COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
ONE: (916) 323-3562
. ,AX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

June 2, 2004

Mr. Keith Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Ad Affected State Agencies and Interested Parties (see enclosed mailing list)

Re: *Cancer Presumption (K-14);* 02-TC-15
Santa Monica Community College District, Claimant
Statutes 1982, Chapter 1568 (AB 3011);
Statutes 1984, Chapter 114 (AB 1399);
Statutes 1988, Chapter 1038 (SB 1145);
Statutes 1989, Chapter 1171 (SB 89);
Statutes 1999, Chapter 595 (AB 539);
Statutes 2000, Chapter 887 (SB 1820)
Labor Code Section 3212.1

Dear Mr. Petersen:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **June** 23, 2004. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183 .01 , subdivision (c)(l), of the Cornmission's regulations.

Hearing

This test claim is set for hearing **July** 29, 2004, at 9:30 am. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about July 8, 2004. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183 .01 , subdivision (c)(2), of the Commission's regulations.

Please contact Camille Shelton, Senior Commission Counsel, if you have any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc.

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Hearing Date:

ITEM ___
TEST CLAIM
DRAFT STAFF ANALYSIS

Labor Code Section 32 12.1

Statutes 1982, Chapter 1568
Statutes 1984, Chapter 114
Statutes 1988, Chapter 1038
Statutes 1989, Chapter 1171
Statutes 1999, Chapter 595 (AB 539)
Statutes 2000, Chapter 887 (SB 1820)

Cancer Presumption (K-l 4)

(02-TC-15)

Santa Monica Community College District, Claimant

EXECUTIVE SUMMARY

The Executive Summary will be included with the Final Staff Analysis.

STAFF ANALYSIS

Claimants

Santa Monica Community College District

Chronology

02/27/03	Claimants file test claim with Commission
03/12/03	Test claim deemed complete
04/16/03	Department of Finance requests extension of time to file comments on test claim
04/17/03	Request for extension of time is granted
05/15/03	Department of Finance requests extension of time to file comments on test claim
05/16/03	Request for extension of time is granted
06/12/03	Department of Finance files comments on test claim
06/30/03	Claimant files rebuttal
--/--/--	Draft staff analysis is issued

Background

This case addresses an evidentiary presumption given to certain firefighters and peace officers in workers compensation cases, Normally, before an employer is liable for payment of workers compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is normally on the employee to show proximate cause by a preponderance of the evidence.[1]

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of presumptions.[2] In 1982, the Legislature enacted Labor Code section 32 12.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show 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.

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[1] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[2] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[3]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[4], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[5] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded,
>
> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.'

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level ofpresumption enumerated in other presumption statutes. Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[7] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure

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[3] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption . . ., the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

[4] *Zipton, supra,* 218 Cal.App.3d 980.

[5] *Id.* at page 991.

[6] Id. at page 990.

[7] *River-view Fire Protection District v. Workers' Compensation Appeals Board (1994) 23* Cal.App.4th 1120, 1124.

> contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked?

In 1999, the Legislature enacted the test claim statute (Stats. 1999, ch. 595), which amended Labor Code section 3212.1 to address the court's criticism of the reasonable link standard in *Zipton*.[9] The test claim statute, as amended in 1999, eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. **Thus,** the employee need only show 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, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 32 12.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

In 2000, the Legislature enacted the second test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers in an arson-investigating unit, as defined in Penal Code section 830.37, subdivisions (a) and (b).

Prior Test Claim Decisions on Labor Code Section 3212.1

In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 *(Firefighter's Cancer Presumption).* The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers compensation premium costs attributable to Labor Code section 32 12.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 32 12.1

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[8] *Id.* at page 1128.

[9] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors?

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 32 12.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim. [11]

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 175 14. The claimant asserts that school districts and community college districts are eligible to receive reimbursement for the following activities:

- Develop policies and procedures to handle claims by district police officers.
- Pay additional costs of claims caused by the shifting of the burden of proof of the cause of the cancer from the police officer employee to the district.
- Pay additional costs for insurance premiums.

  Training police officer employees to take precautionary measures to prevent cancer on the job.
- Review claims dating back to January 1, 1997, to determine whether the cancer arose out of or in the course of employment.
- Pay previously denied claims dating back to January 1, 1997, for those claims that the district cannot meet the new burden of proof as required by Labor Code section 32 12.1.

Position of the Department of Finance

The Department of Finance filed comments on June 10, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program.[12]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[13] recognizes the state constitutional restrictions on the powers of local government to tax and spend. [14] "Its

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[10] Exhibit D.

[11] Exhibit D.

[12] Exhibit B.

[13] Article XIII B, section 6 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 such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency

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."[15] 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.[16] 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.[17]

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.[18] To detennine 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.[19] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[20]

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affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975 ."

[14] *Department* of *Finance* v. *Commission* on *State Mandates* (2003) 30 Cal.4th 727, 735.

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

[16] *Long Bench Unified School Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 174, In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice. " The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[17] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[18] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra, 44* Cal.3d 830, 835.

[19] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[20] *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; Government Code sections 17514 and 17556.

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.[21] In malting 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."[22]

Issue **1:** Are school districts and community college districts eligible claimants for this test claim?

For the reasons provided below, staff finds that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 32 12.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Labor Code section 3212.1, subdivision (a), lists the employees that are given the cancer presumption, Labor Code section 3212.1, subdivision (a), states the following:

> This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who primarily engaged in active law enforcement activities.

The claimant has not claimed any costs relating to firefighting employees. Declarations from Santa Monica Community College District and Clovis Unified School District, which were filed by the claimant with the test claim, allege costs for district police officers only.[23] In addition, the state has not expressly authorized school districts and community college districts to employ firefighters, and has not mandated that they do so. Thus, there is no evidence in the record that school districts or community college districts employ firefighters that are subject to the test claim statute.

Moreover, based on the plain language of Labor Code section 3212.1, the peace officers employed by school districts and community college districts do not receive the rebuttable cancer presumption enjoyed by peace officers employed by state and local agencies. Labor Code section 32 12.1, subdivision (a), expressly provides that the cancer presumption applies to the peace officers defined in Penal Code sections 830.1, 830.2, subdivision (a), and 830.37, subdivisions (a) and (b). These code sections provide the definition for peace officers employed by counties, cities, port district police, the district attorney, the Department of Justice, the

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[21] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 33 l-334; Government Code sections **17551, 17552.**

[22] *City of San Jose v. State of California (1996)* 45 Cal.App.4th 1802, 18 17; *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280.

[23] Exhibit A.

California Highway Patrol, the University of California, the California State University, the Department of Fish and Game, the Department of Parks and Recreation, and the Department of Forestry and Fire Protection, the Department of Alcoholic Beverage Control, and the Board of Directors of the California Exposition and State Fair.

Peace officers employed by school districts and community college districts are defined in Penal Code section 830.32.[24] The test claim statute does not expressly apply to peace officers defined in Penal Code section 830.32.

Therefore, staff finds that school districts and community college districts are not eligible claimants for this test claim.

Issue 2: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Assuming for the sake of argument only that Labor Code section 3212.1 applied to peace officers or firefighters employed by school districts and community college districts, the test claim statute is still not subject to article XIII B, section 6 because state law does not mandate school districts and community college districts to employ peace officers and firefighters.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement, "[25] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are

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[24] Penal Code section 830.32 states the following:

> The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when malting an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing authority.
>
> (a) Members of a California Community College police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.
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> (b) Persons employed as members of police department of a school district pursuant to Section 39670 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 39670 of the Education Code.
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> (c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by subdivision (f) of Section 832.3 shall be designated a school police officer.

[25] California Constitution, article IX, section 1.

established,"[26] the Constitution does not require school districts to operate fire and police departments as part of their essential educational function. Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools. However, there is no constitutional requirement to maintain safe schools through school district fire and police departments independent of the public safety services provided by the cities and counties a school district serves.[27] In *Leger v. Stockton Unified School District,* the court interpreted the safe schools provision as follows:

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][28]

The Legislature is permitted to authorize school districts to act in any manner that is not in conflict with the Constitution. The Legislature, however, has not authorized or required school districts and community college districts to employ firefighters.

In addition, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[29]

> [t]he governing board of any school district *may* establish a security department ... or a police department . . . [and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers. (Emphasis added.)

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district *may* establish a community college police department . . . [and] rnay employ personnel as necessary to enforce the law on or near the campus. . . . This subdivision shall not be construed to require the employment by a community college district of any additional personnel." (Emphasis added.)

In *Department of Finance v. Commission on State Mandates*, the California Supreme **Court** found that "if a school district elects to participate in or continue participation in any *underlying*

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[26] California Constitution, article IX, section 14.

[27] Article I, section 28, subdivision (c) of the California Constitution provides '"All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." (Emphasis added.)

[28] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455.

[29] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 1583 1.

voluntary education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate."[30] The court further stated, on page 73 1 of the decision, that:

> [*W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs,* and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme **Court. Thus,** pursuant to state law, school districts and community college districts remain free to discontinue providing their own fire or police department and employing firefighters or peace officers. Thus, the activity of disputing a worker's compensation claim filed by a firefighter or peace officer employee flows from the discretionary decision to employ such officers and does not impose a reimbursable state mandate. Therefore, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution.

CONCLUSION

Based on the foregoing, staff concludes that school districts and community college districts are not eligible claimants for this test claim. Staff further concludes that Labor Code section 3212.1, as amended by the test claim legislation, is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

Staff Recommendation

Staff recommends that the Commission deny this test claim.

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[30] *Department of Finance v. Commission on State Mandates, supra, 30* Cal.4th at page 743.

Commission on State Mandates

Original List Date: 3/12/2003
Last Updated: 6/1/2004
List Print Date: 06/02/2004
Claim Number: 02-TC-15
Issue: Cancer Presumption (K-l 4)

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal, Code Regs., tit. 2, § 1181.2.)

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Claimant Representative
Tel: (858) 514-8605
Fax: (858) 514-8645

Ms. Cheryl Miller
Santa Monica Community College District
1900 Pico Blvd.
Santa Monica, CA 90405-1628

Claimant
Tel: (310) 434-4221
Fax (310) 434-4256

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Tel: (916) 646-1400
Fax (916) 646-1300

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

Tel: (916) 446-7517
Fax (916) 446-2011

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax (916) 727-1734.

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Tel: (909) 672-9964
Fax (909) 672-9963

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821
Tel: (916) 483-4231
Fax (916) 483-1403

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630
Tel: (916) 939-7901
Fax (916) 939-7801

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816
Tel: (916) 454-7310
Fax (916) 454-7312

Mr. Arthur Palkowitz
San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-8363
Tel: (619) 725-7565
Fax (619) 725-7569

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730
Tel: (866) 481-2642
Fax (866) 481-5383

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814
Tel: (916) 445-0554
Fax (916) 327-8306

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814
Tel: (916) 445-8913
Fax (916) 327-0225

Mr. Bob Campbell
Department of Finance (A-15)
915 L Street, Suite 11 90
Sacramento, CA 95814
Tel: (916) 445-3274
Fax (916) 324-4888

Mr. David E. Scribner
Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691
Tel: (916) 373-1060
Fax (916) 373-1070

Mr. Todd Wherry
MCS Education Services
1 1 130 Sun Center Drive, Suite 100
Tel: (916) 669-5119
Fax (916) 669-0888

Rancho Cordova, CA 95670

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256
Fax (916) 323-6527

Mr. Mark Brummond
California Community Colleges
Chancellor's Office (G-01)
1102 Q Street, Suite 300
Sacramento, CA 95814-6549

Tel: (916) 322-4005
Fax (916) 323-8245

Director
Department of Industrial Relations (C-50)
770 L Street
Sacramento, CA 95814

Tel: (916) 324-4163
Fax (916) 327-6033
