Rebut or Not To Rebut: Lessons I Am Learning From Presumption Trials.

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Materials:

Quick Poll:

How Many of You Have My Materials?

How Many of You Care?

http://davidhparker.org/parma.html
Lesson One:

“On any given day, anything can happen…”

-CBS This Morning

(…and be presumed compensable for some California employees).

-David H. Parker
Presumptions: Which Ones And What?

Hernia, Heart, Pneumonia
Labor Code Sections
3212, 3212.3 to 3212.5

(Enumerated Public Safety Workers who demonstrate hernia, heart trouble or pneumonia).
Presumptions: Which Ones And What?

Cancer, Including Leukemia
Labor Code Section 3212.1
(Qualified Peace Officers and Firefighters who demonstrate known carcinogenetic exposure).

Presumptions: Which Ones And What?

Tuberculosis
Labor Code Sections 3212.6 and 3212.10

(Peace Officers, Prison Guards, Correctional Officers and Firefighters).
Presumptions: Which Ones And What?

Blood-Borne Infectious Disease
Labor Code section 3212.8

(Penal Code Section 830 et. seq. Peace Officers and Firefighters).
Presumptions: Which Ones And What?

Biochemical Substances
Labor Code section 3212.85

(Penal Code Section 830 et. seq. Peace Officers and Firefighters).**

**“Any biological or chemical agent that may be used as a weapon of mass destruction.”
The meninges are the membranes covering the brain and spinal cord.

**Dura mater (2 layers)**

- Arachnoid
- Pia mater

**Brain**

**Menings**

“Disease caused by the inflammation of the protective membranes covering the brain and spinal cord known as the meninges.”
HEY KID!! DON'T DROWN!!!
Presumptions: Which Ones And What?

**Lyme Disease**
Labor Code section 3212.12

*(Specified Peace Officers defined by Penal Code section 830.1(b) and “Corpsmembers” defined by Public Resources Code section 14302).*
MCLE Lawyer Credit Question:

14302. Young women and men shall be selected for participation in the corps program on the basis of motivation for hard work, personal development, and public service, and without regard to their prior employment or educational background. Participation shall be for a period of one year, which may be extended. The corps, in conjunction with the Employment Development Department, shall place an emphasis on developing and executing plans to assist corpsmembers in obtaining employment following their participation in the corps program.
What If...

Applicant was not young? a man? a woman? motivated? hardworking?

Applicant was old? worked a day? transgender? unmotivated? lazy?
What Have You Learned From Your MCLE Test?

Read the law. Know your facts.

“The statute may be your best defense.”

– David H. Parker
Jacob J. Rosenblum on what every lawyer knows:

“The defense seems to have been prepared according to the old rules. ‘If the facts are against you, hammer the law. If the law is against you, hammer the facts. If the fact and the law are against you, hammer opposing counsel.’”

-Golden Book Magazine 1934
Now back...

TO PRESUMPTIONS: WHICH ONES AND WHAT?
Presumptions: Which Ones And What?

Lower Back

Labor Code section 3213.2

(Known as the “duty belt presumption” applicable to certain law enforcement officers).
Presumptions: Which Ones And What?

Methicillin-Resistant Staphylococcus Aureus (MRSA)

Labor Code section 3212.8
(Qualified Sherriff's Office, Police, Fire Personnel)
Presumptions: Can You Rebut?

Presumption Trivia:

The terms “rebut” and “rebuttable” occur nowhere in Labor Code presumption statutes.
Presumptions: Which Disputes and How?**

**One lawyer’s non-comprehensive, informational educational, in no way, shape or form to be considered legal advice perspective.

See disclaimer.
Presumptions:
Which Disputes and How?**

Independent Incident or Occurrence
Latency
Statute(s) of Limitation(s)
Date of Injury (Labor Code Section 5412)
Liability (Labor Code section 5500.5)
Medical Record Reflects No Industrial Causation

**one lawyer's non-comprehensive non-legal advice education only. See disclaimer.
How To Rebut, aka, “…This Presumption Is Disputable…”

Defendant disputes an applicable Labor Code presumption by presenting evidence that some non work-related event or condition was the sole cause of the presumptive condition City and County of SF v. WCAB (Wiebe) (1978) 43 CCC 984.
How To Rebut, aka, “...This Presumption Is Disputable...”

Defendant disputes an applicable Labor Code presumption by presenting a medical record reflecting only non-industrial causation of applicant’s otherwise presumptive condition Davis v. WCAB (2005) 70 CCC 1593.
How To Rebut, aka, “…This Presumption Is Disputable…”

Defendant disputes an applicable Labor Code presumption by

1. proving the carcinogen is not reasonably linked to the disabling cancer or

2. applicant has not proven exposure to the causative carcinogen Faust v. City of San Diego (2003) 68 CCC 1822 [WCAB en banc decision].
How To Rebut, aka, “…This Presumption Is Disputable…”

Defendant disputes an applicable Labor Code presumption by proving the latency period reflects absence of a reasonable link to its employment Joy v. WCAB 2009 70 CCC 71.
A Real-Life Case Study

Applicant is employed by City Of Bliss for 29 ½ years. He is employed at County Of Doe from 1994 during which he was assigned to a special unit. He is a qualified peace officer the entire time. The record reflects applicant remembers only two incidents related to County of Doe exposures. A diagnosis of cancer was made in late 2008.
A Real-Life Case Study

Applicant applied for workers’ compensation benefits September 26, 2011. County of Doe denied the claim, provided no indemnity payments and “furnished no medical treatment.”
A Real-Life Case Study

Panel Qualified Medical-Legal Reports, depositions, records obtained demonstrate: HPV caused the cancer. Parties dispute whether Medical-Legal supports causation with or without the presumption(s).
A Real-Life Case Study

The Matter Proceeds To Trial On May 4, 2015.
The WCALJ Finds Causation.
A Petition For Reconsideration Is Filed.
WCALJ Rescinds The Award.

Issues Include "What Is The Latency Period?"
CONTENTIONS

Non-Industrial HPV Caused Applicant’s Cancer Condition.

Pesko v. WCAB. (2012)
78 CAL. CCC 61
Cal. Wrk. Comp. Lexis 173
CONTENTIONS

Applicant did not prove exposure to the carcinogen during County of Doe’s Employment by a preponderance of evidence.

The carcinogenic latency period demonstrated exposure outside the County of Doe’s employment.
CONTENTIONS

There was no factual finding of the latency period.
In Plain Language:

Applicant wasn’t exposed to the Carcinogen (Joy), the exposure if any happened well before County of Doe’s employment (Faust) and non-industrial HPV caused the cancer (Pesko).

Does my client win?
Costs and Fees

Total Costs To Date For This Trial With Discovery:

Fees: $21,879.50

Costs: $1,924.25
Exposures:

Past Medical Care: $100,000+ (Group Health Liens)

Future Medical Care: Average Annual Costs of Care,
Cancer: $60,533 (female); $60,885 (male); for individuals over age 65.

PD: 26% $23,485
TTD: $26,999.97
Voucher: $8,000
Liens: None(?)
So, What Would/Should You Do?

Try The Case, Or Try To Settle The Case?
A Real-Life Case Study

Applicant was employed by County of One as a Sheriff from 1973-1977 having been during the period of 1975-1976 when “Inmates were allowed to smoke at this time indoors” and from 1982-1997 being exposed to fumes including but not limited to second hand smoke, Jet-A jet fuel, exhaust from a running engine and UV radiation while flying the helicopter for County of One.
A Real-Life Case Study

Applicant worked for County of Two as a deputy sheriff, from February 10, 1997 through March 31, 2005 during which time his exposures were consistent during the time he worked for County of One with the exception of being involved in firefighting duties for County of One as opposed to just responding to and observing fires with County of Two.
A Real-Life Case Study

Applicant was employed by the County of Two for 8 years, 1 month, and 22 days or 8.14 years.

Applicant went on to work for Helicopter Inc. “Assigned to Skylife Division” from 2005-2010 during which employment he was exposed to co-employees who smoked, exhaust from vehicles and diesel fumes but had no firefighting duties.
A Real-Life Case Study

Clearly there were cancer-causing carcinogenic exposures at both Counties.
CONTENTIONS

Labor Code Section 3212.1 Is Inapplicable. The presumption Created by Labor Code-section 3212.1(d) Expired on April 13, 2007.**

**Labor Code section 3212.1(d): presumption is extended 3 calendar months per year of qualified service. Math: 8.14 years times 3 equals 24.42 months (8.14 yrs x 3 mo = 24.42 mo) or 2.035 years (24.42 mo/12 mo = 2.035 yrs) or 742.775 days (2.035 yrs x 365 days = 742.775 days). March 31, 2005 plus 743 days = April 13, 2007.
CONTENTIONS

Liability Pursuant to Labor Code section 5500.5 Must Be Assessed Against Helicopter Inc. the last employer as well as carcinogenic exposure.
CONTENTIONS

Applicant filed the application more than 1 year following the date he knew or should have known he suffered injury arising out of and during the course of employment.**

**The often “dreaded and lamented” statute of limitations argument.
Labor Code section 5405(a).
Applicant was not entitled to the presumption, filed his application too late and against the wrong defendants.

Does my client win?
Fees and Costs

Total Costs To Date For This Trial With Discovery:

Fees: $32,238.00
Costs: $4,644.55
Exposures:

Future Medical: Close monitoring of Tonsil cancer. Dentist should see every 6 months. Surgeon, Medical Oncologist and Radiation Oncologist should all see Applicant every 6 months for 5 years then annually after year 5. Included will be timely PET/MRI’s. Urologist and Radiation Oncologist every 6 months for two years and annually after that. PSA studies every visit. Possible “catastrophic” future care (note lien of hospital in upcoming slide).
Exposures:

PD Rating:

Tonsil 98% (11.03.02.00 – 20 - [2]23 - 490H – 28 – 33%) 32%
Prostate: 98% (07.05.00.00 – 26 - [2]30 - 490F – 30 – 35%) 34%
Total PD: 34c32 = 55% 311.25 weeks = $82,029.91 at max rate +15% for No offer of work.
Exposures:

Liens:

ADJ7646505 0004800645 ANTHEM BLUE CROSS
2011-03-24 00:00:00 INACTIVE $192,635.96

ADJ7646505 0012124751 EDD SDI FRESNO
2015-09-24 00:00:00 INACTIVE 0
So, What Would/Should You Do?

Try The Case, Or Try To Settle The Case?
Final Thoughts, Q&A
THANK YOU!!!!!

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