ITEM 7
TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code Section 3212.11

Statutes 2001, Chapter 846 (AB 663)

Lifeguard Skin Cancer Presumption (K-14) (02-TC-16)

Santa Monica Community College District, Claimant

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Hearing Date: December 9, 2004
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EXECUTIVE SUMMARY

Background

In 2002, the Commission received a local agency test claim filing, *Skin Cancer Presumption for Lifeguards* (01-TC-27, Item 5). On February 27, 2003, the Commission received a second test claim on the same statute alleging a reimbursable state mandate is also imposed on K-14 school districts. The two test claims were not consolidated.

In 2001, the Legislature passed Assembly Bill 663, adding section 3212.11 to the Labor Code. For the first time, publicly-employed lifeguards were granted a rebuttable presumption that skin cancer developing or manifesting during or for a defined period immediately following employment "shall be presumed to arise out of and in the course of employment." Under the statute, the employer may offer evidence disputing the presumption.

The claimant alleges that the test claim legislation "mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for lifeguards as a result of the new presumption that skin cancer developing or manifesting itself during employment arose out of or in the course of employment and the prohibition from claiming the injury may be attributed to a pre-existing disease or condition." The activities or costs alleged include policies and procedures for handling lifeguard workers' compensation claims alleging skin cancer arising from employment; all of the costs associated with payment of the claims caused by the presumption, *or* payment of the additional costs of insurance premiums to cover such claims; physical examinations to screen lifeguard applicants for pre-existing skin cancer; and training lifeguards to take precautionary measures to prevent skin cancer on the job.

Department of Finance argues the additional duties alleged are not required by the test claim statute.

Staff asserts that although the legal presumption in favor of the lifeguard employee is new law, the claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. Nothing in the statute mandates public employers of lifeguards to develop policies and procedures to handle lifeguard workers' compensation claims. Nothing in

the language of Labor Code section 3212.11 requires a pre-employment physical exam for lifeguards, nor requires the employer to offer training on skin cancer prevention. While all of these "new activities" may be prudent, they are solely undertaken at the discretion of the employing agency, and are not mandated by the state.

The express language of Labor Code section 3212.11 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 is non-industrial remains entirely with the school district.

Further, there is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that districts will incur increased costs from workers' compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program.

Accordingly, staff finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on school districts.

Conclusion

Staff concludes that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, 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.

Staff Recommendation

Staff recommends that the Commission adopt the final staff analysis, denying this test claim as filed on behalf of K-14 school districts.

STAFF ANALYSIS

Claimant

Santa Monica Community College District

Chronology

02/27/03	Commission receives test claim filing
03/12/03	Commission staff determines test claim is complete and requests comments
04/16/03	Department of Finance requests a one-month extension of time for comments
04/17/03	Commission staff grants the extension of time
05/15/03	Department of Finance files response to test claim
06/13/03	Claimant files response to Department of Finance comments
09/28/04	Draft staff analysis issued
10/12/04	Claimant comments on the draft staff analysis received

Background

On July 1, 2002, the Commission received a test claim filing on behalf of claimant, City of Newport Beach, entitled *Skin Cancer Presumption for Lifeguards* (01-TC-27). On February 27, 2003, the Commission received a test claim filing, *Lifeguard Skin Cancer Presumption (K-14)* (02-TC-16), on behalf of claimant Santa Monica Community College District. Although the same statutory provision is involved, these two test claims were not consolidated. Both test claims address an evidentiary presumption given to state and local lifeguards 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 usually 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, primarily fire and safety personnel, by establishing a series of presumptions.[2] 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.)

In 2001, the Legislature passed Assembly Bill 663, adding section 3212.11 to the Labor Code. For the first time, publicly-employed lifeguards were granted a rebuttable presumption that skin

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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.

cancer developing or manifesting during or for a defined period immediately following employment "shall be presumed to arise out of and in the course of employment." Under the statute, the employer may offer evidence disputing the presumption.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts the following:

> [The test claim legislation] mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for lifeguards as a result of the new presumption that skin cancer developing or manifesting itself during employment arose out of or in the course of employment and the prohibition from claiming the injury may be attributed to a pre-existing disease or condition.[3]

The claimant further argues that the test claim legislation newly requires the following activities or costs:

- develop and update policies and procedures for handling lifeguard workers' compensation claims alleging skin cancer arising from his or her employment;
- all of the costs associated with payment of the claims caused by the shifting of the burden of proof and by the prohibition of the use of a pre-existing condition defense, *or* payment of the additional costs of insurance premiums to cover such claims.
- physical examinations to screen lifeguard applicants for pre-existing skin cancer;
- training lifeguards to take precautionary measures to prevent skin cancer on the job.

Claimant's comments on the draft staff analysis, dated October 7, 2004, contend that: 1) school districts "are practically compelled" to engage in the activities listed above; 2) "the test claim legislation is for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public;" and 3) failing to follow earlier Commission decisions granting mandate reimbursement for cancer presumption statutes is "arbitrary and unreasonable."

State Agency's Position

The Department of Finance filed comments dated May 12, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program for increased workers' compensation claims for skin cancer in lifeguards. However, the Department of Finance disputes any additional duties identified by the claimant on the grounds that the test claim statute does not expressly require them.

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[3] Test Claim, page 2.

No comments on the draft staff analysis were received.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "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."[6] 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.[7] 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.[8]

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.[9] 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

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[4] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A 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."

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

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

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

[8] *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*).

[9] *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.)

legislation.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

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.[13] 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."[14]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Staff finds that the test claim legislation 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.

Labor Code section 3212.11, as added by Statutes 2001, chapter 846, provides:

> This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.
>
> Skin cancer so developing or manifesting itself 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 shall find in accordance with it. This presumption shall be extended to a lifeguard following termination of service for a period of three calendar months for each

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

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

[12] *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.

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

[14] *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.

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.

Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.

This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> Prior to 1975, there was no statute, code section or regulation that created a presumption that skin cancer developing or manifesting itself on lifeguards arose out of or in the course of their employment with the district. Nor was there any statute, code section, or regulation which prohibited such skin cancer from being attributed to a pre-existing disease or condition.[15]

Although it is true that the legal presumption in favor of the lifeguard employee is new law, the claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. Nothing in the statute mandates public employers of lifeguards to develop policies and procedures to handle lifeguard workers' compensation claims. Nothing in the language of Labor Code section 3212.11 requires a pre-employment physical exam for lifeguards, nor requires the employer to offer training on skin cancer prevention. While all of these "new activities" may be prudent, they are solely undertaken at the discretion of the employing agency, and are not mandated by the state.

Labor Code section 3208, as last amended in 1971, specifies that for the purposes of workers' compensation, "'Injury' includes *any* injury or disease arising out of the employment." [Emphasis added.] Assembly Bill 663's sponsor, the California Independent Public Employees Legislative Counsel, stated that since 1985, one-third of the 30 City of San Diego lifeguards who received industrial disability did so due to skin cancer.[16] Thus, public lifeguards' ability to make a successful workers' compensation claim for an on-the-job injury from skin cancer predates the 2001 enactment of Labor Code section 3212.11.

The express language of Labor Code section 3212.11 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 is non-industrial remains entirely with the school district. The plain language of Labor Code section 3212.11 states that the "presumption is disputable and *may* be controverted by other evidence ..." [Emphasis added.]

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[15] Test Claim, page 3.

[16] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assembly Bill No. 663 (2001-2002 Reg. Sess.), page 4, September 7, 2001.

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][17]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[18] Consistent with this principle, the courts have strictly construed the meaning and effects of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[19]

This is further supported by the California Supreme Court's decision in *Kern High School Dist.*[20] In *Kern High School Dist.*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[21] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[22]

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[17] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[18] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[19] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[20] *Kern High School Dist., supra*, 30 Cal.4th 727.

[21] *Id.* at page 737.

[22] *Ibid.*

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.[23] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *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. (Emphasis in original.)[24]

Thus, the Supreme Court held as follows:

> [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 programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][25]

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[26]

The claimant, in comments on the draft staff analysis dated October 7, 2004, argues that the Commission should look to the 2004 decision of the California Supreme Court, *San Diego Unified School Dist., supra,* in which the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[27] In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

> an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency

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[23] *Id.* at page 743.

[24] *Ibid.*

[25] *Id.* at page 731.

[26] *Ibid.*

[27] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887.

possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse, in this case,* an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

The Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta; however, staff recognizes that the Court was giving clear notice that the *City of Merced* "discretionary" rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced,* or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning continues to apply in this case. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[28] As indicated above, school districts are not legally compelled by state law to dispute a presumption in a workers' compensation case. The decision and the manner in which to litigate such cases is made at the local level and is within the discretion of the school district. Thus, the employer's burden to prove that the skin cancer is not arising out of and in the course of employment is also not state-mandated. The evidentiary burden is simply an aspect of having to defend against a workers' compensation lawsuit, if the employer chooses to do so.

The claimant wants to analogize the "mandate" being claimed here to the *Carmel Valley* case and the Court's recent discussion in *San Diego Unified School Dist.*: "Here, in this test claim, the test claim legislation is for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public."[29] But Labor Code section 3212.11 does not mandate training as proposed by the claimant, or the purchase of materials as in the *Carmel Valley* case; it states that if skin cancer is diagnosed during and briefly after the employment of the lifeguard, for purposes of workers' compensation lawsuits, the skin cancer is presumed to arise out of the employment. Not every statute that is of benefit to public employees and results in costs to the employer imposes a reimbursable state mandated program.

There is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that school districts will incur increased costs from workers' compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs

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[28] *Kern High School Dist., supra,* 30 Cal.4th at page 743.

[29] Claimant comments dated October 7, 2004, page 4.

alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[30]

Returning to the recently decided *San Diego Unified School Dist., supra,* 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services,* this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

Therefore, the potential for increased costs resulting from the statute, without more, does not impose a reimbursable state-mandated program.

Prior Test Claim Decisions on Cancer Presumptions

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 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 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 3212.1, 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.

However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, the California the California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.[31] In *Weiss v. State Board of*

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[30] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th at page 735.

[31] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

Equalization, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated, in pertinent part, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [32]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[33] While opinions of the Attorney General are not binding, they are entitled to great weight.[34]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 are not arbitrary or unreasonable as long as the decision strictly construes the Constitution and the statutory language of the test claim statute, and does not apply section 6 as an equitable remedy.[35] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow. In addition, the Commission followed this same analysis in its most recent decisions regarding the issue of reimbursement for cancer presumption statutes.[36]

Accordingly, staff finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on school districts.

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[32] *Id.* at page 776.

[33] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

[34] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

[35] *City of San Jose, supra,* 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

[36] Test claim *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) was denied at the May 27, 2004 Commission hearing, and *Cancer Presumption (K-14)* (02-TC-15) was denied at the July 29, 2004 Commission hearing.

CONCLUSION

Staff concludes that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, 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.

STAFF RECOMMENDATION

Staff recommends that the Commission adopt the final staff analysis, denying this test claim as filed on behalf of K-14 school districts.

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EXHIBIT A

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TEST CLAIM FORM

Claim No. 02-TC-16

Local Agency or School District Submitting Claim

SANTA MONICA COMMUNITY COLLEGE

Contact Person

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Representative Organization to be Notified

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This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

Lifeguard Skin Cancer Presumption (K-14)

Chapter 846, Statutes of 2001 Labor Code Section 3212.11

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

Cheryl Miller
Associate Vice President, Business Services

Telephone No.

(310) 434-4221

Signature of Authorized Representative

x Cheryl Miller

Date

November 20, 2002

Claim Prepared By:
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of: Santa Monica Community College Test Claimant	No. CSM 02-TC-16 Chapter 846, Statutes of 2001 Labor Code Sections 3212.11 Lifeguard Skin Cancer Presumption (K-14) TEST CLAIM FILING

PART 1. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code section 17551(a) to "...hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." Santa Monica Community College is a "school district" as defined in Government Code section 17519.[1]

[1] Government Code Section 17519, as added by Chapter 1459/84:

"School District" means any school district, community college district, or county superintendent of schools."

PART II. LEGISLATIVE HISTORY OF THE CLAIM

This test claim alleges mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for lifeguards as a result of the new presumption that skin cancer developing or manifesting itself during employment arose out of or in the course of employment and the prohibition from claiming the injury may be attributed to a pre-existing disease or condition.

SECTION 1. LEGISLATIVE HISTORY PRIOR TO JANUARY 1, 1975

The "Workers' Compensation and Insurance" law is found in Division 4 of the Labor Code. Labor Code Section 3200[2] sets forth the declaration of the Legislature that the term "workman's compensation" shall thereafter be known as "workers' compensation".

Labor Code Section 3202[3] provides that the provisions of Division 4 and Division

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[2] Labor Code Section 3200, added by Chapter 1454, Statutes of 1974, Section 11:

"The Legislature hereby declares its intent that the term "workmen's compensation" shall hereafter also be known as "workers' compensation." In furtherance of this policy it is the desire of the Legislature that references to the terms "workmen's compensation" in this code be changed to "workers' compensation" when such code sections are being amended for any purpose. This act is declaratory and not amendatory of existing law."

[3] Labor Code Section 3202, added by Chapter 90, Statutes of 1937, Section 3202:

"The provisions of Division IV and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons

5 of the code shall be liberally construed by the courts to extend benefits to persons injured in the course of their employment.

Labor Code Section 3208[4] defines injury to include any injury or disease arising out of the employment.

Prior to 1975, there was no statute, code section or regulation that created a presumption that skin cancer developing or manifesting itself on lifeguards arose out of or in the course of their employment with the district. Nor was there any statute, code section, or regulation which prohibited such skin cancer from being attributed to a pre-existing disease or condition.

SECTION 2. LEGISLATIVE HISTORY AFTER JANUARY 1, 1975

Chapter 922, Statutes of 1982, Section 3, added Labor Code Section 3202.5[5]

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injured in the course of their employment."

[4] Labor Code Section 3208, added by Chapter 90, Statutes of 1937, Section 3208, as amended by Chapter 1064, Statutes of 1971, Section 1:

"'Injury' includes any injury or disease arising out of the employment, including injuries to artificial members, dentures, hearing aids, eyeglasses and medical braces of all types; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for, unless injury to them is incident to an injury causing disability."

[5] Labor Code Section 3202.5, as added by Chapter 922, Statutes of 1982, Section 3:

"Nothing contained in Section 3202 shall be construed as relieving a party from meeting the evidentiary burden of proof by a preponderance of the evidence. "Preponderance of the evidence" means such evidence as, 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

to clarify that nothing in Section 3202 (i.e. "liberal construction") shall be construed as relieving a party from meeting the evidentiary burden of proof by a "preponderance of the evidence".

Chapter 4, Statutes of 1993, Section 15, amended Labor Code Section 3202.5 to make technical changes.

Chapter 846, Statutes of 2001, Section 1, added Labor Code Section 3212.11[6] which created, for the first time, a disputable presumption that skin cancer contracted by employee lifeguards arose out of or in the course of their employment. This section

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convincing force of the evidence."

[6] Labor Code Section 3212.11, added by Chapter 856, Statutes of 2001, Section 1:

"This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

Skin cancer so developing or manifesting itself 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 shall find in accordance with it. This presumption shall be extended to a lifeguard 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.

Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.

This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year."

applies to all active lifeguards employed by a city, county, city and county, district, or other municipal corporation or political subdivision and expands the term "injury" to include skin cancer when developing or manifesting itself during his or her term of employment and shall be extended to a lifeguard after termination of service for a period of three calendar months for each full year of service, not to exceed 60 months. Section 3212.11 also prohibits such skin cancer from being attributed to a pre-existing disease or condition.

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Labor Code Section referenced in this test claim results in school districts incurring costs mandated by the state, as defined in Government Code section 17514[7], by creating new state-mandated duties related to the uniquely governmental function of providing public service to students and these statutes apply to school districts and do not apply generally to all residents and entities in the state.[8]

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[7] Government Code section 17514, as added by Chapter 1459/84:

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

[8] Public schools are a Article XIII B, Section 6 "program," pursuant to Long Beach Unified School District v. State of California, (1990) 225 Cal.App.3d 155; 275 Cal.Rptr. 449.

The new duties mandated by the state upon school districts and community college districts require state reimbursement of the direct and indirect costs of labor, materials and supplies, data processing services and software, contracted services and consultants, equipment and capital assets, staff training, and travel to implement the following activities:

A) To develop policies and procedures, and periodically update those policies and procedures, for the handling of claims by lifeguard employees who make claims for worker's compensation alleging the development of his or her skin cancer was caused by his or her employment as a lifeguard with the district pursuant to Labor Code Section 3212.11;

B) To pay the costs of claims, including full hospital, surgical and medical treatment, disability indemnity and death benefits, caused by the shifting of the burden of proof of the cause of skin cancer from the lifeguard employee to the district and by the prohibition from attributing the injury to a pre-existing disease or condition pursuant to Labor Code Section 3212.11;

C) In lieu of the additional cost of claims caused by skin cancer of its lifeguard

"In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly government function. (Cf. Carmel Valley Fire Protection Dist. V. State of California (1987) 190 Cal.App.3d at p.537) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a 'program' within the meaning of Section 6."

employees, to pay the additional costs of insurance premiums covering those injuries pursuant to Labor Code Section 3212.11;

D) The cost of physical examinations, or the increased costs of physical examinations, prior to employment of lifeguard job applicants, to screen those applicants to determine if they already suffer from skin cancer pursuant to Labor Code Section 3212.11; and

E) The cost of training its lifeguard employees to take precautionary measures to prevent skin cancer on the job pursuant to Labor Code Section 3212.11.

SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

None of the Government Code Section 17556[9] statutory exceptions to a finding

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[9] Government Code section 17556, as last amended by Chapter 589, Statutes of 1989:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges,

of costs mandated by the state apply to this test claim. Note, that to the extent school districts may have previously performed functions similar to those mandated by the referenced code section, such efforts did not establish a preexisting duty that would relieve the state of its constitutional requirement to later reimburse school districts when these activities became mandated.[10]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

No funds are appropriated by the state for reimbursement of these costs mandated by the state and there is no other provision of law for recovery of costs from any other source.

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title

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fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

[10] Government Code section 17565, added by Chapter 879, Statutes of 1986:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

2, California Code of Regulations:

Exhibit 1: Declaration of Cheryl Miller, Associate Vice President Business Services
Santa Monica Community College District

Declaration of Sharleen Crosby, Benefits Technician
Clovis Unified School District

Exhibit 2: Copies of Statutes Cited

Chapter 846, Statutes of 2001

Exhibit 3: Copies of Code Sections Cited

Labor Code Section 3212.11

PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on November 20, 2002, at Santa Monica, California by:

Cheryl Miller
Associate Vice President
Business Services

Voice: (310) 434-4221
Fax: (310) 434-3607

PART VI. APPOINTMENT OF REPRESENTATIVE

Santa Monica Community College District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

Cheryl Miller
Cheryl Miller
Associate Vice President
Business Services

Nov 20, 2002
Date

EXHIBIT 1
DECLARATIONS

DECLARATION OF CHERYL MILLER

Santa Monica Community College District

Test Claim of Santa Monica Community College District

COSM No. _____

Chapter 846, Statutes of 2001

Labor Code Section 3212.11

Lifeguard Skin Cancer Presumption (K-14)

I, Cheryl Miller, Associate Vice President Business Services, Santa Monica Community College District, make the following declaration and statement.

In my capacity as Associate Vice President Business Services , I am the supervisor of the district's Risk Management Department and I directly supervise those employees of the department who are responsible for the receipt and processing of claims for worker's compensation. I am familiar with the provisions and requirements of the Statute and Labor Code Section enumerated above.

This Statute and Labor Code section requires the Santa Monica Community College District to:

A) To develop policies and procedures, and periodically update those policies and procedures, for the handling of claims by lifeguard employees who make claims for worker's compensation alleging the development of his or her skin cancer was caused by his or her employment as a lifeguard with the district pursuant to Labor Code Section 3212.11;

B) To pay the costs of claims, including full hospital, surgical and medical

treatment, disability indemnity and death benefits, caused by the shifting of the burden of proof of the cause of skin cancer from the lifeguard employee to the district and by the prohibition from attributing the injury to a pre-existing disease or condition pursuant to Labor Code Section 3212.11;

C) In lieu of the additional cost of claims caused by skin cancer of its lifeguard employees, to pay the additional costs of insurance premiums covering those injuries pursuant to Labor Code Section 3212.11;

D) The cost of physical examinations, or the increased costs of physical examinations, prior to employment of lifeguard job applicants, to screen those applicants to determine if they already suffer from skin cancer pursuant to Labor Code Section 3212.11; and

E) The cost of training its lifeguard employees to take precautionary measures to prevent skin cancer on the job pursuant to Labor Code Section 3212.11.

It is estimated that Santa Monica Community College District will incur, should such a Worker's Compensation claim be filed, approximately $1,000, or more annually, in staffing and other costs in excess of any funding provided to districts to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 20 day of November, 2002, at Santa Monica, California

Cheryl Miller

Cheryl Miller
Associate Vice President Business Services
Santa Monica Community College District

DECLARATION OF SHAREEN CROSBY

Clovis Unified School District

Test Claim of Santa Monica Community College District

COSM No. _____

Chapter 846, Statutes of 2001

Labor Code Section 3212.11

Lifeguard Skin Cancer Presumption

I, Shareen Crosby, Benefits Technician, Clovis Unified School District, make the following declaration and statement.

In my capacity as Benefits Technician for Clovis Unified School District, I am responsible for receiving and processing Worker's Compensation claims. I am familiar with the provisions and requirements of the Labor Code Section enumerated above.

This Labor Code section requires the Clovis Unified School District to:

A) To develop policies and procedures, and periodically update those policies and procedures, for the handling of claims by lifeguard employees who make claims for worker's compensation alleging the development of his or her skin cancer was caused by his or her employment as a lifeguard with the district pursuant to Labor Code Section 3212.11;

B) To pay the costs of claims, including full hospital, surgical and medical treatment, disability indemnity and death benefits, caused by the shifting of the burden of proof of the cause of skin cancer from the lifeguard

employee to the district and by the prohibition from attributing the injury to a pre-existing disease or condition pursuant to Labor Code Section 3212.11;

C) In lieu of the additional cost of claims caused by skin cancer of its lifeguard employees, to pay the additional costs of insurance premiums covering those injuries pursuant to Labor Code Section 3212.11;

D) The cost of physical examinations, or the increased costs of physical examinations, prior to employment of lifeguard job applicants, to screen those applicants to determine if they already suffer from skin cancer pursuant to Labor Code Section 3212.11; and

E) The cost of training its lifeguard employees to take precautionary measures to prevent skin cancer on the job pursuant to Labor Code Section 3212.11.

It is estimated that Clovis Unified School District will incur, should such a Worker's Compensation claim be filed, approximately $1,000, or more annually, in staffing and other costs to implement these new duties mandated by the state for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the

foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 18th day of February, 2003, at Clovis, California.

Shareen Crosby
Benefits Technician
Clovis Unified School District

EXHIBIT 2
COPY OF STATUTE CITED

WORKERS COMPENSATION—LIFEGUARDS—INJURIES

CHAPTER 846

A.B. No. 663

AN ACT to add Section 3212.11 to the Labor Code, relating to workers' compensation.

[Filed with Secretary of State October 13, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

AB 663, Vargas. Workers' compensation: lifeguards.

Existing law provides that an injury of an employee arising out of and in the course of employment is generally compensable through the workers' compensation system. Existing law provides that, in the case of certain law enforcement officers and firefighters, the term "injury" includes heart trouble, hernia, pneumonia, and other injuries and diseases.

This bill would provide, with respect to active lifeguards employed, for more than 3 consecutive months in a calendar year, by certain local agencies and the Department of Parks and Recreation, that the term "injury" includes skin cancer that develops or manifests itself during the period of the lifeguard's employment.

This bill would further create a rebuttable presumption that the above injury arises out of and in the course of the lifeguard's employment if it develops or manifests during the period of the employment.

The people of the State of California do enact as follows:

SECTION 1. Section 3212.11 is added to the Labor Code, to read:

3212.11. This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

Skin cancer so developing or manifesting itself 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 shall find in accordance with it. This presumption shall be extended to a lifeguard 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.

Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.

This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

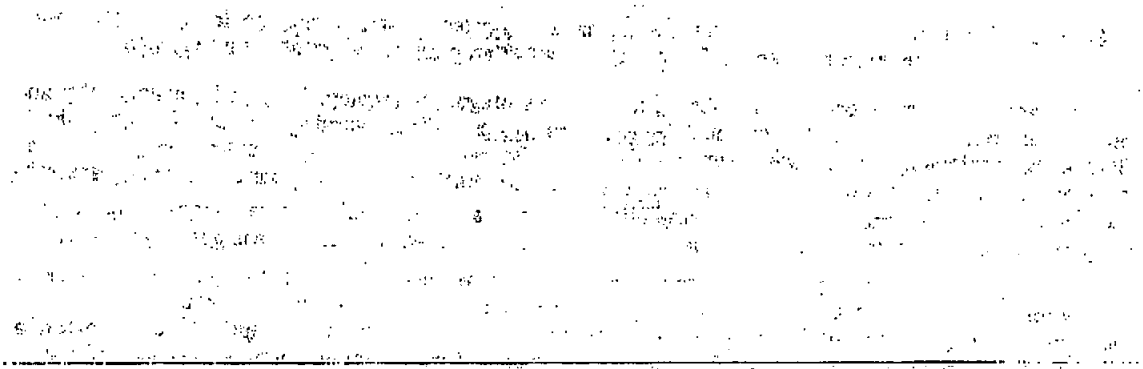

EXHIBIT 3
COPY OF CODE SECTION CITED

§ 3212.11. Lifeguards; skin cancer that develops or manifests itself during period of employment; compensation awarded for injury; months employed; rebuttable presumption

This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

Skin cancer so developing or manifesting itself 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 shall find in accordance with it. This presumption shall be extended to a lifeguard 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.

Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.

This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

(Added by Stats.2001, c. 846 (A.B.668), § 1.)

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
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March 12, 2003

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

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

Re: *Lifeguard Skin Cancer Presumption (K-14)*, 02-TC-16
Santa Monica Community College District, Claimant
Statutes 2001, Chapter 846 (AB 663)
Labor Code Section 3212.11

Dear Mr. Petersen:

Commission staff has reviewed the above-named test claim and determined that it is complete. A copy of the test claim is being provided to affected state agencies and interested parties because of their interest in the Commission's determination.

The key issues before the Commission are:

- Do the provisions listed above impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and costs mandated by the state pursuant to section 17514 of the Government Code?
- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?

The Commission requests your participation in the following activities concerning this test claim:

- **Informal Conference.** An informal conference may be scheduled if requested by any party. See Title 2, California Code of Regulations, section 1183.04 (the regulations).
- **State Agency Review of Test Claim.** State agencies receiving this letter are requested to analyze the merits of the test claim and to file written comments on the key issues before the Commission. Alternatively, if a state agency chooses not to respond to this request, please submit a written statement of non-response to the Commission. Requests for extensions of time may be filed in accordance with sections 1183.01 (c) and 1181.1 (g) of the regulations. State agency comments are due 30 days from the date of this letter.
- **Claimant Rebuttal.** The claimant and interested parties may file rebuttals to state agencies' comments under section 1183.02 of the regulations. The rebuttal is due 30 days from the service date of written comments.

- **Hearing and Staff Analysis.** A hearing on the test claim will be set when the draft staff analysis of the claim is being prepared. At least eight weeks before a hearing is conducted, the draft staff analysis will be issued to parties, interested parties, and interested persons for comment. Comments are due at least five weeks prior to the hearing or on the date set by the Executive Director, pursuant to section 1183.07 of the Commission's regulations. Before the hearing, a final staff analysis will be issued.
- **Mailing Lists.** Under section 1181.2 of the Commission's regulations, the Commission will promulgate a mailing list of parties, interested parties, and interested persons for each test claim and provide the list to those included on the list, and to anyone who requests a copy. Any written material filed on that claim with the Commission shall be simultaneously served on the other parties listed on the mailing list provide by the Commission.
- **Dismissal of Test Claims.** Under section 1183.09 of the Commission's regulations, test claims may be dismissed if postponed or placed on inactive status by the claimant for more than one year. Prior to dismissing a test claim, the Commission will provide 150 days notice and opportunity for other parties to take over the claim.

Note, on July 1, 2002, the City of Newport Beach filed the *Skin Cancer Presumption for Lifeguards* test claim (01-TC-27). If an affected state agency or interested party finds that the issues here are similar to 01-TC-27, a written statement may be submitted to the Commission incorporating by reference the comments filed in response to 01-TC-27. The Commission intends to consolidate these two test claims at the end of the comment period.

If the Commission determines that a reimbursable state mandate exists, the claimant is responsible for submitting proposed parameters and guidelines for reimbursing all eligible local entities. All interested parties and affected state agencies will be given an opportunity to comment on the claimant's proposal before consideration and adoption by the Commission.

Finally, the Commission is required to adopt a statewide cost estimate of the reimbursable state-mandated program within 12 months of receipt of an amended test claim. This deadline may be extended for up to six months upon the request of either the claimant or the Commission.

Please contact Nancy Patton at (916) 323-8217 if you have any questions.

Sincerely,

Shirley Opie

SHIRLEY OPIE
Assistant Executive Director

Enclosure: Copy of Test Claim

WORKING BINDER:
CHRON: ompleteltr.doc
DATE: 3/22/02 INITIAL: VS
MAILED: FAXED:

Original List Date: 3/12/2003 Mailing Information: Completeness Determination
Last Updated:
List Print Date: 03/12/2003
Claim Number: 02-TC-16
Issue: Lifeguard Skin Cancer Presumption (K-14)

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	
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Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Tel: (916) 646-1400 Fax: (916) 646-1300	
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	

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EXHIBIT C

DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

May 12, 2003

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of March 12, 2003, the Department of Finance has reviewed the test claim submitted by the Santa Monica Community College District (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 846, Statutes of 2001, (AB 663, Vargas) are reimbursable state mandated costs (Claim No. CSM-02-TC-16 "Lifeguard Skin Cancer Presumption (K-14)"). Commencing with page 6, of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- 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 skin cancer for lifeguards.
- Increased workers' compensation claims for skin cancer in lifeguards.
- Increased workers' compensation insurance coverage for lifeguards.
- Increased requirements for physical examinations prior to employment.
- Increased training to prevent the contraction of skin cancer.

As the result of our review, we have concluded that these statutes may have resulted in the following new state mandated program:

- Increased workers' compensation claims for skin cancer in lifeguards.

This new program may have resulted in establishing a presumption that the contraction of skin cancer occurring during the employee's service period arose out of and in the course of employment. This finding is consistent with our comments in the initial response to Claim No. CSM-01-TC-27, a similar claim filed by the City of Newport Beach. This claim, however, goes beyond CSM-01-TC-27 by asserting additional duties related to this mandate. We do not concur that the following constitute a new state mandated program or reimbursable mandate:

- 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 skin cancer for lifeguards.
- Increased requirements for physical examinations prior to employment.
- Increased training to prevent the contraction of skin cancer.
- Increased workers' compensation insurance coverage for lifeguards.

Although these programs are involved in the screening and protection of employees related to the contraction of skin cancer, the statutes cited in this claim do not require these duties and, therefore, these programs cannot be considered state reimbursable mandates as specified within this claim.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your March 12, 2003 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Jennifer Osborn, Principal Program Budget Analyst at (916) 445-8913 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF JENNIFER OSBORN
DEPARTMENT OF FINANCE
CLAIM NO. CSM-02-TC-16

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

Sacramento
at Sacramento, CA

Jennifer Osborn
Jennifer Osborn

PROOF OF SERVICE

Test Claim Name: Lifeguard Skin Cancer Presumption (K-14)
Test Claim Number: CSM-02-TC-16

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8th Floor, Sacramento, CA 95814.

On May 12, 2003, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

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

Mr. Keith B. Petersen
SixTen & Associates
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Ms. Cheryl Miller
Santa Monica Community College District
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Mr. Arthur Palkowitz
San Diego Unified School District
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Mr. Michael Havey
State Controller's Office (B-08)
Division of Accounting and Reporting
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Ms. Beth Hunter
Centration, Inc.
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Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 12, 2003 at Sacramento, California.

Mary Latorre

EXHIBIT D

SixTen and Associates
Mandate Reimbursement Services

TH B. PETERSEN, MPA, JD, President
3252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

June 9, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 02-TC-16
Santa Monica Community College District
Lifeguard Skin Cancer Presumption (K-14)

Dear Ms. Higashi:

I have received the comments of the Department of Finance ("DOF") dated May 12, 2003, to which I now respond on behalf of the test claimant.

Although none of the objections generated by DOF are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

1. **The Comments of the DOF are Incompetent and Should be Excluded**

Test claimant objects to the Comments of the DOF, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The DOF comments do not comply with this essential requirement.

2. The Test Claim Legislation and Regulations Create New Mandated Duties

DOF concurs that the test claim statutes may have resulted in a new state mandated program for increased workers compensation claims for skin cancer in lifeguards.

DOF disagrees that the test claim statutes have resulted in a new state mandated program for (1) increased workload associated with the development and periodic revision of policies and procedures related to those increased workers' compensation claims, (2) increased requirements for physical examinations prior to employment, (3) increased training to prevent the contraction of skin cancer, and (4) increased workers' compensation insurance coverage for lifeguards.

This response will not address items (1) or (3) as they are implicit activities which result from the new mandate.

(2) Increased Requirements for Physical Examinations Prior to Employment

Subdivision (c) of Labor Code Section 3212.11 provides:

> "Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation."

The practical application of this new statute is that an applicant for employment could already have skin cancer at the time of his or her application and, if hired, would benefit not only from the work-caused presumption, but also from the prohibition against raising the pre-existing condition as a defense. It is a reasonable precaution for these job applicants to be given physical examinations prior to employment to screen out this possible scenario.

(4) Increased Workers' Compensation Insurance Coverage

The test claim seeks reimbursement for:

> "In lieu of the additional cost of claims caused by skin cancer of its lifeguard employees, to pay the additional costs of insurance premiums covering those injuries pursuant to Labor Code Section 3212.11[1]

[1] Test Claim, Page 6, Line 18 through Page 7, Line 2.

While admitting that the test claim legislation may have resulted in a new state mandated program for paying the cost of increased workers' compensation claims, the DOF disagrees that, "*in lieu of*" the costs of those increased claims, these costs may best be paid through increased costs of insurance against those increased claims. If the costs of those claims are reimbursable, then the costs of insuring against those claims is also reimbursable. Workers' compensation insurance is a reasonable method of insurance risk management.

The response of the DOF should be ignored as legally incompetent for its failure to comply with Section 1183.02 of Title 5, California Code of Regulations and its response is legally and factually incorrect.

CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

Original List Date: 3/12/2003
Last Updated:
List Print Date: 04/17/2003
Claim Number: 02-TC-16
Issue: Lifeguard Skin Cancer Presumption (K-14)

Mailing Information: Other

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.)

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Ms. Susan Geanacou
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Sacramento, CA 95814
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Fax: (916) 324-4888

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

September 28, 2004

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

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

Re: *Lifeguard Skin Cancer Presumption (K-14)*; 02-TC-16
Santa Monica Community College District, Claimant
Statutes 2001, Chapter 846 (AB 663)
Labor Code Section 3212.11

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 **October 18, 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)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing **November 18, 2004,** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about October 28, 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 Katherine Tokarski, Commission Counsel, at (916) 323-3562 if you have any questions.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enc.

MAILED: ✓ FAXED:
DATE: 9/28/11 INITIAL: VS
CHRON: FILE: ✓
WORKING BINDER:

ITEM ___
TEST CLAIM
DRAFT STAFF ANALYSIS

Labor Code Section 3212.11

Statutes 2001, Chapter 846 (AB 663)

Lifeguard Skin Cancer Presumption (K-14) (02-TC-16)

Santa Monica Community College District, Claimant

EXECUTIVE SUMMARY

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

STAFF ANALYSIS

Claimant

Santa Monica Community College District

Chronology

02/27/03	Commission receives test claim filing
03/12/03	Commission staff determines test claim is complete and requests comments
04/16/03	Department of Finance requests a one-month extension of time for comments
04/17/03	Commission staff grants the extension of time
05/15/03	Department of Finance files response to test claim
06/13/03	Claimant files response to Department of Finance comments

Background

On July 1, 2002, the Commission received a test claim filing on behalf of claimant, City of Newport Beach, entitled *Skin Cancer Presumption for Lifeguards* (01-TC-27). On February 27, 2003, the Commission received a test claim filing, *Lifeguard Skin Cancer Presumption (K-14)* (02-TC-16), on behalf of claimant Santa Monica Community College District. Although the same statutory provision is involved, these two test claims were not consolidated. Both test claims address an evidentiary presumption given to state and local lifeguards 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 usually 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, primarily fire and safety personnel, by establishing a series of presumptions.[2] 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.)

In 2001, the Legislature passed Assembly Bill 663, adding section 3212.11 to the Labor Code. For the first time, publicly-employed lifeguards were granted a rebuttable presumption that skin cancer developing or manifesting during or for a defined period immediately following employment "shall be presumed to arise out of and in the course of employment." Under the statute, the employer may offer evidence disputing the presumption.

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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.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts the following:

> [The test claim legislation] mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for lifeguards as a result of the new presumption that skin cancer developing or manifesting itself during employment arose out of or in the course of employment and the prohibition from claiming the injury may be attributed to a pre-existing disease or condition.[3]

The claimant further argues that the test claim legislation newly requires the following activities or costs:

- develop and update policies and procedures for handling lifeguard workers' compensation claims alleging skin cancer arising from his or her employment;
- all of the costs associated with payment of the claims caused by the shifting of the burden of proof and by the prohibition of the use of a pre-existing condition defense, *or* payment of the additional costs of insurance premiums to cover such claims.
- physical examinations to screen lifeguard applicants for pre-existing skin cancer;
- training lifeguards to take precautionary measures to prevent skin cancer on the job.

State Agency's Position

The Department of Finance filed comments dated May 12, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program for increased workers' compensation claims for skin cancer in lifeguards. However, the Department of Finance disputes any additional duties identified by the claimant on the grounds that the test claim statute does not expressly require them.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "Its

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[3] Test Claim, page 2.

[4] 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 affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or

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."[6] 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.[7] 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.[8]

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.[9] 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.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

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.[13] In making its

---

(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

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

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

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

[8] *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*).

[9] *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.)

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

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

[12] *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.

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

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."[14]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Staff finds that the test claim legislation 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.

Labor Code section 3212.11, as added by Statutes 2001, chapter 846, provides:

> This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.
>
> Skin cancer so developing or manifesting itself 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 shall find in accordance with it. This presumption shall be extended to a lifeguard 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.
>
> Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.
>
> This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> Prior to 1975, there was no statute, code section or regulation that created a presumption that skin cancer developing or manifesting itself on lifeguards arose out of or in the course of their employment with the district. Nor was there any statute, code section, or regulation which prohibited such skin cancer from being attributed to a pre-existing disease or condition.[15]

Although it is true that the legal presumption in favor of the lifeguard employee is new to the 2001 law, the claimant reads requirements into Labor Code section 3212.11, which, by the plain

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[14] *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.

[15] Test Claim, page 3.

meaning of the statute, are not there. Nothing in the statute mandates public employers of lifeguards to develop policies and procedures to handle lifeguard workers' compensation claims. Nothing in the language of Labor Code section 3212.11 requires a pre-employment physical exam for lifeguards, nor requires the employer to offer training on skin cancer prevention. While all of these "new activities" may be prudent, they are solely undertaken at the discretion of the employing agency, and are not mandated by the state.

Labor Code section 3208, as last amended in 1971, specifies that for the purposes of workers' compensation, "Injury' includes *any* injury or disease arising out of the employment." [Emphasis added.] Assembly Bill 663's sponsor, the California Independent Public Employees Legislative Counsel, stated that since 1985, one-third of the 30 City of San Diego lifeguards who received industrial disability did so due to skin cancer.[16] Thus, public lifeguards' ability to make a successful workers' compensation claim for an on-the-job injury from skin cancer predates the 2001 enactment of Labor Code section 3212.11.

The express language of Labor Code section 3212.11 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 is non-industrial remains entirely with the local agency. The plain language of Labor Code section 3212.11 states that the "presumption is disputable and *may* be controverted by other evidence ..." [Emphasis added.]

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][17]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[18] Consistent with this principle, the courts have strictly construed the meaning and effects of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under

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[16] Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Assembly Bill No. 663 (2001-2002 Reg. Sess.), page 4, September 7, 2001.

[17] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[18] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

> our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[19]

This is further supported by the California Supreme Court's decision in *Kern High School Dist.*[20] In *Kern High School Dist.*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[21] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[22]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.[23] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *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. (Emphasis in original.)[24]

Thus, the Supreme Court held as follows:

> [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 programs in which claimants have participated; *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][25]

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[19] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[20] *Kern High School Dist., supra*, 30 Cal.4th 727.

[21] *Id.* at page 737.

[22] *Ibid.*

[23] *Id.* at page 743.

[24] *Ibid.*

[25] *Id.* at page 731.

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[26]

The decision of the California Supreme Court in *Kern High School Dist.* is relevant and its reasoning applies in this case. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[27] Thus, based on the Supreme Court's decision, the Commission must determine if the underlying program (in this case, the decision to rebut the presumption that the cancer is an industrial injury) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not legally compelled by state law to dispute a workers' compensation case. The decision to litigate such cases is made at the local level and is within the discretion of the district. Thus, the employer's burden to prove that the skin cancer is not arising out of and in the course of employment is also not state-mandated.

Further, there is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that districts will incur increased costs from workers' compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[28]

Most recently in *San Diego Unified School Dist., supra,* 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services,* this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

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[26] *Ibid.*

[27] *Id.* at page 743.

[28] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th at page 735.

Prior Test Claim Decisions on Cancer Presumptions

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 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 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 3212.1, 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.

However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, the California the California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.[29] In *Weiss v. State Board of Equalization*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated, in pertinent part, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [30]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor

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[29] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

[30] *Id.* at page 776.

unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[31] While opinions of the Attorney General are not binding, they are entitled to great weight.[32]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 are not arbitrary or unreasonable as long as the decision strictly construes the Constitution and the statutory language of the test claim statute, and does not apply section 6 as an equitable remedy.[33] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow. In addition, the Commission followed this same analysis in its most recent decisions regarding the issue of reimbursement for cancer presumption statutes.[34]

Accordingly, staff finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on school districts.

CONCLUSION

Staff concludes that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, 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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[31] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

[32] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

[33] *City of San Jose, supra,* 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

[34] Test claim *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) was denied at the May 27, 2004 Commission hearing, and *Cancer Presumption (K-14)* (02-TC-15) was denied at the July 29, 2004 Commission hearing.

ATTACHMENT

BILL ANALYSIS

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	AB 663

THIRD READING

Bill No: AB 663
Author: Vargas (D), et al
Amended: 8/31/01 in Senate
Vote: 21

SENATE LABOR & INDUSTRIAL RELATIONS COMMITTEE : 5-3, 6/27/01
AYES: Alarcon, Figueroa, Kuehl, Polanco, Romero
NOES: Margett, McClintock, Oller

SENATE APPROPRIATIONS COMMITTEE : 8-4, 9/6/01
AYES: Alpert, Bowen, Burton, Escutia, Karnette, Murray, Perata, Speier
NOES: Battin, Johannessen, McPherson, Poochigian

ASSEMBLY FLOOR : 53-14, 6/5/01 - See last page for vote

SUBJECT : Workers' compensation: lifeguards

SOURCE : California Independent Public Employees Legislative Council

DIGEST : This bill creates a disputable presumption that skin cancer developing or manifesting itself with respect to specified lifeguards arises out of and in the course of employment.

ANALYSIS : If specified public safety personnel (peace officers and firefighters) suffer a hernia, heart trouble,

CONTINUED

pneumonia, cancer, tuberculosis, hepatitis, or meningitis, the injury or illness is presumed to be compensable if the problem develops or manifests itself during a period of service by the worker. Other evidence may controvert the presumption. If not controverted, the Workers' Compensation Appeals Board is bound to find that the injury or illness "arose out of and in the course of employment." Thus, it becomes compensable.

These presumptions apply to, among others, full or part-time law enforcement personnel employed by a sheriff or a police department and firefighters employed by any city, county or district fire departments. The presumptions do not apply to employees whose principal duties are clerical and clearly do not fall within the scope of active law enforcement or firefighting duties. Generally, the presumptions extend to a period beyond employment equaling three months for each year of service, but not more than five years.

This bill:

1. Provides, with respect to active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and active state lifeguards employed by the State Department of Parks and Recreation, the term "injury," includes skin cancer that develops and manifests itself during the period of the lifeguard's employment.

   The compensation awarded for this injury includes full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

2. Provides that the skin cancer so developing or manifesting itself 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 shall find in accordance with it. This presumption shall be extended to a lifeguard 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.

Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.

3. Provides that the bill applies only to lifeguards employed for more than three consecutive months in a calendar year.

Comments

Skin cancer is a malignant growth on the skin. The skin has two main layers and several types of cells. The top layer of skin is called epidermis. It contains the following three types of cells: (1) flat, scaly cells on the surface called squamous cells, (2) round cells called basal cells, and (3) cells called melanocytes, which give skin its color. The most common skin cancers are basal cell cancer and squamous cell cancer. Melanoma is a disease in which cancer (malignant) cells are found in melanocytes. Melanoma is sometimes called cutaneous melanoma or malignant melanoma. Melanoma is a more serious type of cancer than the more common skin cancers, basal cell cancer or squamous cell cancer. Sunburn and ultraviolet light can damage the skin, and this damage can lead to skin cancer. People with fair skin, with a northern European heritage appear to be more susceptible.

Prior Legislation

SB 424 (Burton) -- lower back impairment presumption for certain law enforcement personnel.

SB 1176 (Machado and Burton) -- extends the cancer presumption to specified peace officers.

SB 1222 (Romero) -- creates a hernia, heart trouble, pneumonia, tuberculosis, meningitis, and hepatitis presumption for certain members of the State Department of Corrections, the State Department of the Youth Authority, and specified peace officers.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: No

The estimates for increased claims for Workers' Compensation from state employees that would result from the extended presumptions are unknown, but potentially significant. Local estimates range from $2 million to $6 million per year.

The state is not insured and pays Workers' Compensation claims directly.

SUPPORT : (Verified 9/4/01)

California Independent Public Employees Legislative Council (source)
California Applicants' Attorneys Association
California Labor Federation, AFL-CIO
California State Firefighters' Association
Los Angeles County Lifeguard Association
Peace Officers Research Association of California

OPPOSITION : (Verified 9/4/01)

California Association of Recreation and Park Districts
California Special Districts Association
California State Association of Counties
California Taxpayers' Association
League of California Cities
Los Angeles County Board of Supervisors

ARGUMENTS IN SUPPORT : The California Independent Public Employees Legislative council (Council) is the sponsor of this bill and seeks to provide parity for local and state government lifeguards with local and state firefighters and peace officers who are covered by various presumptions. The Council states that lifeguards work in environments and respond to situations that are hazardous and provide exposure to ultraviolet rays, chemical spills, contaminated water, and transmission of infected blood and tissues. The Council states that the City of San Diego there have been 30 industrial disability retirements since 1985, and one-third of those were due to skin cancer and another

third to back injuries.

California's lifeguards annually perform more than 12,000 swimmer rescues, 6,000 medical aides, swift water and flood rescues, technical cliff rescues and the full range of law enforcement duties. Despite this, lifeguards are not awarded the same protection as peace officers under worker's compensation law.

ARGUMENTS IN OPPOSITION : The League of California Cities and the California State Association of Counties (CSAC) oppose this bill because it creates a process under which a lifeguard can claim workers' compensation benefits based on a presumptive injury. It is impossible to disprove that an "injury," as defined in this bill, developed ruing the course of one's lifeguarding duties and subjects the public agency to costly claims that have no job causation. Further, do the lifeguards that desire to be included in this bill have higher incident rates for these conditions? Finally, the League of California Cities and CSAC believe that proponents of this bill should demonstrate through reliable medical and statistical studies that this presumption is warranted.

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Calderon, Canciamilla, Cardenas, Cardoza, Chan, Chavez, Chu, Cogdill, Cohn, Corbett, Correa, Diaz, Dutra, Firebaugh, Florez, Frommer, Goldberg, Havice, Horton, Jackson, Keeley, Kehoe, Koretz, La Suer, Liu, Longville, Lowenthal, Maddox, Maldonado, Migden, Nakano, Nation, Negrete McLeod, Oropeza, Robert Pacheco, Papan, Pavley, Pescetti, Reyes, Salinas, Shelley, Simitian, Steinberg, Strom-Martin, Thomson, Vargas, Wayne, Wesson, Wiggins, Wright, Hertzberg
NOES: Aanestad, Ashburn, Bogh, Briggs, Daucher, Dickerson, Harman, Hollingsworth, Kelley, Leslie, Matthews, Rod Pacheco, Runner, Wyman

NC:cm 9/7/01 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Original List Date: 3/12/2003
Last Updated: 6/14/2004
List Print Date: 09/28/2004
Claim Number: 02-TC-16
Issue: Lifeguard Skin Cancer Presumption (K-14)

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.)

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EXHIBIT F

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October 7, 2004

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Test Claim 02-TC-16
Santa Monica Community College District
Lifeguard Skin Cancer Presumption (K-14)

Dear Ms. Higashi:

I have received the draft staff analysis to the above referenced test claim and respond on behalf of Santa Monica Community College District, test claimant.

The staff analysis concludes that the test claim statute "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." As will be shown, the staff reasons for that conclusion are erroneous.

1. School Districts are Practically Compelled to Perform the Claimed Activities

Staff admits that the test claim legislation is new but that the language of Labor Code section 3212.11 does not impose any state-mandated requirements on school districts. Adopting a "lay down and play dead" philosophy staff claims:

> "Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the local agency. The plain language of Labor Code section 3212.11 states that the 'presumption is disputable and *may* be controverted by other evidence. . ." (Staff analysis, at page 6, emphasis in the original)

Staff goes on the argue:

> ". . .the Commission must determine if . . .the decision to rebut the presumption that the cancer is an industrial injury. . .is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not legally compelled by state law to dispute a workers' compensation case. The decision to litigate such cases is made at the local level and is within the discretion of the district. Thus, the employer's burden to prove that the skin cancer is not arising out of and in the course of employment is also not state-mandated." (Staff analysis, at page 8)

As the legal basis of this passive interpretation, staff cites *Department of Finance v. Commission on State Mandates* (2004) 30 Cal.4th 727 (hereinafter "*Kern*") The staff analysis partially recites a portion of "*Kern*":

> "The Supreme Court left undecided whether a reimbursable state mandate 'might be found in circumstances short of legal compulsion - for example, if the state were to impose a substantial penalty. . . upon any local entity that declined to participate in a given program." (Staff analysis, at page 8)

From this partial quotation, Staff concludes ". . .there is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to dispute such cases."

By relying solely on the absence of a "substantial penalty," staff misinterprets the law on practical compulsion.

The controlling case law on the subject of legal compulsion, vis-a-vis nonlegal compulsion, is still *City of Sacramento v. State of California* (1990) 50 Cal.3rd 51 There, at page 76 the court concluded that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or

comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

So it can be seen that a complete analysis should also determine whether the design of the test claim legislation "suggests an intent to coerce" and "any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." The Staff analysis ignores the true rule of law by limiting its analysis only to looking for a "penalty."

The staff suggestion that school districts are not legally compelled by state law to contest a workers' compensation case totally disregards the "practical consequences" of a so-called "decision" not to contest such a claim. The "practical consequences" of any such "decision" not to contest such a claim would be a breach of trust to its taxpayer constituency to safeguard the district from false or unfounded claims. Thus, staff ignores the practical implications of the shift of the presumption when it argues that "[W]hile all of these 'new activities' may be prudent, they are solely undertaken at the discretion of the employing agency, and are not mandated by the state." The test claim activities are not merely "prudent," they are practically compelled because the practical consequences of nonparticipation, noncompliance, or withdrawal would be financial irresponsibility.

2. The Test Claim Activities Increase the Level of Quality of Governmental Services Provided

Staff next quotes only a portion of a recent decision of the California Supreme Court. *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859 (Hereinafter, "*San Diego Unified*") The quoted paragraph is immediately followed by the following (which was not quoted by staff):

> "By contrast, Courts of Appeal have found a reimbursable 'higher level of service' concerning an existing 'program' when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided. In *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d 521, 537-538* (Carmel Valley), for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a

higher level of service to the public, thereby satisfying the first alternative test set out in *County of Los Angeles* (citation). . ."

Note that in *Carmel Valley* the executive order required protective clothing and safety equipment, obviously for the protection and safety of the firefighters. The *Carmel Valley* court was able to conclude that protective clothing and safety equipment for the protection and safety of firefighters was the legal equivalent of providing a higher level of service to the public.[1]

Here, in this test claim, the test claim legislation is for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public.

In "*San Diego Unified*" the court agreed that the mandatory aspect of the Education Code section in question, insofar as it compels suspension and mandates an expulsion recommendation for firearm possession, carries out a governmental function of providing services to the public and hence constitutes an increased or higher level of service concerning an existing program, holding, in essence, that the matter is more analogous to *Carmel Valley* and *Long Beach*[2] than to *County of Los Angeles*[3], *City of Sacramento*[4] and *City of Richmond*[5].

Likewise, the instant test claim legislation is also for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public.

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[1] This transition of finding a benefit to the employee to also be a higher of level of service to the public is not always without difficulty. Note that the Supreme Court in "*San Diego Unified*" opinion actually states ". . . the mandate 'evidently' was intended to produce a higher level of service to the public. . ."

[2] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155

[3] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46

[4] Supra

[5] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190

3. The Proposed Action by Staff is Arbitrary and Unreasonable

Staff attempts to explain away why the prior decisions of the Commission on the Firefighter's Cancer Presumption and the Cancer Presumption for Peace Officers should not be considered in this test claim. Staff argues that the failure of a quasi-judicial agency to consider prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency citing *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772. (Hereinafter, "*Weiss*")

The *Weiss* opinion states the whole rule:

> "Probably deliberate change in or deviation from established administrative policy should be permitted *so long as the action is not arbitrary or unreasonable.* This is the view of most courts. (Citations)" *Weiss v. State Board of Equalization* (supra, at page 777, emphasis supplied)

The rule of law which is the subject of this issue is the rule of *"stare decisis".*[6] The *Weiss* court explained why the rule exists: "Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily." The California Supreme Court recently explained:

> "...the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law'." *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 504.

So Staff is mistaken when it asserts that *Weiss* holds that the failure of a quasi-judicial agency to consider prior decisions is not a violation of due process and does not constitute an arbitrary action by the agency, when the decision actually states it is "probably" permissible so long as the action is not arbitrary or unreasonable, and that

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[6] "New Latin, to stand by things that have been settled: the doctrine under which courts adhere to precedent on questions of law in order to insure certainty, consistency, and stability in the administration of justice with departure from precedent permitted for compelling reasons (as to prevent the perpetuation of injustice)." Merriam-Webster's Dictionary of Law © 1996

same decision states that "to adopt different standards for similar situations is to act arbitrarily."

Reliance on prior decisions is also a factor:

> "The significance of stare decisis is highlighted when legislative reliance is potentially implicated. (citation) Certainly, '[s]*tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Sierra Club v. San Joaquin Local Agency Formation Commission* (supra, at 504)

An acceptable analysis, then, needs to concentrate on the facts before coming to a conclusion whether or not the action taken is arbitrary or unreasonable. In *Weiss*, there was no element of reasonable reliance. The plaintiff was seeking a liquor license near a school and complained that denial was unreasonable when other businesses had been granted licenses before him. The court, in *Weiss*, answered this argument with "[H]ere the board was not acting arbitrarily even if it did change its position because it may have concluded that another license would be too many in the vicinity of the school." (Opinion, at page 777) Simply stated, the *Weiss* court held that the licensing board had a rational reason for acting as it did.

Staff has offered no compelling reason[7] (because there is none) why mandated activities of district peace officers were reimbursable in previous rulings and now similar activities of district lifeguards are not reimbursable, other than what appears to be a whim or current fancy. This 180-degree change of course does not insure certainty, consistency and stability in the administration of justice. This comes square within the *Weiss* explanation that "to adopt different standards for similar situations is to act arbitrarily."

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[7] Test claimant anticipates that Staff will respond that its compelling reason is that a recent decision of the Supreme Court ("*Kern*", *supra*) establishes a new rule of law, i.e., discretionary activities of local agencies are not reimbursable. To the contrary, this has been the law since 1984. *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Lifeguard Skin Cancer Presumption (K-14) 02-TC-16
CLAIMANT: Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of October 7, 2004, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

AND per mailing list attached

FAX: (916) 445-0278

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 10/7/04, at San Diego, California.

D Bramwell
Diane Bramwell

Original List Date: 3/12/2003
Last Updated: 6/14/2004
List Print Date: 09/28/2004
Claim Number: 02-TC-16
Issue: Lifeguard Skin Cancer Presumption (K-14)

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.)

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2 of 6 DOCUMENTS

SIERRA CLUB et al., Plaintiffs and Appellants, v. SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION, Defendant and Respondent; CALIFIA DEVELOPMENT GROUP et al., Real Parties in Interest and Respondents.

No. S072212.

SUPREME COURT OF CALIFORNIA

21 Cal. 4th 489; 981 P.2d 543; 87 Cal. Rptr. 2d 702; 1999 Cal. LEXIS 5313; 99 Cal. Daily Op. Service 6719; 99 Daily Journal DAR 8553

August 19, 1999, Decided

PRIOR HISTORY: Superior Court of San Joaquin County. Super. Ct. No. CV001997. Bobby W. McNatt, Judge.

DISPOSITION: The judgment of the Court of Appeal is reversed, and the cause is remanded for further proceedings in accordance with this decision.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, an environmental organization, interested individuals, and a local foundation, appealed from a decision of the California Court of Appeal that affirmed a trial court order of dismissal for respondent party in interest which found that the Alexander rule required that a local agency formation commission (LAFCO) undertake reconsideration of an adverse resolution before an aggrieved person could file for relief in the courts.

OVERVIEW: Plaintiffs objected to approval of a city's annexation of territory for a wastewater treatment facility and a development project at LAFCO proceedings. The county LAFCO approved the projects over plaintiffs' objections. Plaintiffs requested reconsideration of the LAFCO decision by letter, then withdrew that request and filed a mandamus petition in the state courts against respondents alleging a lack of substantial evidence to support their finding of overriding considerations with respect to the environmental impacts and, alternatively, that the LAFCO had failed to follow applicable statutory provisions related to territory annexation. One respondent filed a motion to dismiss contending the Alexander rule required exhaustion of agency reconsideration prior to judicial review in the courts. The trial court granted respondent's dismissal motion which was affirmed on appeal. The state supreme court granted plaintiffs' petition for review, and reversed and remanded. The court, stating its decision applied retroactively, overruled Alexander and found that reconsideration was not always prerequisite for judicial review of administrative rulings presenting no new information.

OUTCOME: Judgment of the appeals court was reversed, and the case was remanded for further proceedings in accordance with the court's decision overruling Alexander, and holding that subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency was not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.

LexisNexis(R) Headnotes

Administrative Law > Agency Adjudication > Review of Initial Decisions
Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
[HN1] When the legislature provides that a petitioner before an administrative tribunal "may" seek reconsideration or rehearing of an adverse decision of that tribunal, the petitioner always must seek reconsideration in order to exhaust his or her administrative remedies prior to seeking recourse in the courts.

Governments > Local Governments > Administrative Boards
[HN2] A LAFCO annexation determination is quasi-legislative; judicial review thus arises under the ordinary mandamus provisions of Cal. Code Civ. P. § 1085, rather than the administrative mandamus provisions of Cal. Civ. Code § 1094.5.

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN3] See *Cal. Gov't. Code § 56857(a).*

Administrative Law > Judicial Review >

Reviewability > Exhaustion of Remedies
[HN4] That failure to exhaust administrative remedies is a bar to relief in a California court is long the general rule.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
[HN5] The general rule that exhaustion of administrative remedies is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, follows under the doctrine of stare decisis, and is binding upon all courts. Exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
[HN6] The rule that administrative remedies must be exhausted before redress may be had in the courts is established in California.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
[HN7] The Alexander rule suffers from several basic flaws. First, the Alexander rule might easily be overlooked, even by a reasonably alert litigant. At the most basic level, when a party is given ostensibly permissive statutory authorization to seek reconsideration of a final decision, that he or she is affirmatively required to do so in order to obtain recourse to the courts is not intuitively obvious. Even to attorneys, the word "may" ordinarily means just that. It does not mean "must" or "shall."

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN8] Under the Administrative Procedures Act, a rehearing opportunity styled as permissive is actually permissive, and not a mandatory prerequisite to court review. *Cal. Gov't. Code §11523.*

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
[HN9] Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. It can serve as a preliminary administrative sifting process unearthing the relevant evidence and providing a record which the court may review.

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN10] The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive legal arguments is small. Indeed, no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute, Cal. Code Civ. P. §1008.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
[HN11] Cal. Gov't. Code § 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. This overrules any contrary case law implication.

Governments > Courts > Judicial Precedents
[HN12] The doctrine of stare decisis, is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. It is likewise well established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately to depart from, its own prior precedent in an appropriate case. Although the doctrine of stare decisis does indeed serve important values, it nevertheless should not shield court-created error from correction.

Governments > Courts > Judicial Precedents
[HN13] The significance of stare decisis is highlighted when legislative reliance is potentially implicated. Stare decisis adds force when the legislature, in the public sphere, and citizens, in the private realm, acts in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

Governments > Courts > Common Law
[HN14] The legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors.

Governments > Legislation > Interpretation
[HN15] In the absence of compelling language in the statute to the contrary, it will be assumed that the legislature adopts the proposed legislation with the intent and meaning expressed by the council in its report.

Governments > Courts > Judicial Precedents
[HN16] A decision of the California state supreme court overruling one of its prior decisions ordinarily applies retroactively.

Governments > Courts > Authority to Adjudicate
Governments > Courts > Judicial Precedents
[HN17] A court may decline to follow the standard rule when retroactive application of a decision would raise

substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts look to the hardships imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases.

Governments > Courts > Authority to Adjudicate
[HN18] The California state supreme court deems it preferable to apply its decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
[HN19] Subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
[HN20] A rehearing petition is necessary to call to the agency's attention errors or omissions of fact or law in the administrative decision itself that are not previously addressed in the briefing, in order to give the agency the opportunity to correct its own mistakes before those errors or omissions are presented to a court. The general exhaustion rule remains valid: administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum.

COUNSEL:

Brandt-Hawley & Zoia and Susan Brandt-Hawley for Plaintiffs and Appellants.

Nancy N. McDonough and David Guy for Plaintiff and Appellant San Joaquin Farm Bureau Federation.

Remy, Thomas and Moose, Michael H. Remy, James G. Moose, John H. Mattox and Lee Axelrad for the Planning and Conservation League as Amicus Curiae on behalf of Plaintiffs and Appellants.

Herum, Crabtree, Dyer, Zolezzi & Terpstra, Steven A. Herum and Thomas H. Terpstra for Defendant and Respondent and for Real Parties in Interest and Respondents Gold Rush City Holding Company, Inc., and Califia Development Group.

Susan Burns Cochran, City Attorney, for Real Party in Interest and Respondent City of Lathrop.

Van Bourg, Weinberg, Roger & Rosenfeld and Sandra Rae Benson for the Northern California District Council of Laborers as Amicus Curiae on behalf of Defendant and Respondent and Real Parties in Interest and Respondents.

Meyers, Nave, Riback, Silver & Wilson, Andrea J. Saltzman and Rick W. Jarvis for Seventy Four California Cities as Amicus Curiae on behalf of Real Parties in Interest and Respondents.

JUDGES: Opinion by Werdegar, J., expressing the unanimous view of the court.

OPINIONBY: WERDEGAR

OPINION: [*493] [**545] [***705]

WERDEGAR, J.

In *Alexander v. State Personnel Bd. (1943) 22 Cal. 2d 198 [137 P.2d 433]* (*Alexander*), we held that [HN1] when the Legislature has provided that a petitioner before an administrative tribunal "may" seek reconsideration or rehearing n1 of an adverse decision of that tribunal, [**546] the petitioner always must seek reconsideration in order to exhaust his or her administrative remedies prior to seeking recourse in the courts. The *Alexander* rule has received little attention since its promulgation, and several legal scholars and at least one Court of Appeal have expressed the belief that the rule has been abandoned or legislatively abrogated. That conclusion was premature; the rule remains controlling law. However, as it serves little practical purpose and is inconsistent with procedure in parallel contexts, we hereby abandon it. This is not to say that reconsideration of agency actions need never be sought prior to judicial review. Such a request is necessary [*494] where appropriate to raise matters not previously brought to the agency's attention. We simply see no necessity that parties file pro forma requests for reconsideration raising issues already fully argued before the agency, and finally decided in the administrative decision, solely to satisfy the procedural requirement imposed in *Alexander*.

n1 The terms "reconsideration" and "rehearing" are used interchangeably by the literature and case authority in this area, as well as by the parties to this appeal. Perceiving no fundamental difference between the two terms for purposes of this case,

we will do the same.

I. FACTUAL AND PROCEDURAL HISTORY

In early 1996, the City of Lathrop (City) approved a proposal for a large development project on several thousand acres of farmland outside of city limits. A plan was approved, an environmental impact report (EIR) was certified, and a development agreement was executed. A second plan was approved to double the capacity of the City's wastewater treatment facility, [***706] and a separate EIR was certified for that project.

Proceedings were commenced before the San Joaquin Local Agency Formation Commission (SJLAFCO) to obtain approval of the City's annexation of the territory. The Sierra Club, the San Joaquin Farm Bureau Federation, Eric Parfrey and Georgianna Reichelt (collectively petitioners) objected in that proceeding. SJLAFCO overruled their objections and approved the proposed annexation; it also adopted a finding of overriding considerations with regard to the environmental impacts identified in the EIR.

Parfrey sent a letter to SJLAFCO requesting reconsideration of the approval. In the letter he asserted the required $700 filing fee for the reconsideration would be forthcoming. The next day he withdrew his request and, together with the other petitioners, filed this mandamus petition in the superior court. The suit named SJLAFCO as respondent, and various developers including Califia Development Group (Califia), the City and others as real parties in interest. The petition alleged a lack of substantial evidence to support the finding of overriding considerations with respect to the environmental impacts identified in the EIR and, alternatively, that SJLAFCO failed to follow the applicable statutory provisions related to territory annexation.

Califia moved to dismiss the petition. Observing that *Government Code section 56857*, subdivision (a) provides that an aggrieved person may request reconsideration of an adverse local agency formation commission (LAFCO) resolution, Califia argued that under the authority of *Alexander*, *supra*, 22 Cal. 2d at page 200, such a request is a mandatory prerequisite to filing in the courts. Petitioners responded that the *Alexander* rule is no longer good law, as reflected in *Benton v. Board of Supervisors (1991) 226 Cal. App. 3d 1467, 1475 [277 Cal. Rptr. 481]*. The trial court granted the motion to dismiss. [*495]

The Court of Appeal affirmed. The majority concluded dismissal was compelled by *Alexander*, despite its view that the *Alexander* rule is "outmoded" and "presents a fitful trap for the unwary." We granted review.

II. THE LAFCO STATUTORY SCHEME

LAFCO's are administrative bodies created pursuant to the Cortese-Knox Local Government Reorganization Act of 1985 (*Gov. Code, § 56000* et seq.) to control the process of municipality expansion. The purposes of the act are to encourage "planned, well-ordered, efficient urban development patterns with appropriate consideration of preserving open-space lands within those patterns" (*id.*, § 56300), and to discourage urban sprawl and encourage "the orderly formation and development of local agencies based upon local conditions and circumstances" (*id.*, § 56301). (1) [HN2] A LAFCO annexation determination is quasi-legislative; judicial [**547] review thus arises under the ordinary mandamus provisions of *Code of Civil Procedure section 1085*, rather than the administrative mandamus provisions of *Code of Civil Procedure section 1094.5*. (*City of Santa Cruz v. Local Agency Formation Com. (1978) 76 Cal. App. 3d 381, 387, 390 [142 Cal. Rptr. 873].)*

[HN3] *Government Code section 56857*, subdivision (a) provides: "Any person or affected agency *may* file a written request with the executive officer requesting amendments to or reconsideration of any resolution adopted by the commission making determinations. The request shall state the specific modification to the resolution being requested." (Italics added.) Such requests must be filed within 30 days of the adoption of the LAFCO resolution, and no further action may be taken on the annexation until the LAFCO has acted on the request. (*Id.*, subds. (b), (c).) Nothing in the statutory scheme explicitly states that an aggrieved party must seek rehearing prior to filing a court action.

[***707] III. THE *ALEXANDER* RULE

(2) [HN4] That failure to exhaust administrative remedies is a bar to relief in a California court has long been the general rule. In *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280 [109 P.2d 942, 132 A.L.R. 715]* (*Abelleira*), a referee issued a ruling awarding unemployment insurance benefits to striking employees. The affected employers filed a petition for a writ of mandate without first completing an appeal to the California Employment Commission, as required by the statutory scheme. The appellate court issued an alternative writ and a temporary restraining order blocking payment of the benefits. We, in turn, issued a peremptory writ of prohibition restraining the appellate court from enforcing its writ and order. In so doing, we stated [HN5] [*496] the general rule that exhaustion of administrative remedies "is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts. . . . [E]xhaustion of the

administrative remedy is a jurisdictional prerequisite to resort to the courts." (*Id. at p. 293*, italics in original.)

The employers in *Abelleira* argued that completing the administrative process would have been futile because the commission had already ruled against their position in prior decisions based upon similar facts. We rejected this argument, noting that a civil litigant is not permitted to bypass the superior court and file an original suit in the Supreme Court merely because the local superior court judge might be hostile to the plaintiff's views. "The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide." (*Abelleira, supra*, 17 Cal. 2d at p. 301.)

We then stated: "It should be observed also that this argument is completely answered by those cases which apply the rule of exhaustion of remedies to rehearings. Since the board has already made a decision, if the argument of futility of further application were sound, then surely this is the instance in which it would be accepted. (3) But it has been held that where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made: [Citations.]" (*Abelleira, supra*, 17 Cal. 2d at pp. 301–302.)

Two years later we issued *Alexander, supra*, 22 Cal. 2d 198. In that case two civil service employees sought a writ of mandate directing the State Land Commission to reinstate them after the State Personnel Board had upheld their dismissals in an administrative proceeding. The Civil Service Act at the time provided that employees "may apply" for a rehearing within 30 days of receiving an adverse decision of the State Personnel Board. The employees did not seek rehearing before filing the writ petition, and the deadline for doing so passed. The trial court sustained the defendants' demurrer. (*Id.* at p. 199.)

[**548] We affirmed. [HN6] "The rule that administrative remedies must be exhausted before redress may be had in the courts is established in this state. (*Abelleira v. District Court of Appeal, 17 Cal. 2d 280 [109 P.2d 942, 132 A.L.R. 715]*; [*497] and cases cited at pages 292, 293, 302.) The provision for a rehearing is unquestionably such a remedy. . . . [P] The petitioners ask this court to distinguish between a provision in a statute which requires the filing of a petition for rehearing before an administrative board as a condition precedent to commencing proceedings in the courts [citations], and a provision such as in the present act which it is claimed is permissive only. The distinction is of no assistance to the petitioners under the [***708] rule. If a rehearing is available it is an administrative remedy to which the petitioners must first resort in order to give the board an opportunity to correct any mistakes it may have made. As noted in the Abelleira case, *supra*, at page 293, the rule must be enforced uniformly by the courts. Its enforcement is not a matter of judicial discretion. It is true, the Civil Service Act does not expressly require that application for a rehearing be made as a condition precedent to redress in the courts. But neither does the act expressly designate a specific remedy in the courts. So that where, as here, the act provides for a rehearing, but makes no provision for specific redress in the courts and resort to rehearing as a condition precedent, the rule of exhaustion of administrative remedies supplies the omission." (*Alexander, supra*, 22 Cal. 2d at pp. 199–200.)

Justices Carter and Traynor each dissented. n2 Both dissents noted that the Legislature has the ability to make an administrative rehearing a mandatory requirement if it chooses to do so, and that it had already done so explicitly in two statutory schemes enacted prior to *Alexander. (22 Cal. 2d at p. 201* (dis. opn. of Carter, J.); *id. at pp. 204–205* (dis. opn. of Traynor, J.).) Justice Carter further emphasized that the majority's broad interpretation of the exhaustion requirement is contrary to the principles of procedure ordinarily applicable in judicial and quasi-judicial forums. (*Id. at p. 201.*) For example, a litigant need not make a motion for a new trial before pursuing an appeal after final judgment in the trial court, nor must that litigant petition the Court of Appeal for rehearing prior to seeking review (or, at that time, hearing) before the Supreme Court after the appellate court issues its decision. (*Ibid.*) Justice Traynor additionally noted that the majority's interpretation was neither compelled by *Abelleira (22 Cal. 2d at p. 205)* nor in accordance with the federal rule (*id. at p. 204).*

n2 Chief Justice Gibson did not participate in the decision.

In 1945, the Legislature passed the Administrative Procedure Act (APA) (then *Gov. Code, § 11500* et seq., now *Gov. Code, § 11340* et seq.), which governs a substantial portion of the administrative hearings held in this state. The APA and related legislative enactments were the final culmination of a detailed Judicial Council administrative law study ordered by the Legislature [*498] two years earlier. n3 The Judicial Council reported its conclusions and recommendations in its Tenth Biennial

Report to the Governor and the Legislature. With regard to permissive rehearings, the report states: "The [draft] statute provides . . . that the right to judicial review is not lost by a failure to petition for reconsideration. The Council decided that the established policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists. . . . [P] The proposals in the field of judicial review are in substantially the form in which they were submitted publicly in a tentative draft. They have received general approval from the agencies and from members of the bar and the Council believes that the enactment of these recommended statutes will [**549] produce a substantial improvement in our present procedure for the judicial review of administrative orders and decisions." (Judicial Council of Cal., 10th Biennial Rep. (1944) Rep. on Administrative Agencies Survey, p. 28.)

n3 The Judicial Council was entrusted to "make a thorough study of the subject . . . of review of decisions of administrative boards, commissions and officers . . . [and] formulate a comprehensive and detailed plan . . . [including] drafts of such legislative measures as may be calculated to carry out and effectuate the plan." (Stats. 1943, ch. 991, § 2, p. 2904.)

[***709] In enacting the APA, the Legislature concurred with this recommendation. *Government Code section 11523* controls judicial review of agency rulings under the APA and provides that "[t]he right to petition shall not be affected by the failure to seek reconsideration before the agency." Of course, section 11523 applies only in proceedings arising under the APA.

Over the next half-century, the *Alexander* rule remained controlling authority but garnered little attention in either case law or legal scholarship. *Alexander* was expressly followed in two early decisions. (*Clark v. State Personnel Board (1943) 61 Cal. App. 2d 800 [144 P.2d 84]; Child v. State Personnel Board (1950) 97 Cal. App. 2d 467 [218 P.2d 52].)* While over the decades *Alexander* was cited in decisions several dozen other times, the citation was nearly always a reference to the *Abelleira* principle, i.e., the general proposition that one must exhaust administrative remedies before seeking recourse in the courts.

The specific effect of failing to seek a seemingly permissive rehearing was not at issue in another published case until *Benton v. Board of Supervisors, supra, 226 Cal. App. 3d 1467.* In *Benton*, opponents of a California Environmental Quality Act (CEQA) decision by a county board of supervisors did not request reconsideration by the board before seeking a writ of mandate in the superior court. The Court of Appeal rejected the argument the petitioners [*499] had failed to exhaust administrative remedies, concluding that because county ordinances and CEQA guidelines expressly denied the board any authority to reconsider its decision, there was no additional remedy to pursue. (*Id. at pp. 1474–1475.)*

The Court of Appeal went on to bolster its conclusion, stating: "Second, even if we assume arguendo that the board had the authority to reconsider its adoption of the mitigated negative declaration, we are satisfied that the Bentons exhausted their administrative remedies. At one time, the California Supreme Court required an aggrieved person to apply to the administrative body for a rehearing after a final decision had been issued in order to exhaust administrative remedies. (*Alexander v. State Personnel Bd. (1943) 22 Cal. 2d 198, 199–201 [137 P.2d 433];* see 3 Witkin, Cal. Procedure ([4th]ed. [1996]) Actions, § [309, p. 398].) This holding—criticized by at least one legal scholar as 'extreme'—has been repealed by statute. (*Gov. Code, § 11523* [Administrative Procedure Act cases]; see 3 Witkin, Cal. Procedure, *supra*, § 309, p. 398].) Therefore, we are not bound by it. The Bentons complied with the exhaustion requirement when they filed a timely appeal of the commission's decision to the board and argued their position before that body. [Citations.]" (*Benton v. Board of Supervisors, supra, 226 Cal. App. 3d at p. 1475,* fn. omitted.)

The Legislature, of course, did not directly overturn the *Alexander* rule by enacting the APA, because the procedural changes it created were limited to APA cases. To directly repudiate the *Alexander* rule, the Legislature would have had to enact a contrary statute of general application, providing that in all cases not otherwise provided for by statute or regulation, the failure to seek reconsideration before an administrative body does not affect the right to judicial review. The *Alexander* rule thus remains the controlling common law of this state, even though the only recent case specifically to discuss that rule opined it is no longer in force.

IV. MERITS OF THE *ALEXANDER* RULE

(4a) [HN7] We have reconsidered the *Alexander* rule and come to the conclusion that it suffers from several basic flaws. First, the *Alexander* rule might easily be overlooked, even by a reasonably alert litigant. At the most basic level, when a party has been given ostensibly permissive statutory authorization to seek reconsideration of a final decision, that he or she is affirmatively *required* to do so in order to obtain recourse to the courts is [**550] not intuitively [***710] obvious. Even to

attorneys, the word "may" ordinarily means just that. It does not mean "must" or "shall." [*500]

Likewise, attorneys and litigants familiar with the rudiments of court procedure know that one need not make a request for a new trial prior to filing an appeal of an adverse judgment, nor seek reconsideration of an adverse appellate decision prior to seeking review in this court. Without receiving explicit notification from within the statutory scheme, they are unlikely to anticipate that a different rule will apply in administrative proceedings. This requirement, indeed, may not be apparent even to practitioners with experience in administrative law, since [HN8] under the APA a rehearing opportunity styled as permissive is actually permissive, and not a mandatory prerequisite to court review. (*Gov. Code, § 11523.*)

Nor would an attorney familiar with federal law be placed on notice. The relevant section of the federal Administrative Procedure Act, *5 United States Code section 704,* provides: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes [of judicial review] whether or not there has been presented or determined an application . . . for any form of reconsideration . . . ." In spite of the citations to federal case law in the *Alexander* majority opinion, this is the common law rule in federal courts and had been for decades before *Alexander* was decided. (See, e.g., *Prendergast v. N. Y. Tel. Co. (1923) 262 U.S. 43, 48 [43 S. Ct. 466, 468, 67 L. Ed. 853]; Levers v. Anderson (1945) 326 U.S. 219, 222 [66 S. Ct. 72, 73–74, 90 L. Ed. 26].)* n4

> n4 Neither federal case relied upon by the *Alexander* majority actually holds that a rehearing must be sought whenever available. In each case, the litigants attempted to raise issues before the courts that had never been raised in the proceeding before the administrative tribunal. (*Vandalia R. R. v. Public Service Comm. (1916) 242 U.S. 255 [37 S. Ct. 93, 61 L. Ed. 276]; Red River Broadcasting Co. v. Federal C. Commission (D.C. Cir. 1938) 98 F.2d 282 [69 App.D.C. 1].)* Neither case stands for anything more than a general exhaustion principle, a la *Abelleira.*

In sum, even an alert legal practitioner could overlook the necessity of seeking rehearing, as a condition to judicial review, until after the deadline to act had passed, and many who petition before administrative bodies do so without the benefit of legal training. In recent years, moreover, even an awareness of the rehearing issue might not have avoided the potential pitfall, given that the only recent Court of Appeal decision (*Benton v. Board of Supervisors, supra, 226 Cal. App. 3d at p. 1475)* declares the rule to have been legislatively repealed, and a leading treatise on California procedure, citing that decision, strongly implies the rule is no longer in force. n5

> n5 Witkin states: "In [*Alexander*], a split court took the extreme position that the exhaustion doctrine included a requirement of application to the administrative body for a *rehearing* of its final determination. [Citation.] This view was later repudiated by statute, both for the Personnel Board (*Govt. C. 19588*) and for agencies under the Administrative Procedure Act (*Govt. C. 11523*)." (*3 Witkin, Cal. Procedure (4th ed. 1996) Actions,* § *309*, p. 398, italics in original.) Some specific practice guides are even more emphatic in their view the *Alexander* rule is no longer good law. (See, e.g., 1 Fellmeth & Folsom, Cal. Administrative and Antitrust Law (1992) § 8.04, p. 361 ["Although at one time a litigant was required to seek a rehearing or petition for reconsideration, that requirement is no longer commonly applied." (Fn. omitted.)]; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1997) § 23.100, pp. 1015–1016 ["The continuing vitality of the *Alexander* rule . . . is questionable."].)

[*501]

Of course, circumstances can exist where enforcement of a judicially created procedural rule is justifiable even though the rule is neither intuitively expected nor consistent with other procedural schemes. If the *Alexander* rule were necessary to the purposes behind the doctrine of exhaustion of administrative remedies, or at least significantly advanced those purposes, then its usefulness might well outweigh [***711] its drawbacks. This does not appear to be the case.

(5) "There are several reasons for the exhaustion of remedies doctrine. 'The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' (*Morton v. Superior Court* [(1970)] *9 Cal. App. 3d 977, 982 [88 Cal. Rptr. 533].)* [HN9] Even where the [**551] administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and pro-

motes judicial efficiency. ' (*Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 980 [201 Cal. Rptr. 379].)* It can serve as a preliminary administrative sifting process (*Bozaich v. State of California (1973) 32 Cal. App. 3d 688, 698 [108 Cal. Rptr. 392])*, unearthing the relevant evidence and providing a record which the court may review. (*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476 [131 Cal. Rptr. 90, 551 P.2d 410].)*" (*Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 1240-1241 [230 Cal. Rptr. 382].)*

(4b) In cases such as this, however, the administrative record has been created, the claims have been sifted, the evidence has been unearthed, and the agency has already applied its expertise and made its decision as to whether relief is appropriate. [HN10] The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive legal arguments is small. Indeed, no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute. (*Code Civ. Proc., § 1008.*)

We also think it unlikely the *Alexander* rule has any substantial effect in reducing the burden on the courts. When the parties are aware of the rule and [*502] comply with it, the administrative body presented with the same facts and arguments is unlikely to reverse its decision. The only likely consequence is delay and expense for both the parties and the administrative agency prior to the commencement of judicial proceedings. Of course, the courts' burden is marginally reduced by the occasional case when a party, unaware of the rule, fails to comply and thus is barred from seeking judicial review, but we believe the striking of potentially meritorious claims solely to clear them from a court's docket should not stand as a policy goal in and of itself.

The primary useful purpose the rule might serve was expressed in *Alexander* itself. Theoretically, the rule "give[s] the [administrative body] an opportunity to correct any mistakes it may have made." (*Alexander, supra*, 22 Cal. 2d at p. 200.) We presume, however, that the decisions of the various agencies of this state are reached, in the overwhelming majority of the proceedings undertaken, only after due consideration of the issues raised and the evidence presented. While occasional mistakes are an unfortunate by-product of all tribunals, judicial or administrative, the fact remains that a petition for reconsideration, raising the same arguments and evidence for a second time, will not likely often sway an administrative body to abandon the conclusions it has reached after full prior consideration of those same points.

We are not alone in our reasoning. After a multiyear consideration and public review process, the California Law Revision Commission recently issued a report recommending a complete overhaul and consolidation of the myriad statutes for judicial review of California agency decisions under one uniform procedural scheme. (Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 13 (Revision Report).) The commission's proposed legislation provides in pertinent part: "all administrative remedies available within an agency are deemed exhausted . . . if no higher level of review is available within the agency, [***712] whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review." (*Id.*, § 1123.320, p. 75.) The comment to this section is clear: " [HN11] Section 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. See former Gov't Code § *11523, Gov't Code* § 19588 (State Personnel Board). This overrules any contrary case law implication. *Cf. Alexander v. State Personnel Bd., 22 Cal. 2d 198, 137 P.2d 433 (1943).*" (*Id.* at pp. 75-76.)

The Revision Report also contains several background studies by Professor Michael Asimow, who was retained by the commission as a special [*503] consultant for this project. In [**552] discussing this issue, Professor Asimow opines: "Both the existing California APA and other statutes provide that a litigant need not request reconsideration from the agency before pursuing judicial review. However, the common law rule in California may be otherwise [citing *Alexander*]. A request for reconsideration should never be required as a prerequisite to judicial review unless specifically provided by statute to the contrary. " (Revision Rep., *supra*, at pp. 274-275, fns. omitted.) We recognize that, to date, the Legislature has not acted on the Law Revision Commission's recommendations; we do not suggest that the unenacted recommendation reflects the current state of California law. It does reflect, however, the opinion of a learned panel as to the wisdom of and necessity for the *Alexander* rule.

Over 50 years ago, the United States Supreme Court suggested that: "motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders." (*Levers v. Anderson, supra, 326 U.S. at p. 222 [66 S. Ct. at pp. 73-74];* see also Rames, *Exhausting the Administrative Remedies: The Rehearing Bog (1957) 11 Wyo. L.J. 143, 149-153.)*

We agree. There is little reason to maintain "an illogical extension of this general rule [of exhaustion of administrative remedies that] require[s] an idle act." (Cal. Administrative Mandamus (Cont.Ed.Bar. 1989) § 2.30, p. 52.) Were the issue before us in the first instance, we would have little difficulty concluding that the rule concerning administrative rehearings should be made consistent with judicial procedure, the federal rule, and California's own APA. n6

n6 An amicus curiae submission from 74 California cities suggests that reversing the *Alexander* rule would interfere with the uniformity of California exhaustion law and create confusion as to which administrative remedies need be followed and which could be bypassed. The concern is overstated. There is nothing uniform about the current state of exhaustion law with regard to permissive reconsideration. Reversal would merely make California common law consistent with the APA, federal law, and parallel judicial procedure. The effect of such a reversal is limited to reconsideration and has no effect on general principles requiring that each available stage of administrative appeal be exhausted.

V. STARE DECISIS AND LEGISLATIVE INTENT

(6) The issue of whether seemingly permissive reconsideration options in administrative proceedings need be exhausted is not before us for the first time, however, and we do not lightly set aside a 50-year-old precedent of this court. "It is, of course, a fundamental jurisprudential policy that prior [*504] applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as [HN12] the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the [***713] law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' [Citation.] [P] It is likewise well established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case. [Citation.] As we stated in *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 924 [221 Cal. Rptr. 575, 710 P.2d 375]*, '[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction.' " (*Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 296 [250 Cal. Rptr. 116, 758 P.2d 58].)*

(7) [HN13] The significance of stare decisis is highlighted when legislative reliance is potentially implicated. (See, e.g., *People v. Latimer (1993) 5 Cal. 4th 1203, 1213-1214 [23 Cal. Rptr. 2d 144, 858 P.2d 611]* (*Latimer*).) Certainly, "[*s*]*tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." [**553] (*Hilton v. South Carolina Public Railways Comm'n (1991) 502 U.S. 197, 202 [112 S. Ct. 560, 564, 116 L. Ed. 2d 560].)*

In *Latimer, supra, 5 Cal. 4th 1203*, we considered the ongoing vitality of a 30-year-old precedent of this court interpreting *Penal Code section 654* as prohibiting multiple punishments for multiple criminal acts when those acts had been committed with a single intent and objective. (*Neal v. State of California (1960) 55 Cal. 2d 11, 19 [9 Cal. Rptr. 607, 357 P.2d 839]* (*Neal*).) Although the *Neal* rule had been the subject of criticism, and we acknowledged we might now decide the matter differently had it been presented to us as a matter of first impression (*Latimer, supra*, 5 Cal. 4th at pp. 1211-1212), we concluded we were not free to do so because of the collateral consequences such a reversal might have on the entire complicated determinate sentencing structure the Legislature had enacted in the intervening years. "At this time, it is impossible to determine whether, or how, statutory law might have developed differently had this court's interpretation of section 654 been different. For example, the limitations the *Neal* rule placed on consecutive sentencing may have affected legislative decisions regarding the length of sentences for individual crimes or the development of sentence enhancements. [P] . . . [P] . . . What would the Legislature have intended if it had [*505] known of the new rule? On a more general front, what other statutes and legislative decisions may have been influenced by the *Neal* rule, and in what ways? These are questions the Legislature, not this court, is best equipped to answer." (*Id.* at pp. 1215-1216.)

Of course, principles of stare decisis do not preclude us from ever revisiting our older decisions. Indeed, in the same year we decided *Latimer* we overruled a different sentencing precedent in *People v. King (1993) 5 Cal. 4th 59 [19 Cal. Rptr. 2d 233, 851 P.2d 27]* (*King*). The primary difference between the cases was the extent to which a reversal of precedent would cast uncertainty on the appropriate interpretation of the other statutes and case law that make up California's criminal sentenc-

ing structure. As we explained in *Latimer*, the sentencing precedent at issue in *King* "was a specific, narrow ruling that could be overruled without affecting a complete sentencing scheme. The [rule at issue in *Latimer*], by contrast, is far more pervasive; it has influenced so much subsequent legislation that stare decisis mandates adherence to it. It can effectively be overruled only in a comprehensive fashion, which is beyond the ability of this court. The remedy for any inadequacies in the [***714] current law must be left to the Legislature." (*Latimer, supra*, 5 Cal. 4th at p. 1216.)

(4c) We do not perceive legislative reliance to be a substantial obstacle in this case. Like the precedent at issue in *King*, *Alexander* sets forth a narrow rule of limited applicability. Certainly, no reason appears to believe the rule is a vital underpinning of the entire administrative law structure of California. Unlike the precedent at issue in *Latimer*, little hard evidence suggests the Legislature has affirmatively taken the *Alexander* rule into account in enacting subsequent legislation.

Unlike the rules at issue in both *King* and *Latimer*, the *Alexander* rule is not a matter of statutory interpretation, as it does not hinge on the meaning of specific words as used in a particular statute. It is a rule of procedure that comes into play whenever the Legislature offers parties the option to seek reconsideration of a final administrative decision without specifying in the relevant statute the consequences, if any, of failing to do so. Thus, the Legislature has not had an opportunity affirmatively to acquiesce in the *Alexander* rule by reenacting or reaffirming exact statutory language. (See, e.g., *Fontana Unified School Dist. v. Burman (1988) 45 Cal. 3d 208, 219 [246 Cal. Rptr. 733, 753 P.2d 689]; Marina Point., Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 734 [180 Cal. Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161].*)

Likewise, as noted previously, in order directly to repudiate the *Alexander* rule, the Legislature would have been required to enact a contrary statute of [*506] general application, providing that in all cases not otherwise provided for by statute or regulation, the [**554] failure to seek reconsideration before an administrative body does not, standing alone, affect the right to judicial review. The Legislature has not enacted such a statute, but that it has not chosen to do so is not necessarily dispositive of its intentions. " [HN14] The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the ' " 'sheer pressure of other and more important business,' " ' ' " 'political considerations,' " ' or a ' " 'tendency to trust to the courts to correct their own errors . . . ,' " ' " (*County of Los Angeles v. Workers' Comp. Appeals Bd. (1981) 30 Cal. 3d 391, 404 [179 Cal. Rptr. 214, 637 P.2d 681]*; see also *King, supra*, 5 Cal. 4th at p. 77; *Latimer, supra*, 5 Cal. 4th at p. 1213; *People v. Escobar (1992) 3 Cal. 4th 740, 750–751 [12 Cal. Rptr. 2d 586, 837 P.2d 1100].*)

No explicit evidence of legislative acquiescence in the *Alexander* rule appears. Neither are there any indications of a legislative view as to the application of the *Alexander* rule specifically to the LAFCO statutory scheme. Respondents argue the Legislature must have enacted *Government Code section 56857*, subdivision (a) with the implicit understanding the *Alexander* rule would apply and with the affirmative intention that it do so. As we have noted, nothing in the language of the statute compels this conclusion or provides affirmative evidence of legislative approval or disapproval, or even awareness, of the *Alexander* rule.

Respondents alternatively argue that the Legislature invested the LAFCO reconsideration remedy with special significance by providing that, if a request for amendment or reconsideration is filed, the annexation process is suspended until the LAFCO has acted upon the request. (*Gov. Code, § 56857*, subd. (c).) From this, they extrapolate that the Legislature must consider reconsideration to be especially meaningful in the LAFCO context and, thus, that the Legislature must affirmatively believe requests for reconsideration are a mandatory remedy that must always be exhausted prior to judicial review. We do not agree. These sections merely demonstrate the Legislature considers such requests to have significance when they are actually made. They cast no light on [***715] whether the Legislature wants parties to file pro forma requests for reconsideration.

We have not been provided with, nor has our research disclosed, any legislative history demonstrating that, in enacting *Government Code section 56857*, subdivision (a), the Legislature affirmatively considered the significance of providing a permissive reconsideration remedy to a party who has already obtained a final decision. In lieu of direct indications of legislative [*507] intent, respondents argue the Legislature's awareness and approval of the general applicability of the *Alexander* rule may indirectly be demonstrated by the existence of other statutes containing reconsideration options. The Legislature has enacted several statutes that provide for reconsideration before the administrative body, but specify that the right to seek judicial review is *not* affected by the failure to seek reconsideration. Respondents have identified several statutes worded in this manner, in addition to the APA itself. (*Wat. Code, § 1126*, subd. (b); *Health & Saf. Code, § 40864*, subd. (a); *Gov. Code, § 19588*; Stats. 1989, ch. 1392, § 421, pp. 6023–6024,

Deering's Wat.—Uncod. Acts (1999 Supp.) Act 2793, p. 162; Stats. 1989, ch. 844, § 504, p. 2777, Deering's Wat.—Uncod. Acts (1999 Supp.) Act 4833, p. 26.) Because these statutes postdate and thus supersede the *Alexander* rule where applicable, their enactment permits an inference of ongoing legislative awareness of the *Alexander* rule. Reversing course at this date, respondents maintain, would render the relevant language in these provisions surplusage.

As petitioners point out, however, at least one statute provides the opposite. *Labor Code section 5901* was amended in 1951 to provide in pertinent part: "No cause of action arising out of any final order, decision or award made and filed by a [workers' compensation] commissioner or a referee shall accrue in any court to any person until and unless . . . such person files a petition for reconsideration, and such reconsideration is granted or denied." (Stats. 1951, ch. 778, § 14, pp. 2268–2269.) Among other things, [**555] the 1951 amendment replaced the word "rehearing" in the statute with the word "reconsideration." (See Historical Note, 45 West's Ann. Lab. Code (1989 ed.) foll. § 5901, p. 177.) Thus, the Legislature chose to fine-tune language in a statute providing that a workers' compensation claimant must request reconsideration of a final decision prior to recourse to the courts, even though the entire provision would be surplusage were we to assume the Legislature's awareness of the rule of general application provided by *Alexander*.

Further ambiguity may be found in other statutes. *Health and Safety Code section 121270*, the AIDS Vaccine Victims Compensation Fund statute, provides in pertinent part: "(h) . . . Upon the request by the applicant within 30 days of delivery or mailing [of the written decision], the board may reconsider its decision. [P] (i) Judicial review of a decision shall be under *Section 1094.5 of the Code of Civil Procedure*, and the court shall exercise its independent judgment. A petition for review shall be filed as follows: [P] (1) If no request for reconsideration is made, within 30 days of personal delivery or mailing of the board's decision on the application. [P] (2) If a [*508] timely request for reconsideration is filed and rejected by the board, within 30 days of . . . the notice of rejection. [P] (3) If a timely request for reconsideration is filed and granted by the board, . . . [within 30 days of the final decision]." Although the statute does not expressly state that a party who fails to seek reconsideration may seek judicial review, by providing for different time limitations depending on whether reconsideration was sought, the statutory wording arguably implies that in enacting the statute the Legislature was operating under the assumption that failure to seek reconsideration of a final administrative decision is not ordinarily a bar to further [***716] judicial review. Any such inference, however, is weak.

In sum, all the inferences the parties would have us draw are insubstantial and do not provide us with a sufficient basis to extrapolate legislative approval of the *Alexander* rule. The most one can say is that at times the Legislature has had a specific intention regarding the significance of reconsideration in an administrative scheme and has chosen to craft a statute so as to accomplish its intentions.

We ultimately return to the sole reliable indication of the Legislature's view of the need for the *Alexander* rule. (8) In enacting the APA, the Legislature was aware it was creating a general statutory framework that would be applied by myriad agencies under varying circumstances, not a specific scheme applicable to only one type of administrative hearing. Despite this anticipation of broad applicability, the Legislature determined the right to judicial review under the APA shall not be affected by failure to seek reconsideration before the agency in question, because the "policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists." (Judicial Council of Cal., 10th Biennial Rep., *supra*, at p. 28.)

"[The Tenth Biennial Report] is a most valuable aid in ascertaining the meaning of the statute. While it is true that what we are interested in is the legislative intent as disclosed by the language of the section under consideration, the council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation it told the Legislature what it intended to provide by the language used. [HN15] In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (*Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 397 [184 P.2d 323];* accord, *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 817 [140 Cal. Rptr. 442, 567 P.2d 1162].)* [*509]

(4d) Neither the APA nor any other statute has any compelling language to the contrary. As best we can surmise, the considered public policy judgment of the Legislature is that the exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review arises. This judgment is consistent [**556] with our own conclusion

the *Alexander* rule is neither necessary nor useful.

Respondents argue that if we determine to overrule the *Alexander* rule, the decision should have only prospective effect. We do not agree. (9a) [HN16] A decision of this court overruling one of our prior decisions ordinarily applies retroactively. (*Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 978 [258 Cal. Rptr. 592, 772 P.2d 1059]; Peterson v. Superior Court (1982) 31 Cal. 3d 147, 151 [181 Cal. Rptr. 784, 642 P.2d 1305].)* Admittedly, "we have long recognized the potential for allowing narrow exceptions to the general rule of retroactivity when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule. [HN17] A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the 'hardships' imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases." (*Newman, supra,* at p. 983.)

(4e) We do not perceive that retroactive application of our decision will create [***717] any unusual hardships. *Alexander* set forth a rule of very limited application. That the general administration of justice will be significantly affected by its abrogation or many pending actions will be affected is unlikely. No issue of substantial detrimental reliance is present here; no one has acquired a vested right or entered into a contract based on the existence of the *Alexander* rule. (E.g., *Peterson v. Superior Court, supra, 31 Cal. 3d at p. 152.)* (9b) Finally, all things being equal, [HN18] we deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action. (See, e.g., *Newman v. Emerson Radio Corp., supra, 48 Cal. 3d at p. 990; Moradi-Shalal v. Fireman's Fund Ins. Companies, supra, 46 Cal. 3d at pp. 304-305.)*

(4f) Respondents argue that to permit petitioners to receive the benefit of our decision would be inequitable, since they were presumably aware of the *Alexander* rule and made a voluntary decision to ignore it. Respondents [*510] infer this awareness solely from petitioner Parfrey's initial request for reconsideration of SILAFCO's approval of the annexation of the development property, which he later withdrew. In reality, the filing and subsequent withdrawal of a reconsideration request are equally consistent with an understanding that reconsideration is merely permissive as with a belief it is mandatory. Indeed, to assume petitioners consciously chose to expose their action to dismissal on purely procedural grounds is difficult. Moreover, as we have discussed in detail above, although *Alexander* was decided over a half-century ago, the rule of the case has remained relatively obscure since that time, and that a litigant would be uncertain of its vitality today is not at all unlikely. The filing and withdrawal of a request for reconsideration appear to reflect only a judgment that perfecting the request would not be worthwhile.

We hereby overrule *Alexander, supra,* 22 Cal. 2d 198, and hold that, [HN19] subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.

We emphasize this conclusion does not mean the failure to request reconsideration or rehearing may never serve as a bar to judicial review. Such a petition remains necessary, for example, to introduce evidence or legal arguments before the administrative body that were not brought to its attention as part of the original decisionmaking process. (See, e.g., 2 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) § 15.8, p. 341.) Our reasoning here is not addressed to new evidence, changed circumstances, fresh legal arguments, filings by [**557] newcomers to the proceedings and the like. Likewise, [HN20] a rehearing petition is necessary to call to the agency's attention errors or omissions of fact or law in the administrative decision itself that were not previously addressed in the briefing, in order to give the agency the opportunity to correct its own mistakes before those errors or omissions are presented to a court. The general exhaustion rule remains valid: Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum. Our decision is limited to the narrow situation where one would be required, after a final decision by an agency, to raise for a second time the same evidence and legal arguments one has previously raised solely to exhaust administrative remedies under *Alexander.* [*511]

[***718] The judgment of the Court of Appeal is reversed, and the cause is remanded for further proceedings in accordance with this decision.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred.

Non-Mandates Cases Cited

Estate of Griswald
(2001) 25 Cal.4th 904

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Weiss v. State Board of Equalization
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(1944) 24 Cal.2d 753

Zipton v. Workers' Compensation Appeals Board
(1990) 218 Cal.App.3rd 980

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.

No. S087881.

Supreme Court of California

June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of "acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties ***905** in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.

In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of "acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance contingent upon the decedent's awareness of the relatives who claim an inheritance right.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990)

Wills and Probate, § § 153, 153A, 153B.]

(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the ***906** ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only "natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial ***907** court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL

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Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.

BAXTER, J.

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." In this case, we must determine whether

section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory *908 construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

FN2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold *909 divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted

Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. *910

As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [*911105 Cal.Rptr.2d 457, 19 P.3d 1196].) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal.4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we " ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd

consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word "acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge " is "to admit to be true or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

> FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, *912 test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the legislation was to "make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the

participation *913 of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child " and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing *914Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly acknowledging it as his own." (See Civ. Code, former § 230.) [FN4] Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

FN4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
In 1975; the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' "

(*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388- 389 [330 P.2d 452]; see *Estate of Gird*, *supra*, 157 Cal. at pp. 542- 543), but, as discussed, the word retains virtually the same meaning in general usage today-"to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his ***915** one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*, 157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394.)

> FN5 Section 255 of the former Probate Code provided in pertinent part: " ' Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the ***916** same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. [FN6]

FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. *917

In *Estate of Maxey*, *supra*, 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or "shouted ... from the house-tops " (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not

support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, *918257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledg[e] it as his own"; (2) that he "receiv[e] it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra*, 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. " (*Id.* at p. 276.) *919

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did

and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a "natural brother or sister" within the meaning of such ***920** exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

FN7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*, 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8] ***921**

FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262- 263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, § § 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states

wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: "For the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453, subd. (b)(1).)

FN10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."

FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he *922 argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties

here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal.App.4th at pp. 1516- 1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d 1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. *923 It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the

record. *924

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. *925

BROWN, J.

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. ***926**

Cal. 2001.

Estate of DENIS H. GRISWOLD, Deceased. NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.

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RIDEOUT HOSPITAL FOUNDATION, INC., Plaintiff and Respondent,
v.
COUNTY OF YUBA et al., Defendants and Appellants.

No. C011614.

Court of Appeal, Third District, California.

Jul 20, 1992.

SUMMARY

A nonprofit hospital brought an action against a county to recover property taxes it had paid under protest after the county denied the hospital's application for the welfare exemption (Rev. & Tax. Code, § 214) on the ground that the hospital had net operating revenues in excess of 10 percent for the two tax years in question. The trial court granted summary judgment in favor of the hospital, finding that a nonprofit hospital that earns surplus revenues in excess of 10 percent for a given tax year can still qualify for the welfare exemption. (Superior Court of Yuba County, No. 45090, Robert C. Lenhard, Judge.)

The Court of Appeal affirmed. The court held that Rev. & Tax. Code, § 214, subd. (a)(1), which provides that a hospital will not be deemed to be operated for profit if its operating revenue does not exceed 10 percent, does not automatically preclude a hospital that does have revenue in excess of 10 percent from invoking the welfare exemption. The legislative history of the provision, the court held, indicates that it was not intended to deny exemption to a nonprofit organization earning excess revenues for debt retirement, facility expansion, or operating cost contingencies, but merely to require a hospital earning such excess revenue to affirmatively show that, in fact, it is not operated for profit and that it meets the other statutory conditions for invoking the exemption. (Opinion by Davis, J., with Sparks, Acting P. J., and Nicholson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Property Taxes § 24--Exemptions--Property Used for Religious, Hospital, or Charitable Purposes--Hospital Earning in Excess of 10 Percent Revenue.

In a nonprofit hospital's action against a county to recover property taxes paid under protest, the trial court *215 properly found that the hospital, which had net operating revenues in excess of 10 percent for the tax years in question, was not automatically ineligible for the "welfare exemption" of Rev. & Tax. Code, § 214. Rev. & Tax. Code, § 214, subd. (a)(1), provides that a hospital will not be deemed to be operated for profit if its operating revenue does not exceed 10 percent, but does not state the effect of earnings in excess of that amount. The legislative history of the provision indicates that it was not intended to deny exemption to a nonprofit organization earning excess revenues if those revenues were to be used for debt retirement, facility expansion, or operating cost contingencies. Thus, while a hospital earning such excess revenue does not receive the benefit of being deemed nonprofit, it can still invoke the exemption if it can show that, in fact, it is not operated for profit and meets the other statutory conditions for invoking the exemption.

[See **Cal.Jur.3d,** Property Taxes, § § 18, 20; 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, § § 153, 155.]

(2) Taxpayers' Remedies § 14--Proceedings and Actions to Recover Taxes Paid--Review--Questions of Law--Interpretation of Welfare Exemption Statute.

In a nonprofit hospital's action against a county to recover taxes paid under protest, the question of whether the hospital qualified for the "welfare exemption" of Rev. & Tax. Code, § 214, even though it had earned surplus revenue in excess of 10 percent for the tax years in question, was a question of law for the Court of Appeal's independent consideration on review.

(3) Statutes § 29--Construction--Language--Legislative Intent.

In interpreting a statute, the court's function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. To ascertain such intent, courts turn first to the words of the statute itself, and seek to give those words their usual and ordinary meaning. When a court interprets statutory language, it may neither insert language that has been

omitted nor ignore language that has been inserted. The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute. If possible, the language should be read so as to conform to the spirit of the enactment. If the statute is ambiguous or uncertain, a court employs various rules of construction to assist in its interpretation.

(4) Property Taxes § 24--Exemptions--Property Used for Religious, Hospital, or Charitable Purposes--Strict Construction of Welfare *216 Exemption Statute.
The "welfare exemption" of Rev. & Tax. Code, § 214, like all tax exemption statutes, is to be strictly construed to the end that the exemption allowed is not extended beyond the plain meaning of the language employed. The rule of strict construction, however, does not mean that the narrowest possible interpretation must be given to the statute, since strict construction must still be reasonable.

(5) Statutes § 46--Construction--Presumptions--Legislative Intent.
A fundamental rule of statutory construction is that the court must assume that the Legislature knew what it was saying and meant what it said. A related principle is that a court will not presume an intent to legislate by implication. Moreover, when the Legislature has expressly declared its intent, the courts must accept that declaration.

(6) Statutes § 42--Construction--Aids--Opinions of Attorney General.
Opinions of the Attorney General, while not binding, are entitled to great weight, and the Legislature is presumed to know of the Attorney General's formal interpretation of a statute.

COUNSEL

Daniel G. Montgomery, County Counsel, and James W. Calkins, Chief Deputy County Counsel, for Defendants and Appellants.

McCutchen, Doyle, Brown & Enersen, John R. Reese and Gerald R. Peters for Plaintiff and Respondent.

DAVIS, J.

In this action to recover property taxes paid under protest, County of Yuba (County) appeals from a decision in favor of the taxpayer, Rideout Memorial Hospital (Rideout). There is but one issue on appeal: can a nonprofit hospital that earned surplus revenue in excess of 10 percent (for a given year) still qualify for the "welfare exemption" from property taxation in light of Revenue and Taxation Code section 214, subdivision (a)(1)? We hold that it can.

Background

Revenue and Taxation Code section 214 (section 214) sets forth the "welfare exemption" from property taxation. For the tax years in question *217 here, the section provided in pertinent part: "(a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in- aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness.

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual.

"(3) The property is used for the actual operation of the exempt activity, and does not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose.

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession.

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital,

scientific, or charitable purpose.

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes. ...

"The exemption provided for herein shall be known as the 'welfare exemption.' " *218

Our concern centers on section 214, subdivision (a)(1) (hereafter, section 214(a)(1)). [FN1]

FN1 Section 214(a)(1) was amended nonsubstantively in 1989 and now provides: "(a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: [¶] (1) The owner is not organized or operated for profit. However, in the case of hospitals, the organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses has not exceeded a sum equivalent to 10 percent of those operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness." (Stats. 1989, ch. 1292, § 1.) In 1985, the previously undesignated introductory paragraph of section 214 was lettered "(a)." (Stats. 1985, ch. 542, § 2, p. 2026.) This change redesignated section 214(1) as 214(a)(1), section 214(2) as 214(a)(2), and so on. For the sake of simplicity we will use the terms "section 214(a)(1)" "section 214(a)(2)" and the like when referring to the pre- or the post-1985 section 214.

County denied Rideout's applications for the welfare exemption for the tax years 1986-1987 and 1987-1988. Rideout paid the taxes under protest and applied for a refund. After County denied the refund, Rideout sued County.

County contends that Rideout had excess revenues, under section 214, of 24 and 21 percent for the two years in question. Rideout concedes that its net operating revenues under section 214 exceeded 10 percent in each of those two years.

In summary judgment proceedings, the parties narrowed the issues to the single issue stated above and the trial court ruled in favor of Rideout. (1a) County argues that Rideout is *automatically* ineligible for the welfare exemption for the years in question because its net revenues exceeded the 10 percent limitation of section 214(a)(1). Rideout counters that the 10 percent provision constitutes a "safe harbor" for nonprofit hospitals by which the hospital can be deemed to satisfy section 214(a)(1), but that a nonprofit hospital with revenues over 10 percent can still meet the condition of section 214(a)(1) by showing, pursuant to the general rule, that it is not organized or operated for profit. We conclude that Rideout's position is essentially correct.

Discussion

(2) The issue in this case presents a question of law that we consider independently. (See *219 *Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624]; *Burke Concrete Accessories, Inc. v. Superior Court* (1970) 8 Cal.App.3d 773, 774-775 [87 Cal.Rptr. 619].)

All property in California is subject to taxation unless exempted under federal or California law. (Cal. Const., art. XIII, § 1; Rev. & Tax. Code, § 201; all further references to undesignated sections are to the Revenue and Taxation Code unless otherwise specified.) The constitutional basis for the "welfare exemption" was added to the California Constitution in 1944; as revised nonsubstantively in 1974, it now provides: "The Legislature may exempt from property taxation in whole or in part: [¶] ... Property used exclusively for religious, hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those purposes, (2) that are nonprofit, and (3) no part of whose net earnings inures to the benefit of any private shareholder or individual." (Cal. Const., art. XIII, § 4, subd. (b); formerly art. XIII, § 1c.) The rationale for the welfare exemption is that the exempt property is being used either to provide a government-like service or to accomplish some desired social objective. (Ehrman & Flavin, Taxing Cal. Property (3d ed. 1989) Exempt Property, § 6.05, p. 9.)

Pursuant to this constitutional authorization, the Legislature in 1945 enacted section 214 and labeled that exemption the "welfare exemption." In this appeal, we are asked to interpret subdivision (a)(1) of section 214.

Certain general principles guide our interpretation. (3) "Our function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817, 621 P.2d 856].) To ascertain such intent, courts turn first to the words of the statute itself (*ibid.*), and seek to give the words employed by the Legislature their usual and ordinary meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted. (Code Civ. Proc., § 1858.) The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 608 [86 Cal.Rptr. 793, 469 P.2d 665]), and where possible the language should be read so as to conform to the spirit of the enactment. (*Lungren v. Deukmejian, supra,* 45 Cal.3d at p. 735.)" (*Rudd v. California Casualty Gen. Ins. Co., supra,* 219 Cal.App.3d at p. 952.) If the statute is ambiguous or uncertain, courts employ various rules of construction to assist in the interpretation. (See 58 Cal.Jur.3d, Statutes, § § 82-118, ***220** pp. 430-508.) (4) Finally, "[t]he welfare exemption, like all tax exemption statutes, is to be strictly construed to the end that the exemption allowed is not extended beyond the plain meaning of the language employed. However, the rule of strict construction does not mean that the narrowest possible interpretation be given; ' "strict construction must still be a reasonable construction." ' (*Cedars of Lebanon Hosp. v. County of L.A.* (1950) 35 Cal.2d 729, 734-735 [221 P.2d 31, 15 A.L.R.2d 1045]; *English v. County of Alameda* (1977) 70 Cal.App.3d 226, 234 [138 Cal.Rptr. 634].)" (*Peninsula Covenant Church v. County of San Mateo* (1979) 94 Cal.App.3d 382, 392 [156 Cal.Rptr. 431].)

(1b) We therefore first consider the language of section 214(a)(1), which stated at the relevant times herein: "(a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: [¶] (1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness." (See fn. 1, *ante.*)

As we immediately see, the proviso presents somewhat of a "knotty" problem, being cast as a double negative-if revenues did *not* exceed 10 percent, the hospital shall *not* be deemed to be organized or operated for profit. [FN2] Under the language of section 214(a)(1), the Legislature did not *automatically* exclude nonprofit hospitals earning *more* than 10 percent surplus revenues from the welfare exemption. The proviso does not address this situation on its face; it concerns only the hospital earning 10 percent or *under.* In fact, the automatic exclusion would have been a simple matter to accomplish-a mere untying of the two "knots" from the proviso would have done it. We note that in other sections of the Revenue and Taxation Code, when the Legislature wishes to exclude certain entities from a taxation exemption it can do so in clear terms. (See, e.g., § 201.2, subd. (c): "(c) This section shall not be construed to exempt any profit- making organization or concessionaire from any property tax, ...") ***221**

> FN2 Of course, if a hospital satisfies this proviso it must still actually be nonprofit because the welfare exemption does not apply to profitmaking hospitals regardless of their earnings (Cal. Const., art. XIII, § 4, subd. (b)); moreover, to claim the exemption, the nonprofit hospital must satisfy all of the other conditions set forth in section 214(a) (i.e., subds. (2) through (6)).

Nevertheless, there is that double negative. Does that double negative make a positive? In other words, is the converse of the proviso to be implied-as County argues-so that a hospital which exceeded the 10 percent figure is deemed unable to satisfy section 214(a)(1)? These questions raise ambiguities that call for the employment of certain rules of construction.

(5) A fundamental rule of construction is that we

must assume the Legislature knew what it was saying and meant what it said. (*Blew v. Horner* (1986) 187 Cal.App.3d 1380, 1388 [232 Cal.Rptr. 660]; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 764 [150 Cal.Rptr. 785, 587 P.2d 227]; *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 604 [45 Cal.Rptr. 512].) In related fashion, courts will not presume an intent to legislate by implication. (*People v. Welch* (1971) 20 Cal.App.3d 997, 1002 [98 Cal.Rptr. 113]; *First M. E. Church v. Los Angeles Co.* (1928) 204 Cal. 201, 204 [267 P. 703].) County has constructed section 214 on a foundation of implication which does not fare well under the weight of these rules.

Another important rule is that when the Legislature has expressly declared its intent, the courts must accept that declaration. (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 11 [106 Cal.Rptr. 761, 507 P.2d 65]; see *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15 [270 Cal.Rptr. 796, 793 P.2d 2].) (1c) Here, the application of this rule requires us to consider section 214's legislative history. (See 51 Cal.3d at pp. 14-16.)

As originally enacted in 1945, section 214 did not contain the proviso found in subdivision (a)(1), and the condition stated by subdivision (a)(3) was different. The section originally read in pertinent part as follows: "[a] Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted; ..." (Stats. 1945, ch. 241, § 1, p. 706.)

In *Sutter Hospital v. City of Sacramento* (1952) 39 Cal.2d 33 [244 P.2d 390], the California Supreme Court was asked whether a nonprofit hospital *222 which had deliberately earned an 8 percent surplus of income over expenses to be used for debt retirement and facility expansion could qualify for the welfare exemption of section 214. Relying on subdivision (a)(3) as stated above, the court said no. (39 Cal.2d at pp. 39-41.) The court acknowledged that its holding made it difficult for modern hospitals to operate in a financially sound manner to reduce indebtedness and expand their facilities, but said that matter should be addressed to the Legislature rather than the courts because subdivision (a)(3) compelled the court's holding. (39 Cal.2d at pp. 40-41.)

Responding to the challenge raised by the *Sutter* decision, the Legislature in 1953 amended section 214. (Stats. 1953, ch. 730, § 1-4, pp. 1994-1996; *Christ The Good Shepherd Lutheran Church v. Mathiesen* (1978) 81 Cal.App.3d 355, 365 [146 Cal.Rptr. 321].) This amendment was proposed in Assembly Bill No. 1023 (A.B. 1023). As originally introduced, A.B. 1023 rewrote subdivision (a)(3) to require simply that the property be "used for the actual operation of the exempt activity," and contained an urgency clause setting forth the Legislature's intent as follows: "This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution, and shall go into immediate effect. The facts constituting such necessity are: Continuously since the adoption of the 'welfare exemption' it has been understood by the administrators of the law, as well as by the public generally, that it was the purpose and the intent of Legislature in the adoption of subdivision [a](3) of Section 214 of the Revenue and Taxation Code to disqualify for tax exemption any property of a tax exempt organization which was not used for the actual operation of the exempt activity, but that such organization could rightfully use the income from the property devoted to the exempt activity for the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies without losing the tax exempt status of its property.

"Recently, doubt has been cast upon the foregoing interpretation by a decision of the State Supreme Court involving the tax exemption of a hospital. This decision was broad in its application and has caused the postponement or actual abandonment of plans for urgently needed hospital construction and expansion at a time when there are insufficient hospital facilities in this State to properly care for the health needs of its citizens, and virtually no surplus facilities for use in case of serious epidemic or disaster. This Legislature has recognized that in addition to gifts and bequests the traditional method for the financing of the expansion and construction of voluntary religious and community nonprofit hospital facilities

is through the use of receipts from the actual operating facilities. In its decision the Supreme Court indicated that this was a matter for legislative clarification. ***223**

"It has never been the intention of the Legislature that the property of nonprofit religious, hospital or charitable organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, it having been the intent of the Legislature in adopting subsection [a](3) of Section 214 to deny exemption to property not used for exempt purposes even though the income from the property was used to support an exempt activity.

"Therefore, in order to clarify the legislative intent and to remove any doubt with respect to the status of property actually used for exempt purposes, it is necessary to amend subdivision [a](3) of Section 214 of the Revenue and Taxation Code. It is essential that this be done at the earliest possible moment to avoid further delays in the construction and expansion of needed hospital facilities." (Stats. 1953, ch. 730, § 4, pp. 1995-1996.)

About three months after this urgency clause and amendment to subdivision (a)(3) were proposed in A.B. 1023, A.B. 1023 was amended to include the proviso in subdivision (a)(1) at issue here. (Stats. 1953, ch. 730, § 1, p. 1994.) Thereafter, A.B. 1023-with the urgency clause and the noted changes to subdivisions (a)(1) and (a)(3)-was enacted into law. (Stats. 1953, ch. 730, § 1, pp. 1994-1996.)

In the urgency clause, the Legislature expressly stated its intent that a section 214 organization "could rightfully use the income from the property devoted to the exempt activity for the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies without losing the tax exempt status of its property," and that "[i]t has never been the intention of the Legislature that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, ..." (Stats. 1953, ch. 730, § 4, pp. 1995-1996.)

Where the Legislature has expressly declared its intent, we must accept that declaration. (*Tyrone v. Kelley, supra*, 9 Cal.3d at p. 11; see *California Assn. of Psychology Providers v. Rank, supra*, 51 Cal.3d at p. 15.) Pursuant to the legislative expression here, there is no limitation on earned revenue that *automatically* disqualifies a nonprofit hospital from obtaining the welfare exemption; the concern is whether that revenue is devoted to furthering the ***224** exempt purpose by retiring debt, expanding facilities or saving for contingencies. [FN3]

> FN3 This is not to say that a nonprofit hospital can earn any amount above 10 percent and still qualify for the welfare exemption. The hospital must show that indeed it is not organized or operated for profit and that it meets all of the other conditions in section 214. One of these other conditions, section 214 (a)(3), now mandates in pertinent part that the "property [be] used for the actual operation of the exempt activity, *and ... not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose.*" (Italics added.)

It is true that the urgency clause containing the Legislature's expressed intent was made a part of A.B. 1023 before the proviso in section 214(a)(1) was added to that bill, and that the clause refers to section 214(a)(3). Regardless of timing, however, both the section 214(a)(1) proviso and the urgency clause were enacted into law as part of A.B. 1023. (Stats. 1953, ch. 730, § § 1, 4, pp. 1995-1996.) More importantly, the urgency clause focuses on the issues of tax exemptions for *hospitals*, the urgent need for *hospital* construction and expansion, and the ways of financing that construction and expansion for nonprofit *hospitals*. It is in this context-a context fundamentally implicated by a hospital earning above the 10 percent figure in section 214(a)(1)-that the Legislature declares "[i]t has never been the intention of the Legislature that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, ..." (Stats. 1953, ch. 730, § 4, p. 1996.) In a related vein, the reference in the urgency clause to section 214(a)(3) concerns the issue of how the use of income from exempted

property affects welfare exemption eligibility; this issue is also fundamentally implicated in the context of a nonprofit hospital earning a surplus revenue greater than 10 percent.

County contends the section 214 (a)(1) proviso is rendered meaningless if interpreted to allow a nonprofit hospital that earns more than 10 percent the welfare exemption; under such an interpretation, County maintains, it makes no difference whether a nonprofit hospital earns below or above the 10 percent figure-the exemption can be claimed in either instance.

We think the 10 percent figure in section 214(a)(1) is meaningful even if nonprofit hospitals that earn over that figure can still qualify for the welfare exemption. The 10 percent figure provides a clear guideline by which nonprofit hospitals can engage in sound financial practices to further the exempt activity without jeopardizing their tax exempt status, assuming they otherwise qualify for the welfare exemption. The proviso in *225section 214(a)(1) recognizes the complex financial and functional realities of the modern hospital operation, an operation that often requires deliberately designed surplus revenues to ensure adequate levels of service and resources. (See *Sutter Hospital v. City of Sacramento, supra,* 39 Cal.2d at pp. 36, 39- 40; see also *St. Francis Hosp. v. City & County of S. F.* (1955) 137 Cal.App.2d 321, 323-326 [290 P.2d 275]; *Cedars of Lebanon Hosp. v. County of L. A.* (1950) 35 Cal.2d 729, 735- 736 [221 P.2d 31, 15 A.L.R.2d 1045].)

The modern hospital is an extremely complex entity-essentially, it is a minicity. (See *Cedars of Lebanon Hosp. v. County of L. A., supra,* 35 Cal.2d at pp. 735-745.) A modern hospital generates significant revenue but spends considerable amounts for labor, equipment, facilities and capital outlay; large and complex annual budgets are commonplace in this setting. (See *St. Francis Hosp. v. City & County of S. F., supra,* 137 Cal.App.2d at p. 325.) And in this setting, a surplus might be accidental rather than designed; or a particular surplus might be designed but the fate of fortuity intervenes and the budget forecasters have sleepless nights. (*Ibid.*)

Recall, section 214 was amended in light of the *Sutter Hospital* court's request for legislative intervention after the court acknowledged that its holding made it difficult for modern hospitals to operate in a financially sound manner to reduce indebtedness and expand their facilities. In that case, the nonprofit hospital purposely earned surplus revenue to retire its debt and expand its facilities. (39 Cal.2d at pp. 36, 40.) Accordingly, § 214(a)(1) provides a clear guideline by which nonprofit hospitals can deliberately design surplus revenues and not risk losing their tax exempt status (provided the other conditions of section 214 are satisfied and the revenues are used for proper purposes).

The very complexity just described and recognized in the cited cases runs counter to an interpretation that an earned surplus revenue above 10 percent *automatically* disqualifies a nonprofit hospital from the welfare exemption. To say, as County does with its interpretation of *automatic* ineligibility, that a nonprofit hospital which earned 10 percent is eligible for the exemption while the nonprofit hospital which earned 10.01 percent is *automatically* excluded from it, is to say that these complex realities are irrelevant.

Rather, the nonprofit hospital earning over 10 percent is outside the clear guideline offered by section 214(a)(1) and thereby subject to an increased scrutiny by tax authorities and an increased burden in showing it is not organized or operated for profit. Such a nonprofit hospital is no longer "deemed" to meet the condition of section 214(a)(1). In short, the proviso of *226 section 214(a)(1) provides no protection for the nonprofit hospital earning over 10 percent; that hospital must prove it is not organized or operated for profit under the general rule of section 214(a)(1). Contrary to County's argument, therefore, the section 214(a)(1) 10 percent proviso is meaningful even if not construed as a point of automatic disqualification.

County also relies on a 1954 opinion of the Attorney General and a 1967 opinion from the First District. The Attorney General's opinion considered whether the 1953 amendments to subdivisions (a)(1) and (a)(3) of section 214 were valid and effective in a general sense. (*Welfare Exemptions,* 23 Ops.Cal.Atty.Gen. 136 (1954).) In passing, the Attorney General noted that "[t]he Legislature might well determine that hospitals as distinguished from other organizations entitled to the welfare exemption usually operate on a schedule of rates more comparable to a schedule of rates by a commercial organization and therefore their net earnings should be restricted in order for them to have the benefit of the welfare exemption (see *Sutter Hospital* case pp. 39-40)." (*Id.* at p. 139.) The First District opinion-*San Francisco Boys' Club, Inc. v. County of Mendocino* (1967) 254 Cal.App.2d 548 [62 Cal.Rptr. 294]-involved profitmaking logging operations on land

owned by and used for a nonprofit, charitable club for boys. Referring to the section 214(a)(1) proviso at issue here, the court noted that "the Legislature amended section 214 to permit nonprofit hospitals to have excess operating revenues in a sum equivalent to 10 percent of operating expenses." (254 Cal.App.2d at p. 557.)

Against the Attorney General's passing reference of 1954 and the First District's dicta of 1967 stands an Attorney General opinion from 1988 on the identical issue in this case. (*Welfare Exemption Qualification,* 71 Ops.Cal.Atty.Gen. 106 (1988).) In fact, it was County that requested this 1988 opinion. In that opinion, the Attorney General concluded that "[a] non-profit hospital which had earned surplus revenue in excess of ten percent during the preceding fiscal year might still qualify for the 'welfare exemption' from taxation under section 214 of the Revenue and Taxation Code." (*Id.* at p. 107.) Although it was not used as pivotal support, the 1954 Attorney General opinion was cited twice in the 1988 opinion. (*Id.* at p. 112.) [FN4]

> FN4 County also relies on cryptic passages in certain letters written in 1953 to then Governor Earl Warren. These letters were from the attorney for the California Hospital Association, which sponsored A.B. 1023, and from the Attorney General. In deciding whether to sign A.B. 1023 amending subdivisions (a)(1) and (a)(3), Governor Warren requested the views of these two entities. These unpublished and informal expressions to the Governor-especially the letter from the hospital association attorney-are not the type of extrinsic aids that courts can meaningfully use in discerning legislative intent. (See 58 Cal.Jur.3d, Statutes, § § 160-172, pp. 558-582.)

The First District's opinion in *San Francisco Boys' Club* concerned an issue relating to a charitable social organization rather than a hospital. For *227 that reason, the analysis there is not germane to the hospital-specific provision before us. (6, 1d) Although opinions of the Attorney General, while not binding, are entitled to great weight (*Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 251 [239 Cal.Rptr. 395]; *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 883 [144 Cal.Rptr. 568]), it is unclear how to apply this principle to the two published Attorney General opinions noted above. This principle applies because the Legislature is presumed to know of the Attorney General's formal interpretation of the statute. (*Ibid.*) But the two Attorney General opinions seem to be at odds. And while the 1954 opinion is a contemporaneous construction of long duration, the 1988 opinion involves the identical issue in this case and the Legislature amended section 214(a)(1) nonsubstantively about one and one- half years after the 1988 opinion was published. (*Welfare Exemption Qualification, supra,* 71 Ops.Cal.Atty.Gen. 106; Stats. 1989, ch. 1292, § 1.) So we return, as we must, to the words used by the Legislature in the statute and in the urgency clause's declaration of intent.

That return also provides the answer to County's final argument. County argues that its interpretation of the 10 percent figure in section 214 as a point of automatic ineligibility is supported by the language in section 214(a)(1) that qualifies the terms "operating revenues" and "operating expenses." Under section 214(a)(1), gifts, endowments and grants-in-aid are excluded from "operating revenues" while depreciation based on cost of replacement and amortization of, and interest on, indebtedness are included in "operating expenses." Basically, County argues that the Legislature has provided certain financial advantages for facility improvement, debt retirement and nonoperating revenues in section 214(a)(1), thereby intending to place a cap on what nonprofit hospitals can earn for welfare exemption eligibility.

The problem with this argument is that it is difficult to define automatic ineligibility in a more roundabout way than that suggested by County's interpretation. If the section 214(a)(1) proviso accounts favorably to nonprofit hospitals for all of the uses of net earnings that do not defeat welfare exemption eligibility, why did the Legislature include that double negative? In such a situation, the proviso would be tailor-made for dispensing with the double negative because the statute has the sound financial management practices and the allowed uses for net earnings built into it. But the section 214(a)(1) proviso, by its terms, applies only to the nonprofit hospital whose operating revenues have *not* exceeded 10 percent of operating expenses; in that situation, the proviso *deems* the nonprofit hospital in compliance with section 214(a)(1). The proviso, by its terms, does not cover the nonprofit *228 hospital which has earned over 10 percent; in that situation, the nonprofit hospital must *show* it is not organized or operated for profit. And the Legislature stated in the urgency clause that it has

never been the Legislature's intent "that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies ...."

Nor does our construction of section 214(a)(1) violate the rule of strict construction by extending the tax exemption allowed beyond the plain meaning of the language employed. (*Peninsula Covenant Church v. County of San Mateo, supra,* 94 Cal.App.3d at p. 392.) If we have attempted to do anything in this opinion, we have attempted to adhere to the plain meaning of the language employed in section 214(a)(1).

For all of these reasons, we conclude that a nonprofit hospital that earned surplus revenue in excess of 10 percent during the relevant fiscal year can still qualify for the "welfare exemption" from taxation under section 214. [FN5]

> FN5 Our opinion and conclusion are limited to this single question of law. Accordingly, we express no views on whether Rideout actually was or was not organized or operated for profit or whether Rideout can obtain the welfare exemption for the specific years in question, aside from concluding that earnings in excess of 10 percent do not *automatically* disqualify Rideout from the exemption.

Disposition

The judgment is affirmed. Each party to bear its own costs on appeal.

Sparks, Acting P. J., and Nicholson, J., concurred.

A petition for a rehearing was denied August 17, 1992. ***229**

Cal.App.3.Dist.,1992.

Rideout Hosp. Foundation, Inc. v. County of Yuba

END OF DOCUMENT

ALFRED K. WEISS et al., Appellants,
v.
STATE BOARD OF EQUALIZATION et al., Respondents.

L. A. No. 22697.

Supreme Court of California

Apr. 28, 1953.

HEADNOTES

(1) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
In exercising power which State Board of Equalization has under Const., art. XX, § 22, to deny, in its discretion, "any specific liquor license if it shall determine for good cause that the granting ... of such license would be contrary to public welfare or morals," the board performs a quasi judicial function similar to local administrative agencies.

See **Cal.Jur.2d**, Alcoholic Beverages, § 25 et seq.; **Am.Jur.**, Intoxicating Liquors, § 121.

(2) Licenses § 32--Application.
Under appropriate circumstances, the same rules apply to determination of an application for a license as those for its revocation.

(3) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
The discretion of the State Board of Equalization to deny or revoke a liquor license is not absolute but must be exercised in accordance with the law, and the provision that it may revoke or deny a license "for good cause" necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.

(4) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
3While the State Board of Equalization may refuse an on-sale liquor license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, § 13), the absence of such a provision or regulation by the board as to off-sale licenses does not preclude it from making proximity of the premises to a school *773 an adequate basis for denying an off-sale license as being inimical to public morals and welfare.

(5) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
It is not unreasonable for the State Board of Equalization to decide that public welfare and morals would be jeopardized by the granting of an off-sale liquor license within 80 feet of some of the buildings on a school ground.

(6) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
Denial of an application for an off-sale license to sell beer and wine at a store conducting a grocery and delicatessen business across the street from high school grounds is not arbitrary because there are other liquor licenses operating in the vicinity of the school, where all of them, except a drugstore, are at such a distance from the school that it cannot be said the board acted arbitrarily, and where, in any event, the mere fact that the board may have erroneously granted licenses to be used near the school in the past does not make it mandatory for the board to continue its error and grant any subsequent application.

(7) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
Denial of an application for an off-sale license to sell beer and wine at a store across the street from high school grounds is not arbitrary because the neighborhood is predominantly Jewish and applicants intend to sell wine to customers of the Jewish faith for sacramental purposes, especially where there is no showing that wine for this purpose could not be conveniently obtained elsewhere.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Swain, Judge. Affirmed.

Proceeding in mandamus to compel State Board of Equalization to issue an off-sale liquor license. Judgment denying writ affirmed.

COUNSEL

Riedman & Silverberg and Milton H. Silverberg for Appellants.

Edmund G. Brown, Attorney General, and Howard S. Goldin, Deputy Attorney General, for Respondents.

CARTER, J.

Plaintiffs brought mandamus proceedings in the superior court to review the refusal of defendant, State Board of Equalization, to issue them an off-sale beer and wine license at their premises and to compel the issuance of such a license. The court gave judgment for the board and plaintiffs appeal. *774

Plaintiffs filed their application with the board for an off-sale beer and wine license (a license to sell those beverages to be consumed elsewhere than on the premises) at their premises where they conducted a grocery and delicatessen business. After a hearing the board denied the application on the grounds that the issuance of the license would be contrary to the "public welfare and morals" because of the proximity of the premises to a school.

According to the evidence before the board, the area concerned is in Los Angeles. The school is located in the block bordered on the south by Rosewood Avenue, on the west by Fairfax Avenue, and on the north by Melrose Avenue-an 80-foot street running east and west parallel to Rosewood and a block north therefrom. The school grounds are enclosed by a fence, the gates of which are kept locked most of the time. Plaintiffs' premises for which the license is sought are west across Fairfax, an 80-foot street, and on the corner of Fairfax and Rosewood. The area on the west side of Fairfax, both north and south from Rosewood, and on the east side of Fairfax south from Rosewood, is a business district. The balance of the area in the vicinity is residential. The school is a high school. The portion along Rosewood is an athletic field with the exception of buildings on the corner of Fairfax and Rosewood across Fairfax from plaintiffs' premises. Those buildings are used for R.O.T.C. The main buildings of the school are on Fairfax south of Melrose. There are gates along the Fairfax and Rosewood sides of the school but they are kept locked most of the time. There are other premises in the vicinity having liquor licenses. There are five on the west side of Fairfax in the block south of Rosewood and one on the east side of Fairfax about three-fourths of a block south of Rosewood. North across Melrose and at the corner of Melrose and Fairfax is a drugstore which has an off-sale license. That place is 80 feet from the northwest corner of the school property as Melrose is 80 feet wide and plaintiffs' premises are 80 feet from the southwest corner of the school property. It does not appear when any of the licenses were issued, with reference to the existence of the school or otherwise. Nor does it appear what the distance is between the licensed drugstore and any school buildings as distinguished from school grounds. The licenses on Fairfax Avenue are all farther away from the school than plaintiffs' premises.

Plaintiffs contend that the action of the board in denying them a license is arbitrary and unreasonable and they particularly *775 point to the other licenses now outstanding on premises as near as or not much farther from the school.

The board has the power "in its discretion, to deny ... any specific liquor license if it shall determine for good cause that the granting ... of such license would be contrary to public welfare or morals." (Cal. Const., art. XX, § 22.) (1) In exercising that power it performs a quasi judicial function similar to local administrative agencies. (*Covert v. State Board of Equalization*, 29 Cal.2d 125 [173 P.2d 545]; *Reynolds v. State Board of Equalization*, 29 Cal.2d 137 [173 P.2d 551, 174 P.2d 4]; *Stoumen v. Reilly*, 37 Cal.2d 713 [234 P.2d 969].) (2) Under appropriate circumstances, such as we have here, the same rules apply to the determination of an application for a license as those for the revocation of a license. (*Fascination, Inc. v. Hoover*, 39 Cal.2d 260 [246 P.2d 656]; Alcoholic Beverage Control Act, § 39; Stats. 1935, p. 1123, as amended.) (3) In making its decision "The board's discretion ... however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." (*Stoumen v. Reilly, supra*, 37 Cal.2d 713, 717.)

(4) Applying those rules to this case, it is pertinent to observe that while the board may refuse an on-sale license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, *supra*, § 13) there is no such provision or regulation by the board as to off-sale licenses. Nevertheless, proximity of the licensed premises to a school may supply an adequate basis for denial of a license as being inimical to public morals and welfare. (See *Altadena Community Church v. State Board of Equalization*,

109 Cal.App.2d 99 [240 P.2d 322]; *State v. City of Racine*, 220 Wis. 490 [264 N.W. 490]; *Ex parte Velasco*, (Tex.Civ.App.) 225 S.W. 2d 921; *Harrison v. People*, 222 Ill. 150 [78 N.E. 52].)

The question is, therefore, whether the board acted arbitrarily in denying the application for the license on the ground of the proximity of the premises to the school. No question is raised as to the personal qualifications of the applicants. (5) We cannot say, however, that it was unreasonable for the board to decide that public welfare and morals would be jeopardized by the granting of an off-sale license at premises *776 within 80 feet of some of the buildings on a school ground. As has been seen, a liquor license may be refused when the premises, where it is to be used, are in the vicinity of a school. While there may not be as much probability that an off-sale license in such a place would be as detrimental as an on-sale license, yet we believe a reasonable person could conclude that the sale of any liquor on such premises would adversely affect the public welfare and morals.

(6) Plaintiffs argue, however, that assuming the foregoing is true, the action of the board was arbitrary because there are other liquor licensees operating in the vicinity of the school. All of them, except the drugstore at the northeast corner of Fairfax and Melrose, are at such a distance from the school that we cannot say the board acted arbitrarily. It should be noted also that as to the drugstore, while it is within 80 feet of a corner of the school grounds, it does not appear whether there were any buildings near that corner, and as to all of the licensees, it does not appear when those licenses were granted with reference to the establishment of the school.

Aside from these factors, plaintiffs' argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: "Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. Perhaps the best authority for this observation is *FCC v. WOKO* [329 U.S. 223 (67 S.Ct. 213, 91 L.Ed. 204).] The Commission denied renewal of a broadcasting license because of misrepresentations made by the licensee concerning ownership of its capital stock. Before the reviewing courts one of the principal arguments was that comparable deceptions by other licensees had not been dealt with so severely. A unanimous Supreme Court easily rejected this argument: 'The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.' *777 In rejecting a similar argument that the SEC without warning had changed its policy so as to treat the complainant differently from others in similar circumstances, Judge Wyzanski said: 'Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination of the problems of security regulation. ... The administrator is expected to treat experience not as a jailer but as a teacher.' Chief Justice Vinson, speaking for a Court of Appeals, once declared: 'In the instant case, it seems to us there has been a departure from the policy of the Commission expressed in the decided cases, but this is not a controlling factor upon the Commission.' Other similar authority is rather abundant. Possibly the outstanding decision the other way, unless the dissenting opinion in the second Chenery case is regarded as authority, is *NLRB v. Mall Tool Co.* [119 F.2d 700.] The Board in ordering back pay for employees wrongfully discharged had in the court's opinion departed from its usual rule of ordering back pay only from time of filing charges, when filing of charges is unreasonably delayed and no mitigating circumstances are shown. The Court, assuming unto itself the Board's power to find facts, said: 'We find in the record no mitigating circumstances justifying the delay.' Then it modified the order on the ground that 'Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.' From the standpoint of an ideal system, one can hardly disagree with the court's remark. But from the standpoint of a workable system, perhaps the courts should not impose upon the agencies standards of consistency of action which the courts themselves customarily violate. Probably deliberate change in or deviation from established administrative policy should be permitted so long as the action is not arbitrary or unreasonable. This is the view of most courts." (Davis, Administrative Law, § 168; see also Parker, Administrative Law, pp. 250-253; 73 C.J.S., Public Administrative Bodies and Procedure, § 148; *California Emp. Com. v. Black-Foxe M. Inst.*, 43 Cal.App.2d Supp. 868 [110 P.2d 729].) Here the board was not acting arbitrarily if it did change its position because it may have

concluded that another license would be too many in the vicinity of the school.

(7) The contention is also advanced that the neighborhood is predominantly Jewish and plaintiffs intend to sell wine to customers of the Jewish faith for sacramental purposes. We fail to see how that has any bearing on the issue. The wine ***778** to be sold is an intoxicating beverage, the sale of which requires a license under the law. Furthermore, it cannot be said that wine for this purpose could not be conveniently obtained elsewhere.

The judgment is affirmed.

Gibson, C. J., Shenk, J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Appellants' petition for a rehearing was denied May 21, 1953.

Cal.,1953.

Weiss v. State Bd. of Equalization

END OF DOCUMENT

WHITCOMB HOTEL, INC. (a Corporation) et al., Petitioners,

v.

CALIFORNIA EMPLOYMENT COMMISSION et al., Respondents; FERNANDO R. NIDOY et al., Interveners and Respondents.

S. F. No. 16854.

Supreme Court of California

Aug. 18, 1944.

HEADNOTES

(1) Statutes § 180(2)--Construction--Executive or Departmental Construction.
The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in drafting the statute.

See 23 **Cal.Jur.** 776; 15 **Am.Jur.** 309.

(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

(4) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
The disqualification imposed on a claimant by Unemployment Insurance Act, § 56(b) (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), for refusing without good cause to accept suitable employment when offered to him, or failing to apply for such employment when notified by the district public employment office, is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment.

See 11 **Cal.Jur. Ten-year Supp.** (Pocket Part) "Unemployment Reserves and Social Security."

(5) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within the Unemployment Insurance Act. *754

(6) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
Employment Commission Rule 56.1, which attempts to create a limitation as to the time a person may be disqualified for refusing to accept suitable employment, conflicts with Unemployment Insurance Act, § 56(b), and is void.

(7) Unemployment Relief--Powers of Employment Commission--Adoption of Rules.
The power given the Employment Commission by the Unemployment Insurance Act, § 90, to adopt rules and regulations is not a grant of legislative power, and in promulgating such rules the commission may not alter or amend the statute or enlarge or impair its scope.

(8) Unemployment Relief--Remedies of Employer--Mandamus.
Inasmuch as the Unemployment Insurance Act, § 67, provides that in certain cases payment of benefits shall be made irrespective of a subsequent appeal, the fact that such payment has been made does not deprive an employer of the issuance of a writ of mandamus to compel the vacation of an award of benefits when he is entitled to such relief.

SUMMARY

PROCEEDING in mandamus to compel the California Employment Commission to vacate an award of unemployment benefits and to refrain from charging petitioners' accounts with benefits paid. Writ granted.

COUNSEL

Brobeck, Phleger & Harrison, Gregory A. Harrison and Richard Ernst for Petitioners.

Robert W. Kenny, Attorney General, John J. Dailey, Deputy Attorney General, Forrest M. Hill, Gladstein, Grossman, Margolis & Sawyer, Ben Margolis, William Murrish, Gladstein, Grossman, Sawyer & Edises, Aubrey Grossman and Richard Gladstein for Respondents.

Clarence E. Todd and Charles P. Scully as Amici Curiae on behalf of Respondents.

TRAYNOR, J.

In this proceeding the operators of the Whitcomb Hotel and of the St. Francis Hotel in San Francisco seek a writ of mandamus to compel the California Employment Commission to set aside its order granting unemployment insurance benefits to two of their former employees, Fernando R. Nidoy and Betty Anderson, corespondents in this action, and to restrain the commission from charging petitioners' accounts with benefits paid pursuant to *755 that order. Nidoy had been employed as a dishwasher at the Whitcomb Hotel, and Betty Anderson as a maid at the St. Francis Hotel. Both lost their employment but were subsequently offered reemployment in their usual occupations at the Whitcomb Hotel. These offers were made through the district public employment office and were in keeping with a policy adopted by the members of the Hotel Employers' Association of San Francisco, to which this hotel belonged, of offering available work to any former employees who recently lost their work in the member hotels. The object of this policy was to stabilize employment, improve working conditions, and minimize the members' unemployment insurance contributions. Both claimants refused to accept the proffered employment, whereupon the claims deputy of the commission ruled that they were disqualified for benefits under section 56(b) of the California Unemployment Insurance Act (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), on the ground that they had refused to accept offers of suitable employment, but limited their disqualification to four weeks in accord with the commission's Rule 56.1. These decisions were affirmed by the Appeals Bureau of the commission. The commission, however, reversed the rulings and awarded claimants benefits for the full period of unemployment on the ground that under the collective bargaining contract in effect between the hotels and the unions, offers of employment could be made only through the union.

In its return to the writ, the commission concedes that it misinterpreted the collective bargaining contract, that the agreement did not require all offers of employment to be made through the union, and that the claimants are therefore subject to disqualification for refusing an offer of suitable employment without good cause. It alleges, however, that the maximum penalty for such refusal under the provisions of Rule 56.1, then in effect, was a four-week disqualification, and contends that it has on its own motion removed all charges against the employers for such period.

The sole issue on the merits of the case involves the validity of Rule 56.1, which limits to a specific period the disqualification imposed by section 56(b) of the act. Section 56 of the act, under which the claimants herein were admittedly disqualified, *756 provides that: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: ... (b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the District Public Employment Office." Rule 56.1, as adopted by the commission and in effect at the time here in question, restated the statute and in addition provided that: "In pursuance of its authority to promulgate rules and regulations for the administration of the Act, the Commission hereby provides that an individual shall be disqualified from receiving benefits if it finds that he has failed or refused, without good cause, either to apply for available, suitable work when so directed by a public employment office of the Department of Employment or to accept suitable work when offered by any employing unit or by any public employment office of said Department. Such disqualification shall continue for the week in which such failure or refusal occurred, and for not more than three weeks which immediately follow such week as determined by the Commission according to the circumstances in each case." The validity of this rule depends upon whether the commission was empowered to adopt it, and if so, whether the rule is reasonable.

The commission contends that in adopting Rule 56.1 it exercised the power given it by section 90 of the act to adopt "rules and regulations which to it seem necessary and suitable to carry out the provisions of this act" (2 Deering's Gen. Laws, 1937, Act 8780d, §

90(a)). In its view section 56(b) is ambiguous because it fails to specify a definite period of disqualification. The commission contends that a fixed period is essential to proper administration of the act and that its construction of the section should be given great weight by the court. It contends that in any event its interpretation of the act as embodied in Rule 56.1 received the approval of the Legislature in 1939 by the reenactment of section 56(b) without change after Rule 56.1 was already in effect.

(1) The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are *757 highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club*, 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson*, 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; see, Griswold, *A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 405; 27 Cal.L.Rev. 578; 23 Cal.Jur. 776.) When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. (*Helvering v. Griffiths*, 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill*, 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners*, 21 Cal.2d 399, 402 [132 P.2d 804].) Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. "At most administrative practice is a weight in the scale, to be considered but not to be inevitably followed. ... While we are of course bound to weigh seriously such rulings, they are never conclusive." (*F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976.) (2) An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (*California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028]; *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935]; *Boone v. Kingsbury*, 206 Cal. 148, 161 [273 P. 797]; *Bank of Italy v. Johnson*, 200 Cal. 1, 21 [251 P. 784]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.*, 297 U.S. 129 [56 S.Ct. 397, 80 L.Ed. 528]; *Montgomery v. Board of Administration*, 34 Cal.App.2d 514, 521 [93 P.2d 1046, 94 A.L.R. 610].) (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted *758 without change. (*Biddle v. Commissioner of Internal Revenue*, 302 U.S. 573, 582 [58 S.Ct. 379, 82 L.Ed. 431]; *Houghton v. Payne*, 194 U.S. 88 [24 S.Ct. 590, 48 L.Ed. 888]; *Iselin v. United States*, 270 U.S. 245, 251 [46 S.Ct. 248, 70 L.Ed. 566]; *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 757 [51 S.Ct. 297, 75 L.Ed. 672]; *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976; *Pacific Greyhound Lines v. Johnson*, 54 Cal.App.2d 297, 303 [129 P.2d 32]; see *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 [60 S.Ct. 18, 84 L.Ed. 101]; *Helvering v. Hallock*, 309 U.S. 106, 119 [60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368]; *Federal Comm. Com. v. Columbia Broadcasting System*, 311 U.S. 132, 137 [61 S.Ct. 152, 85 L.Ed. 87]; Feller, *Addendum to the Regulations Problem*, 54 Harv.L.Rev. 1311, and articles there cited.)

In the present case Rule 56.1 was first adopted by the commission in 1938. It was amended twice to make minor changes in language, and again in 1942 to extend the maximum period of disqualification to six weeks. The commission's construction of section 56(b) has thus been neither uniform nor of long standing. Moreover, the section is not ambiguous, nor does it fail to indicate the extent of the disqualification. (4) The disqualification imposed upon a claimant who without good cause "has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office" is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment. (Accord: 5 C.C.H. Unemployment Insurance Service 35,100, par. 1965.04 [N.Y.App.Bd.Dec. 830-39, 5/27/39].) The Unemployment Insurance Act was expressly intended to establish a system of unemployment insurance to provide benefits for "persons unemployed through no fault of their own, and to reduce involuntary unemployment. ..." (Stats. 1939, ch. 564, § 2; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 1.) The public policy of the State as thus declared by the Legislature was intended as a guide to the interpretation and application of the act. (*Ibid.*) (5) One who refuses

suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within *759 the provisions of the statute. (See 1 C.C.H. Unemployment Insurance Service 869, par. 1963.) Section 56(b) in excluding absolutely from benefits those who without good cause have demonstrated an unwillingness to work at suitable employment stands out in contrast to other sections of the act that impose limited disqualifications. Thus, section 56(a) disqualifies a person who leaves his work because of a trade dispute for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; and other sections at the time in question disqualified for a fixed number of weeks persons discharged for misconduct, persons who left their work voluntarily, and those who made wilful misstatements. (2 Deering's Gen. Laws, 1937, Act 8780(d), § § 56(a), 55, 58(e); see, also, Stats. 1939, ch. 674, § 14; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 58.) Had the Legislature intended the disqualification imposed by section 56(b) to be similarly limited, it would have expressly so provided. (6) Rule 56.1, which attempts to create such a limitation by an administrative ruling, conflicts with the statute and is void. (*Hodge v. McCall, supra;* Manhattan General Equipment Co. v. Commissioner of Int. Rev., 297 U.S. 129, 134 [56 S.Ct. 397, 80 L.Ed. 528]; see *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935].) Even if the failure to limit the disqualification were an oversight on the part of the Legislature, the commission would have no power to remedy the omission. (7) The power given it to adopt rules and regulations (§ 90) is not a grant of legislative power (see 40 Columb. L. Rev. 252; cf. Deering's Gen. Laws, 1939 Supp., Act 8780(d), § 58(b)) and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope. (*Hodge v. McCall, supra;* Bank of Italy v. Johnson, 200 Cal. 1, 21 [251 P. 784]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev., supra;* Koshland v. Helvering, 298 U.S. 441 [56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756]; *Iselin v. United States, supra.*) Since the commission was without power to adopt Rule 56.1, it is unnecessary to consider whether, if given such power, the provisions of the rule were reasonable.

The commission contends, however, that petitioners are not entitled to the writ because they have failed to exhaust *760 their administrative remedies under section 41.1. This contention was decided adversely in *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]. It contends further that since all the benefits herein involved have been paid, the only question is whether the charges made to the employers' accounts should be removed, and that since the employers will have the opportunity to protest these charges in other proceedings, they have an adequate remedy and there is therefore no need for the issuance of the writ in the present case. The propriety of the payment of benefits, however, is properly challenged by an employer in proceedings under section 67 and by a petition for a writ of mandamus from the determination of the commission in such proceedings. (See *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]; *W. R. Grace & Co. v. California Employment Com., ante,* p. 720 [151 P.2d 215].) An employer's remedy thereunder is distinct from that afforded by section 45.10 and 41.1, and the commission may not deprive him of it by the expedient of paying the benefits before the writ is obtained. (8) The statute itself provides that in certain cases payment shall be made irrespective of a subsequent appeal (§ 67) and such payment does not preclude issuance of the writ. (See *Bodinson Mfg. Co. v. California Emp. Com., supra,* at pp. 330-331; *Matson Terminals, Inc. v. California Emp. Com., supra.*)

Let a peremptory writ of mandamus issue ordering the California Employment Commission to set aside its order granting unemployment insurance benefits to the corespondents, and to refrain from charging petitioners' accounts with any benefits paid pursuant to that award.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.

CARTER, J.

I concur in the conclusion reached in the majority opinion for the reason stated in my concurring opinion in *Mark Hopkins, Inc. v. California Emp. Co.*, this day filed, *ante,* p. 752 [151 P.2d 233].

Schauer, J., concurred.

Intervener's petition for a rehearing was denied September 13, 1944. Carter, J., and Schauer, J., voted for a rehearing. *761

Cal.,1944.

Whitcomb Hotel v. California Employment Commission

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CONNIE ZIPTON et al., Petitioners,
v.
WORKERS' COMPENSATION APPEALS BOARD, CITY OF SAN LEANDRO et al., Respondents.

No. A044870.

Court of Appeal, First District, Division 3, California.

Mar 14, 1990.

SUMMARY

The surviving spouse of a firefighter who died of cancer initiated workers' compensation proceedings, alleging that the cancer was caused by the firefighter's exposure to known carcinogens during employment. Although it was conceded that the firefighter had been exposed to known carcinogens on the job, the workers' compensation judge ruled that petitioner failed to establish the evidentiary foundation necessary to trigger the statutory presumption of industrial causation set forth in Lab. Code, § 3212.1. The firefighter's cancer was a metastatic undifferentiated carcinoma, and the primary tumor site could not be medically identified. The Workers' Compensation Appeals Board denied reconsideration of the decision of the workers' compensation judge.

On the surviving spouse's petition for review, the Court of Appeal affirmed the board's order denying reconsideration. It held that the spouse had the burden of establishing a reasonable link between the cancer and the exposure to carcinogens before Lab. Code, § 3212.1, could be applied to shift the burden of proof to the public employer on the issue of industrial causation. Since all the medical evidence established that the primary tumor site could not be identified, other than by sheer speculation, it held that petitioner failed to meet that burden of proof. (Opinion by Barry-Deal, Acting P. J., with Merrill and Strankman, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 21--Construction--Legislative Intent.
When a court endeavors to construe a statute, it must ascertain the intent of the Legislature in order to accomplish the purpose of the statute. *981

(2) Workers' Compensation § 76--Presumption of Industrial Causation-- Purpose.
The foremost purpose of the presumptions of industrial causation found in Lab. Code, § 3212 et seq., is to provide additional compensation benefits to certain public employees who provide vital and hazardous services, by easing the burden of proof of industrial causation.

(3) Workers' Compensation § 75--Burden of Proof--Shifting of Burden-- Statutory Presumption of Industrial Causation.
The presumptions of industrial causation found in Lab. Code, § 3212 et seq., are a reflection of public policy, and are implemented by shifting the burden of proof in an industrial injury case. Where proven facts give rise to a presumption under one of the statutes, the burden of proof shifts to the party against whom it operates, to prove the nonexistence of the presumed fact, namely, an industrial relationship.

(4) Workers' Compensation § 76--Presumptions--Industrial Causation--Cancer of Firefighters and Peace Officers.
The presumption of industrial causation of cancer suffered by firefighters and peace officers, set forth in Lab. Code, § 3212.1, differs in application from the other statutory presumptions of industrial causation in Lab. Code, § 3212 et seq. Unlike the other statutory presumptions, Lab. Code, § 3212.1, additionally requires a showing of exposure to a known carcinogen as defined in published standards, and a showing that the carcinogen is reasonably linked to the disabling cancer, before the presumption can be invoked.

(5) Workers' Compensation § 75--Burden of Proof--Reasonable Link Between Cancer and Industrial Exposure to Carcinogen--Public Firefighter.
In workers' compensation proceedings initiated by the surviving spouse of a firefighter who died of cancer, the surviving spouse had the initial burden of proving by a preponderance of the evidence that the firefighter's cancer was reasonably linked to industrial exposure to a known carcinogen, before the burden of proof on the issue of industrial causation

could be shifted to the public employer under Lab. Code, § 3212.1.

(6) Workers' Compensation § 75--Burden of Proof--Reasonable Link Between Cancer and Industrial Exposure to Carcinogen--Public Firefighter--Undifferentiated Carcinoma.

The surviving spouse of a firefighter who died from cancer failed to establish a reasonable link between the cancer and the firefighter's industrial exposure to known carcinogens, for purposes of shifting to the public employer the burden of proof on the issue of industrial causation under *982Lab. Code, § 3212.1, notwithstanding proof that the firefighter had in fact been exposed on the job to known carcinogens, where the cancer was a metastatic undifferentiated carcinoma, and all the medical evidence established that the primary tumor site could not be identified other than by sheer speculation.

[See Cal.Jur.3d, Work Injury Compensation, § § 128, 293; Am.Jur.2d, Workmen's Compensation, § § 304, 515.]

COUNSEL

Davis, Cowell & Bowe, J. Thomas Bowen and Leslie A. Eberhardt for Petitioners.

William B. Donohoe, Thomas, Hall, Salter & Lyding, William R. Thomas, Mark A. Cartier and Don E. Clark for Respondents.

Goshkin, Pollatsek, Meredith & Lee and Samuel E. Meredith as Amici Curiae for Respondents.

BARRY-DEAL, Acting P. J.

Petitioner Connie Zipton (hereafter petitioner), individually and as guardian ad litem for her two minor sons, seeks review of the order of respondent Workers' Compensation Appeals Board (hereafter Board) denying reconsideration of the decision of the workers' compensation judge (hereafter WCJ) who held that petitioner failed to establish the evidentiary foundation necessary to trigger the statutory presumption of industrial causation pursuant to Labor Code section 3212.1. [FN1] *983 Petitioner contends that the Board erred by not invoking the presumption in her behalf, thereby shifting the burden to respondent City of San Leandro (hereafter respondent) to prove that the cancer suffered by her husband, Michael Zipton, deceased, did not arise out of and occur in the course of his employment as a firefighter for respondent.

FN1 All further statutory references are to the Labor Code unless otherwise specified. Section 3212.1 provides in pertinent part: "In the case of active firefighting members of fire departments of cities, counties, cities and counties, districts, or other public or municipal corporations or political subdivisions, and active firefighting members of the fire departments of the University of California and the California State University ..., and in the case of active firefighting members of the Department of Forestry and Fire Protection, or of any county forestry or firefighting department or unit ..., and peace officers as defined in Section 830.1 and subdivision (a) of Section 830.2 of the Penal Code who are primarily engaged in active law enforcement activities, the term 'injury' as used in this division includes cancer which develops or manifests itself during a period while the member is in the service of the department or unit, *if the member demonstrates that he or she was exposed ... to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, and that the carcinogen is reasonably linked to the disabling cancer.* [¶] The compensation which is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, ... [¶] The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. ..." (Italics added.)

At issue is the construction of section 3212.1, and specifically, the definition of the phrase "reasonably linked." For the reasons discussed below, we affirm the Board's order, and hold that petitioner has failed to prove by a preponderance of the evidence that Zipton's fatal cancer was reasonably linked to his industrial exposure to carcinogens.

Factual and Procedural Background

Michael Zipton was employed as a firefighter for respondent from October 1, 1970, until April 12, 1987. His duties included the active suppression of fires. During this period, he was exposed to various carcinogens, as defined by the International Agency for Research on Cancer (IARC), [FN2] while fighting fires. The specific number of carcinogens to which Zipton actually was exposed cannot be ascertained from this record. The parties do agree that he was exposed to the following carcinogens known to cause cancer in humans according to the IARC studies: arsenic, asbestos, certain polyaromatic hydrocarbons, vinylchloride, chromium, and acrylonitrile.

> FN2 In 1971, the IARC initiated a program to evaluate the carcinogenic risk of chemicals to humans by producing critically evaluated monographs on individual chemicals. The term "carcinogenic risk" in the IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans, World Health Organization, International Agency for Research on Cancer, volumes 1 to 29 (Oct. 1982 supp. 4) is defined as the probability that exposure to a chemical or complex mixture, or employment in a particular occupation, will lead to cancer in humans. The criteria developed by the IARC is categorized in terms of sufficient evidence, limited evidence, and inadequate evidence of carcinogenicity. "Sufficient evidence" indicates that there is a causal relationship between the agent and human cancer. In the case of chemicals for which there is "sufficient evidence" of carcinogenicity in experimental animals, the IARC considers such chemicals to pose a carcinogenic risk to humans. The IARC classifies 23 chemicals and groups of chemicals that are causally associated with cancer in humans, and 61 chemicals, groups of chemicals, or industrial processes, that are probably carcinogenic to humans.

In April 1987, Zipton became seriously ill and stopped work. In May 1987, he was diagnosed as suffering from widespread undifferentiated carcinoma of unknown origin. *984

On May 19, 1987, Zipton filed a claim for workers' compensation benefits, alleging that his cancer was occupationally related.

On February 29, 1988, Zipton died, at age 39, from the effects of the cancer. On March 1, 1988, an autopsy revealed the following: "metastatic undifferentiated carcinoma involving liver, hepatic, pancreatic and periaortic lymph nodes, left adrenal, right and left lung."

On March 11, 1988, petitioner filed an application for death benefits, and petitioned the Board for a finding of industrial causation of the disability and death of Zipton pursuant to Government Code section 21026, and for an award of the special death benefit pursuant to Government Code section 21363. [FN3] On April 5, 1988, petitioner was appointed guardian ad litem and trustee for her minor sons, Jeremy and Casey Zipton.

> FN3 The Board found that Zipton did not sustain an industrially related disability within the meaning of Government Code section 21026. Therefore, petitioner was not entitled to the special death benefit under Government Code section 21363.

Respondent denied liability. Numerous medical opinions were obtained regarding the industrial relationship of Zipton's cancer. The parties filed trial briefs and the matter was submitted to the WCJ on the documentary record, regarding the application of the presumption of industrial causation set forth in section 3212.1.

On October 27, 1988, the WCJ issued his decision. As pertinent, he held that because a primary entry site for the cancer could not be identified, petitioner failed to establish a reasonable link between Zipton's cancer and the industrial exposure to carcinogens, as required by section 3212.1. Therefore, she was not entitled to the presumption of industrial causation. Absent the presumption, the WCJ further held that petitioner did not meet her burden of proving that Zipton's cancer was industrially related.

On November 21, 1988, petitioner sought reconsideration, contending that requirement of a primary tumor site as a prerequisite to establishing a reasonable link resulted in a strict, technical evidentiary hurdle, defeating the intended expansive purpose of section 3212.1. On December 21, 1988, the Board denied reconsideration, and adopted the WCJ's report and recommendation on reconsideration

(hereafter Board opinion) dated December 5, 1988.

On December 28, 1989, we granted review.

Medical Evidence

The medical evidence before the Board consisted primarily of the reports and testimony of four well-qualified doctors: Michael Jensen-Akula, M.D., *985 Internal Medicine (Zipton's treating physician at Kaiser Permanente); Selina Bendix, Ph.D., Bendix Environmental Research, Inc. (a consulting toxicologist engaged by petitioner's attorney); Phillip L. Polakoff, M.D., M.P.H., M.Env.Sc., Occupational/Environmental Medicine, Toxicology and Epidemiology (engaged by petitioner's attorney); and Piero Mustacchi, M.D., Clinical Professor of Medicine and Preventive Medicine, Occupational Epidemiology, University of California, San Francisco (engaged by respondent's attorney).

Dr. Jensen-Akula diagnosed Zipton's condition as metastatic undifferentiated carcinoma and stated that he was unaware of any known association between Zipton's cancer and his exposure to toxic chemicals on the job. He noted: "Since the specific type of epithelial carcinoma is not clear in this case, it would be very difficult to associate this with any specific toxin or poison, although I would be interested in having a list of toxic chemicals that you feel he has been exposed to. At this point, I cannot specifically state any definite relationship between any toxic exposure and aggravation cause or acceleration of his tumor." After reviewing the toxicology report, Dr. Jensen-Akula concluded that he was unable to specifically comment on any direct cause and effect relationship between Zipton's exposure to industrial carcinogens and his cancer.

Dr. Polakoff stated in his comprehensive report of February 6, 1988, that cancer due to occupational exposure is indistinguishable from cancer due to other causes. Carcinogens may produce cancer at organs distant from the site of contact, and the potency of a particular carcinogen is not uniform for all tissues. Dr. Polakoff continued: "Cancer is generally regarded as a disease of old age. There are 2 factors that generally draw our attention to chemically-induced cancers as opposed to natural occurrence. One is the appearance of cancer earlier in life than expected, the second is simply looking for a higher than normal incidence rate in the worker cohort or population being evaluated."

Specifically regarding Zipton's situation, Dr. Polakoff noted that Zipton was in excellent health prior to 1987; his life-style was relatively free of other risk factors, e.g., he did not smoke, drink, or use drugs; he had not traveled to exotic locales; he had no previous occupational exposure nor any unique hobbies; there was no history of cancer in his immediate family; and he contracted cancer at a relatively young age. Furthermore, Zipton had direct and continuous exposure to a host of known occupational carcinogens. Moreover, epidemiological studies documented excess cancer in various organ sites, as well as total cancer rates, among firefighters.

Based on all of the factors, Dr. Polakoff concluded that Zipton's 17 years as a firefighter for respondent contributed to the "genesis of his cancer and *986 his markedly depleted lifespan. ... [¶] Although the definitive genesis of his cancer will never be completely known, I believe that his history of serving as a firefighter for over 17 years definitely contributed to its onset."

Dr. Bendix examined Zipton prior to his death, and initially reported on November 16, 1987. At the time of her examination, Dr. Bendix was unaware that the cancer had been diagnosed as a metastatic undifferentiated carcinoma with the primary tumor site unknown. At that time, the preliminary evidence indicated that the primary site was either the lungs or liver, and therefore, Dr. Bendix initially concentrated on these organs, insomuch as the original biopsy involved liver cells.

Dr. Bendix outlined Zipton's exposure history to numerous chemical carcinogens in the course of his employment as a firefighter. With references to scientific and epidemiological studies, she documented many liver and lung carcinogens found in smoke, and discussed their relevant latency periods in reference to Zipton's 17 years of exposure. Dr. Bendix concluded that it was probable that Zipton's employment "caused or materially contributed to his cancer which had a liver or lung primary site."

In a subsequent report dated April 14, 1988, upon reviewing the final pathology report and learning that the primary tumor site was not the liver or lungs, but unknown, Dr. Bendix emphasized: "Consideration of an unknown primary cancer metastatic to the liver broadens rather than restricts the range of carcinogens to which firefighters are exposed which may be relevant to this case. Most of the chemicals listed as liver carcinogens in my first report also affect other sites."

Dr. Bendix acknowledged in her final report that it was impossible to ascertain the usual age of occurrence of Zipton's cancer since the primary site was unknown. However, she noted that death from metastatic cancer is not common at the age of 40. Dr. Bendix concluded that Zipton's cancer was probably caused by exposure to chemical carcinogens in the smoke which he inhaled as a firefighter.

Dr. Mustacchi, in his report of March 18, 1988, concluded that work exposure played no role in Zipton's development of cancer, but did not give any indication as to what he thought might have caused the cancer. He did not discuss possible risk factors, other than eliminating chemical exposure on the job as a possible cause of Zipton's cancer. The major thrust of Dr. Mustacchi's report was directed to taking exception to the conclusions reached by Dr. Bendix regarding Zipton's industrial exposure to specific carcinogens, an issue rendered moot by the subsequent Board finding. *987

Board Opinion

Addressing whether Zipton's fatal cancer came within the ambit of section 3212.1, the WCJ initially determined that petitioner proved the requisite exposure by a preponderance of the evidence. The WCJ stated: "This conclusion is reached after close study of the reports of Drs. Mustacchi and Bendix; although Dr. Mustacchi disagrees with Dr. Bendix as to the status of some of the borderline substances or those not definitely shown to be related to cancer in humans, it is still evident that at least several of them meet the criteria."

Turning to the second requirement of section 3212.1-proof of a "reasonable link" between Zipton's cancer and his industrial carcinogenic exposure-the WCJ emphasized: "[T]o apply the presumption it must then be demonstrated by a preponderance of the evidence that the carcinogen is reasonably linked to the disabling cancer, and therein lies the major difficulty in this case. ... [¶] Unfortunately, the very nature of the diagnosis is such that the burden of proof of industriality ... was impossible to meet regardless of the effort involved." Without scientific evidence as to the nature of the primary cancer, the WCJ concluded that petitioner failed to prove that Zipton's cancer was reasonably linked to his industrial exposure.

Legislative History

(1) It is fundamental that when a court endeavors to construe a statute, it must ascertain the intent of the Legislature in order to accomplish the purpose of the statute. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].)

In the matter before us, the legislative history does not change the outcome. We are concerned, however, that neither the parties to this action, nor amicus California Compensation Defense Attorneys' Association demonstrate an awareness of the specific legislative history. Because this case presents such a troublesome set of circumstances and a difficult issue to resolve, the pertinent legislative history is consequential and should be discussed.

(2) The foremost purpose of the presumptions of industrial causation found in the Labor Code (§ § 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3213) is to provide additional compensation benefits to certain public employees who provide vital and hazardous services by easing the burden of proof of industrial causation. ((3)(See **fn. 4.)** *Saal v. Workmen's Comp. Appeals Bd.* (1975) 50 Cal.App.3d 291, 297 [**988123 Cal.Rptr. 506]; *Smith v. Workmen's Comp. Appeals Bd.* (1975) 45 Cal.App.3d 162, 166 [119 Cal.Rptr. 120].) [FN4]

FN4 The presumptions, which are a reflection of public policy, are implemented by shifting the burden of proof in an industrial injury case. Where facts are proven giving rise to a presumption under one of these statutes, the burden of proof shifts to the party, against whom it operates, to prove the nonexistence of the presumed fact, to wit, an industrial relationship. (Cf. *Gillette v. Workmen's Comp. Appeals Bd.* 320(1971) 20 Cal.App.3d 312, [97 Cal.Rptr. 542]; Evid. Code, § 606.)

Section 1 of Assembly Bill No. 3011, 1981-1982 Regular Session, added section 3212.1 to the Labor Code, thereby extending the presumption of industrial causation to encompass cancer suffered by certain active firefighters. (Stats. 1982, ch. 1568, § 1, p. 6178.) [FN5] Section 3212.1 defines the applicable condition as "cancer which develops or manifests itself" during the employment period. (4) Unlike the other presumptions, however, it additionally requires a showing (1) of *exposure* to a known carcinogen as defined by the IARC, and (2) *that the carcinogen is reasonably linked to the disabling cancer* before the presumption can be invoked.

FN5 Effective January 1, 1990, the presumption also was extended to peace officers as defined in Penal Code sections 830.1 and 830.2, subdivision (a). (Stats. 1989, ch. 1171, § 2, No. 6 Deering's Cal. Legis. Service, pp. 4498-4499.)

In its original form, section 3212.1 only required, in conformity with the other presumption statutes, that the cancer develop or manifest itself during the employment. (Assem. Bill No. 3011 (1981-1982 Reg. Sess.) § 1.) The bill underwent several amendments, apparently in response to considerable opposition from state and local agencies concerned with its potentially excessive financial impact. There was also some skepticism regarding whether cancer was actually an occupational disease encountered by firefighters. (See Senate Report to the Chairman of the Joint Committee on Fire, Police, Emergency and Disaster Services in California (1987) Firefighters: A Battle With Cancer [hereafter cited as 1987 Joint Committee Report], letter to Senator Campbell dated Aug. 17, 1987.)

Additionally, the Assembly added a sunset clause to effect the repeal of section 3212.1 on January 1, 1989. However, following receipt of the 1987 Joint Committee Report demonstrating that cancer was in fact an occupational hazard of firefighters and that the financial cost of the presumption had been much less than anticipated, apparently in spite of the fact that the mortality rate from cancer among firefighters had increased, the Legislature repealed the sunset date. [FN6] (See 1987 J. Com. Rep., *supra*, pp. 3-5, 15-17, 31.)

FN6 Section 3212.8, which would have repealed section 3212.1, was repealed effective January 1, 1988. (Stats. 1987, ch. 1501, § 1.)

The most cogent statement of legislative intent regarding section 3212.1 is found in a letter dated August 26, 1982, from legislative counsel to ***989** Senator Newton Russell. As pertinent, counsel stated: "The workers' compensation law ..., generally speaking, requires every employer ... to secure the payment of workers' compensation for injuries to employees acting within the course of their employment. Before an employee is entitled to workers' compensation benefits, it must be shown that the injury was proximately caused by the employment (subd. (c), Sec. 3600, Lab. C.). ... [¶] If A.B. 3011 is chaptered, the specified firefighters could use this presumption and be entitled to workers' compensation benefits *without showing that the injury was proximately caused by the employment*, unless the local public agencies could provide otherwise." (10 Assem. J. (1981-1982 Reg. Sess.) pp. 17852-17853, italics added.)

We glean from the legislative history that the initial draft of section 3212.1 (Assem. Bill No. 3011, *supra*) was met by stiff resistance from selfinsured state and local agencies which were predicting economic catastrophe. (See 1987 J. Com. Rep., *supra*, p. iii.) Because of this initial panic and the resulting pressure placed on the Legislature, it is evident that the reasonable link requirement was added to appease public entities in order to assure that the bill would be passed. (See 1987 J. Com. Rep., *supra*, p. iii.)

Ironically, the information provided in the 1987 Joint Committee Report indicates that local public entities may be faring better economically under the cancer presumption law. [FN7] If correct, it appears that the original reason ***990** for adding the reasonable link requirement-to curb a potentially disastrous financial impact-may be nonexistent, and public entities may be saving money with the implementation of section 3212.1.

FN7 The 1987 Joint Committee Report reads, as pertinent: "An argument frequently heard in opposition to the firefighter cancer presumption law is the high fiscal costs of that presumption for public employers. [¶] In response to the financial concerns, the *estimated* cost of workers compensation and related benefits attributable to the cancer presumption law appear to be minor. Much higher costs were anticipated when the Legislature passed the original cancer presumption bill in 1982. Those costs were deemed reasonable for the compensation of firefighters who had contracted cancer as a result of their occupation. However, according to recent estimates, the law will not be as costly as originally thought. [¶] Based on a random survey of fire agencies, the Commission on State Mandates estimated the average annual State cost of the firefighter cancer presumption law for the 5-year period covering the fiscal year

1982/83 through fiscal year 1986/87 was approximately $250,000. Furthermore, those costs attributed to the fifth year the law was in effect were roughly 1/3 of the highest cost fiscal year. Therefore, those who argued that costs for firefighter cancer presumption claims *would continue* to escalate were incorrect. The Commission's estimate of the average annual costs of the cancer presumption law are well below the $500,000 ceiling on reimbursements from the States Mandates Claims. [¶] Furthermore, local jurisdictions stand to fare far better under a cancer presumption law. Before the law was enacted, local agencies were responsible for the full cost of workers' compensation benefits, or for the increased premiums resulting from successful claims for firefighters job-related cancer. In addition to the full hospital, surgical, medical disability, indemnity and death benefits costs, local agencies also had to bear the legal, administrative and other overhead expenses associated with handling a firefighter's claim. [¶] However, under the cancer presumption law-when the Legislature adopts the recommendations of the Commission on State Mandates-local entities insured by the State Compensation Insurance Fund (SCIF) may be reimbursed for any increases in workers' compensation premium costs attributable to the cancer presumption. Thus, no additional cost will accrue to the local agency. On the other hand, local self-insured agencies may be reimbursed 50 percent of the actual costs attributable to the cancer presumption law; including but not limited to staff, benefit and overhead costs. Thus, self-insured local agencies can expect a minimum of 50 percent savings on claims for job-related firefighter cancer. [¶] While the financial impact on the State and local agencies cannot be identified precisely, there is no supporting data to assume that the cost would be excessive." (At pp. 15-17, fns. omitted.)

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 the fear of financial doom, 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. [FN8] However, this is clearly a legislative task. Our task is to interpret the reasonable link requirement in light of the facts before us.

FN8 At oral argument, the attorneys were asked to advise the court whether the situation faced by petitioner-a burden of proof made impossible by the current state of medical knowledge-is a common one. They were unable to cite any other similar cases.

Reasonable Link Requirement

The determination of what minimum factual elements must be established in order to invoke the presumption under section 3212.1 is a question of law that is reviewable by the courts. (1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d rev. ed. 1989) § 10.08[5], p. 1042.4; cf. *Dimmig v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 860, 864 [101 Cal.Rptr. 105, 495 P.2d 433]; *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 115 [251 P.2d 955].)

(5) Petitioner had the initial burden of proving by a preponderance of the evidence that Zipton's disabling cancer was reasonably linked to his industrial exposure to carcinogens. (§ 3202.5; *Wehr v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 188, 193 [211 Cal.Rptr. 321]; *California State Polytechnic University v. Workers' Comp. Appeals Bd.* (1982) 127 Cal.App.3d 514, 520 [179 Cal.Rptr. 605].) "'Preponderance of the evidence' ***991** means such evidence as, 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." (§ 3202.5.)

Although we recognize that the Legislature intended to ease the burden of proof of industrial causation faced by firefighters in cancer cases, as emphasized by petitioner, it was incumbent on petitioner to produce prima facie evidence that Zipton's cancer and, ultimately, his death were reasonably linked to the industrial exposure.

(6) Here, there was no evidence whatsoever that the cancer was reasonably linked to the industrial exposure. All of the medical evidence, including the autopsy report, established that a primary tumor site could not be identified. Without this information, it was impossible for petitioner to prove a reasonable link. The WCJ stated: "There is no scientific evidence as to the nature of the primary cancer, and apart from sheer speculation it is impossible based upon the record herein to pinpoint within reasonable medical probability the carcinogen or carcinogens that caused the malignancy. ... [T]he essential missing element, i.e., the nature of the carcinogen and its relationship to the carcinoma that developed and metastasized ... leaves an evidentiary gap. It may be true, as applicant argues, that the presumption's purpose is to fill in gaps and insufficiencies in the evidence *once it has been established that an applicable condition exists* ..., but here we cannot reach that point since insufficient evidence exists to activate the presumption *ab initio*."

Petitioner argues that a reasonable link is established by virtue of the exposure to carcinogens, known to cause lung and liver cancer, and the existence of cancer in the lung and liver organs. We disagree. Petitioner ignores the fact that the cancer found in these organs had metastasized. By definition, a metastasis is a secondary cancer growth which has migrated from the primary site of the disease in another part of the body Here, the medical evidence establishes without dispute that the cancer found in Zipton's liver and lungs *did not originate* in either of these organs, but migrated from an unknown primary site.

Without identification of the underlying factual linkage, i.e., the primary tumor site, the opinions of Drs. Bendix and Polakoff are highly speculative and conclusionary. Dr. Polakoff's opinion regarding the lack of other recognized nonindustrial risk factors is well taken. Nevertheless, it is pure conjecture to conclude that a reasonable link exists between the industrial exposure and an undifferentiated cancer when the primary site is unknown, and *992 by virtue of this fact the cancer cannot be attributed to any particular carcinogen.

It is not our intention to imply that in every cancer case a primary site must be established in order to invoke the presumption of industrial causation under section 3212.1. In determining whether a reasonable link exists, sufficient to invoke the presumption, the proper inquiry should be whether it is more probable than not that a cancer is linked to the industrial exposure. "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 403 [209 Cal.Rptr. 456].)

In the matter before us, however, without the identification of a primary tumor site, there is *no* evidence from which to *reasonably* infer that Zipton's cancer, in the absence of other reasonable causal explanations, was more likely the result of industrial exposure than nonindustrial exposure. To make that leap, as petitioner urges, would require that we simply ignore the legislative directive that a reasonable link must be established by a preponderance of the evidence before the presumption can be invoked.

While the legislative mandate that the workers' compensation laws are to be liberally construed applies to the construction of section 3212.1 (§ 3202; see *Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622, 633 [124 Cal.Rptr. 407]), it does not authorize the creation of nonexistent evidence. (*Wehr v. Workers' Comp. Appeals Bd., supra*, 165 Cal.App.3d 188, 195; *Sully-Miller Contracting Co. v. Workers' Comp. Appeals Bd.* (1980) 107 Cal.App.3d 916, 926 [166 Cal.Rptr. 111].) Furthermore, the Legislature expressly provided that "[n]othing contained in Section 3202 shall be construed as relieving a party from meeting the evidentiary burden of proof by a preponderance of the evidence." (§ 3202.5.)

Petitioner's reliance on *Muznik v. Workers' Comp. Appeals Bd., supra*, 51 Cal.App.3d 622, is misplaced. *Muznik* concerned the construction of the statutory heart presumption embodied in section 3212 and the meaning of its phrase "heart trouble." [FN9] Given the liberal mandate of section 3202 and the general rule that statutory language is to be given its commonly understood meaning, the *Muznik* court held that the phrase "heart trouble" in section 3212 "assumes a rather expansive meaning." (*Id.*, at p. 635.) However, unlike the heart presumption statute, section 3212.1 requires an additional showing that

the industrial exposure is reasonably linked to the *993 disabling cancer. Establishment of this linkage is a question of fact, which must be shown by a preponderance of the evidence. (§ 3202.5.) This additional criterion distinguishes the instant case from *Muznik* and its construction of section 3212, which is much less specific regarding the requisite elements of proof, and therefore, subject to considerably more flexibility in its interpretation. As noted by the WCJ herein, the gap created by the absence of facts necessary to establish a reasonable link simply cannot be bridged by the rule of liberal construction.

FN9 In order for an eligible employee to be entitled to the presumption in section 3212, it must be shown that "heart trouble" has developed or manifested itself during a period while such employee is employed by a relevant agency.

In conclusion, petitioner has failed to establish by a preponderance of the evidence that her deceased husband's cancer was reasonably linked to his industrial exposure to carcinogens while he was employed as a firefighter by respondent.

The Board's order denying reconsideration is affirmed.

Merrill, J., and Strankman, J., concurred.

A petition for a rehearing was denied April 4, 1990, and petitioners' application for review by the Supreme Court was denied June 6, 1990. *994

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