local agencies.[9]

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, 2000, and 2001 additions and amendments to Labor Code section 3212.1, 3212.11, and 3213.2, do not constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[10] Final judgment in the case was entered on May 22, 2007.[11] In its decision affirming the Commission's finding that the test claim statutes did not constitute reimbursable state-mandated programs, the Second District Court of Appeal found:

- Workers' compensation is not a program administered by local governments as a service to the public. As a result, the test claim 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 claim statutes' presumptions will impose increased workers' compensation costs solely on local entities.
- Costs alone do not equate to a higher level of service within the meaning of article XIII B, section 6. The service provided by the counties represented by CSAC-EIA 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 to the public within the meaning of article XIII B, section 6.

Claimant's Position

Claimant, Santa Monica Community College District, contends that the test claim statute constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant asserts that it is entitled to reimbursement for costs incurred as a result of the following activities required by the test claim statute:

- Develop and periodically revise polices and procedures for the handling of workers' compensation claims related to the contraction of hepatitis or blood-borne infectious diseases.
- Payment of additional costs of claims caused by the presumption of industrial causation of hepatitis or blood-borne infectious diseases.
- Payment of increased workers' compensation insurance coverage in lieu of additional costs of claims caused by the presumption of industrial causation.

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[9] *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.

[10] Exhibit E, Supporting Documentation, *CSAC Excess Insurance Authority v. Commission on State Mandates*, Second District Court of Appeal, Case No. B188169 (Unpubl. Opn.).

[11] Exhibit E, Supporting Documentation, Judgment.

- Physical examinations of community college district police officers prior to employment.
- Training of police officer employees to prevent contraction of hepatitis or blood-borne infectious disease on the job.[12]

Department of Finance's (Finance) Position

Finance filed comments on May 12. 2003,[13] arguing that the plain language of the test claim statute does not mandate the following activities:

- Increased workload associated with the development and periodic revision of policies and procedures for the handling of workers' compensation claims related to the contraction of blood-borne infectious disease.
- Increased requirements for physical examinations prior to employment.
- Increased training to prevent the contraction of blood-borne infectious disease.
- Increased workers' compensation insurance coverage for blood-borne infectious diseases.

As a result, Finance contends that claimants are not entitled to reimbursement for these activities. However, Finance finds that the test claim statute may impose a reimbursable state-mandated program requiring:

- Increased workers' compensation claims for blood-borne infectious diseases.

Thus, claimant may be entitled to reimbursement for this activity under article XIII B, section 6 of the California Constitution.

Commission Findings

The courts have found that article XIII B, section 6 of the California Constitution[14] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[15] "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

[12] Exhibit A, p. 109-110.

[13] Exhibit B.

[14] California Constitution, article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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."

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

impose."[16] 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.[17] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[18]

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.[19] 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.[20] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[21]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[22]

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.[23] 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."[24]

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

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

[18] *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*).

[19] *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 (*Los Angeles I*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

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

[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

[22] *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.

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

[24] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: Does Labor Code section 3212.8, as added and amended in 2000, and 2001, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

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.[25] It is well-established that school districts and 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.[26] The costs identified by claimant for the test claim statute are the additional costs of developing and revising polices and procedures for the handling of workers' compensation claims involving hepatitis and blood-borne infectious diseases claims, the additional costs of handling these claims, the cost of increased workers' compensation insurance coverage for these types of claims in lieu of costs to handle these claims, costs of pre-employment physical examinations, and the cost of training peace officer employees to prevent contraction of hepatitis or blood-borne infectious diseases.

However, Labor Code section 3212.8, as added and amended in 2000, and 2001,[27] does not mandate school districts to incur these costs. The statute simply *creates* the presumption of industrial causation for the peace officer employee, but does not require a school district to provide a new or additional service to the public. The relevant language in Labor Code section 3212.8, as added in 2000 states that:

> The hepatitis so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of the employment or service. This presumption is disputable and *may* be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. That presumption shall be extended to a person covered by subdivision (a) following termination of service for a period of three calendar months for each full year of service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity. (Emphasis added.)

The 2001 amendment merely replaces "hepatitis" with "blood-borne infectious diseases" and makes no other substantive change. This statute authorizes, but does not require, school districts that employ police officers to dispute the claims of injured officers. Thus, it is the decision made by the school district to dispute the claim that triggers any litigation costs incurred. Litigation costs are not mandated by the state.[28]

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[25] *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.

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

[27] Statutes 2000, chapter 490, and Statutes 2001, chapter 833.

[28] *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.)

In addition, the Labor Code section 3212.8, on its face, does not mandate school districts 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. School districts, however, have had the responsibility to pay workers' compensation benefits for "any injury or disease arising out of employment" since 1971.[29] 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 statute. Thus, the payment of employee benefits is not new and has not been shifted to school districts 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.[30] Rather, the California Supreme Court and other courts of appeal have determined that the following programs required under law are not administered by local government 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.[31]

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 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.[32] 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

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[29] Labor Code section 3208, as last amended in 1971. See also, Labor code section 3300, defining "employer" for purposes of workers' compensation as "Each county, city, district, and all public and quasi public corporations and public agencies therein," and Education Code sections 44043 and 87042.

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

[31] *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.

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

> 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."*[33]

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*.[34]

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.[35]

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.[36]

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."[37] 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

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[33] *Ibid,* emphasis added.

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

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

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

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

program administered by local agencies as a service to the public.[38] 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.[39]

The reasoning in *City of Anaheim* applies here. Simply because the test claim statute applies uniquely to local governments and school districts does not mean that reimbursement is required under article XIII B, section 6.[40]

Accordingly, the Commission finds that Labor Code section 3212.8, as added and amended in 2000 and 2001, 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

The Commission concludes that Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833; is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on school districts.

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[38] *Id*. at page 1484.

[39] *Ibid*.

[40] *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.