CALIFORNIA COMPENSATION CASES

City of San Diego, Petitioner v. Workers Compensation Appeals Board, Daniel Stanley, Blue Cross of California, Respondents.

Civil No. D029066--

Court of Appeal, Fourth Appellate District, Division One

62 Cal. Comp. Cas 1700; 1997 Cal. Wrk. Comp. LEXIS 5057

October 20, 1997

CORE TERMS: hernia, industrial, industrial causation, writ of review, herniation, surgery, burden of proof, addressing, reconsideration, vital, small intestine, police officer, intra-abdominal, controverted, unambiguous, manifested, protrusion, abdominal, manifest, bowel, feet

PRIOR HISTORY: [1]** Prior History:W.C.A.B. No. SDO 202252--WCJ J.P. McHenry SDO WCAB Panel: Commissioner Gannon, Deputy Commissioner Dietrich, Commissioner Wiegand

DISPOSITION: Disposition:Petition for writ of review denied

HEADNOTE: Presumption of Injury--Hernia--WCAB properly held presumption of Labor Code § 3212[Deering's] applied to applicant police officer's claim of cumulative industrial hernia injury through 3/95. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.113[4][a].]

Applicant, Daniel Stanley, while employed as a police officer for the City of San Diego claimed to have sustained injury AOE/COE.

The case proceeded to trial. The WCJ found that, on 3/29/95, Applicant's first symptoms of an intra-abdominal hernia manifested themselves while he was at work. As a result of the hernia, Applicant underwent surgery, which was paid for by Respondent Blue Cross. During surgery, 27 feet of the Applicant's small intestine was removed. The surgery left the Applicant with approximately 3 feet of small bowel.

The WCJ applied the presumption contained in Labor Code § 3212[Deering's] and concluded that Applicant had sustained an industrial injury to his small intestines, lower extremities, and lungs. **[**2]**

Defendant sought reconsideration contending that Labor Code § 3212[Deering's] did not apply to Applicant's type of hernia and resulting complications. Defendant requested that the award be annulled.

The WCJ recommended that Defendant's petition be denied. In his report and recommendation, the WCJ noted that Applicant's small intestine had protruded through a herniation of his interior abdominal wall. As a result of the bowel's protrusion through the herniation, it became

incarcerated, and the blood supply was severely compromised leading to extensive necrosis. The WCJ noted that the

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herniation may have occurred at the same spot where the Applicant's abdominal wall was cut during an appendectomy when he was a teenager.

Addressing Defendant's contention that Applicant's hernia was not the type of hernia covered by Labor Code § 3212[Deering's], the WCJ noted Labor Code § 3212[Deering's] provides, in relevant part, that:

In the case of members of a police department of [a city] whether such members are volunteer, partly paid, or fully paid, the term "injury' as used in this act includes hernia when any part of the hernia develops or manifests itself during **[**3]** a period while such member is in the service of such department.

Such hernia so developing or manifesting itself in such 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.

The WCJ wrote that:

The foremost purpose of the presumption in the statute above is to provide additional compensation benefits to certain public employees who provide vital and hazardous services by easing the burden of proof of industrial condition. The manifest purpose of [Labor Code] section 3212 is to favor a special class of employees whose service is vital to the public interest and whose strenuous work makes them especially vulnerable to the three conditions as to which the rebuttable presumption of industrial causation will operate: hernia, heart trouble, or pneumonia Paul Smith v. Workers' Compensation Appeals Board, (1975) 45 Cal. App. 3d 162, 40 Cal. Comp. Cases 113. While the burden of establishing industrial causation is on the worker, the presumption is designed to aid these officers in addressing the two part **[**4]** test, usually referred to as AOE/COE, which is found in Labor Code § 3600[Deering's].

To be entitled to the presumption the worker must first show that his disability can be characterized as hernia within the meaning of [Labor Code] section 3212. In this case, while admitting that the worker has suffered a hernia, defendant argues that the hernia he suffered is not the type of hernia contemplated by the legislature when it wrote Labor Code § 3212 [Deering's].

Regarding the interpretation of the word "hernia" the WCJ noted that, "it is a settled principle in California law that when statutory language is clear and unambiguous there is no need for construction, and the court should not indulge in it."Solberg v. Superior Court (1977) 19 Cal.3d 182 [137 Cal. Rptr. 460, 561 P.2d 1148].

The WCJ noted that "hernia" is a general term that means a "protrusion of tissue or an organ

through an abnormal opening in the body cavity that normally contains

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it." Furthermore, the WCJ noted that Labor Code § 3202[Deering's] requires that the Labor Code be liberally construed with the purpose of extending benefits for the protection of persons injured in the course of their employment. **[**5]** By establishing that the hernia manifested itself during the course of his employment as a police officer, Applicant met his burden of proof establishing injury. The WCJ concluded that Applicant did suffer a hernia within the meaning of Labor Code § 3212[Deering's] and that he was entitled to the presumption contained in the statute.

The WCJ noted that Defendant's argument failed to recognize the legal effect of the presumption created by Labor Code § 3212[Deering's]. This presumption shifts the burden to the defendant to prove the non-existence of the industrial causation of the applicant's hernia. Minniear v. Mount San Antonio Community College District (1996) 61 Cal. Comp. Cases 1055. The WCJ concluded that Defendant had failed to do so.

The WCAB denied Defendant's request for reconsideration without comment, and Defendant sought writ of review. Defendant contended, among other issues, that (1) Applicant's hernia was not the type of hernia covered by the presumption created by Labor Code § 3212 [Deering's], and (2)[Deering's] since Labor Code § 3212[Deering's] should not apply to Applicant's case, Applicant has not established his case by a preponderance of the evidence. **[**6]** Both Applicant and lien claimant, Blue Cross, filed answers refuting Defendant's contentions.

WRIT DENIED October 20, 1997.

By the Court:

The petition for writ of review and answers to the petition have been read and considered by Presiding Justice Kremer and Associate Justices Benke and Haller.

The City of San Diego (City) petitions for a writ of review after the Workers' Compensation Judge (WCJ) determined the worker suffered a hernia within the meaning of Labor Coden1

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All statutory references are to the Labor Code.
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section 3212, the worker was entitled to the presumption the injury was industrial and City did not rebut the presumption. City contends the statute applies only to inguinal hernias, not the

intra-abdominal hernia suffered by the worker.

Section 3212 provides "In the case of regular salaried county or city and county peace officers, the term "injury' also includes any hernia which manifests itself or develops during a period while the officer is in the service." The language of section 3212 is clear and unambiguous **[**7]** the presumption of injury applies to any hernia. The WCJ's decision was reasonable.

City also challenges the sufficiency of the evidence supporting the finding the injury was industrial. Because City failed to include the medical evidence before the WCJ in its petition, City waived the issue.

The petition is denied."

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Benke, Acting P.J.