

MEMORANDUM OF LAW

DATE: January 19, 1993

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Findings of Fact on the Industrial Disability  
Retirement Application of Richard Burns

In a memorandum dated December 24, 1992, you asked me to review the Adjudicators Summary of Evidence and Proposed Findings of Fact and Decision, the Applicants Objections to the Adjudicator's Proposed Findings of Fact and Decision and the Appointing Authority's Response to the Objections Filed Regarding Proposed Findings of Fact, which were set forth in the Board Materials for the December 18, 1992, regularly scheduled meeting. In a subsequent phone conversation where I requested clarification of your request, you asked me to address the applicability in disability hearings of Workers' Compensation case law and the presumption for industrial-causation for "heart trouble" contained in California Labor Code section 3212.

My review follows:

**BACKGROUND**

The application for an industrial disability retirement in the above-referenced matter was heard before a Board Adjudicator on September 22, 1992. All parties were represented by counsel. The evidence consisted of the testimony of a former supervisor, the Application for an Industrial Disability Retirement, various reports of physicians and other health-care providers including diagnostic reports, injury reports and supplemental medical reports, testimony of an internist, Dr. William Harrison, called by applicant, and forty-six (46) exhibits received into evidence and reviewed by the Adjudicator.

After a review of the evidence, the Adjudicator made proposed findings of fact and recommended denial of the application. Briefly, the Adjudicator found the applicant to be permanently physically incapacitated by virtue of a combination of hypertension and irregular heartbeats from performing the full range of activities required of a fire fighter. The Adjudicator further found, however, that the applicant failed to sustain his burden of proving that the found physical incapacities arose out

of or were caused by his employment with the City of San Diego or that such employment was a significant factor in bringing about the found permanent physical incapacities.

The applicant filed written objections to the Adjudicator's proposed findings, claiming that the Adjudicator's findings were not consistent with the medical evidence or the law which governs disability retirement. Relying on case law arising under Workers' Compensation Law and County Retirement Systems under the 1937 County Employees' Retirement Law ("1937 Retirement Law"), he argues that an employer takes an employee as he finds him and any acceleration or aggravation of a preexisting disability becomes a service connected injury of that employment. He also argues that he is entitled to the presumption under California Labor Code section 3212 of industrial causation for his "heart trouble."

In response, the Deputy City Attorney at the disability hearing argues that the evidence reviewed by the Adjudicator clearly indicates the existence of heart irregularities prior to employment. The Deputy City Attorney argues that under principles of collateral estoppel, proceedings before the Workers' Compensation Appeals Board ("WCAB") do not bind the Retirement Board. Finally, the Deputy City Attorney argues that California Labor Code section 3212 is confined to WCAB proceedings.

#### ANALYSIS

1. Workers' Compensation Proceedings are separate and distinct from Pension Proceedings.

It is well-settled that the WCAB and the City's Retirement Board "exist for entirely different reasons and were established to attain wholly independent objectives." *Reynolds v. City of San Carlos*, 126 Cal. App. 3d 208, 212 (1981). Citing *Pathe v. City of Bakersfield*, 255 Cal. App. 2d 409, 414-415 (1967), the Reynolds court elaborated on these differences:

The Industrial Accident Commission  
now the WCAB exists primarily to  
adjudicate workmen's compensation  
claims under the general laws adopted  
by the Legislature pursuant to the  
Constitution. Its main objective,  
therefore, is to carry out the  
legislative scheme which is to  
provide adequate compensation for  
employees, public or private, who are  
injured in the course and scope of  
their employment while such employees  
are disabled and incapable of earning  
a living. On the other hand, the

pension board is concerned only with the retirement of a limited class of public employees under a retirement system which was adopted primarily for the betterment of city government. Its objective is not only to recognize the public obligation to certain employees who after long and faithful service become incapacitated by age or physical disabilities, but it is also to make certain that these employees will be replaced by more capable employees for the betterment of the public service without undue hardship on the employees removed. (Citations omitted.)

Pathe v. City of Bakersfield, 255 Cal. App. 2d 409, 414-415 (1967).

As further noted by the Reynolds court: "The jurisdiction of the WCAB 'is exclusive only in relation to its own objectives and purposes and at the very most overlaps the subject matter jurisdiction of the pension board on a single issue of fact only, the issue as to whether an injury or disability is service-connected.'" Reynolds v. City of San Carlos, 126 Cal. App. 3d 208, 213 (1981).

Recognizing the differences in proceedings before the WCAB and our Board outlined above, our Court of Appeal has ruled:

Generally, a WCAB proceeding decides whether the employee suffered any job-related injury. If that injury results in some permanent residual loss . . . the WCAB awards the employee a permanent disability rating. (Citations.) Retirement boards, on the other hand focus on a different issue: whether an employee has suffered an injury or disease of such magnitude and nature that he is incapacitated from substantially performing his job responsibilities. (Emphasis in original.)

Bianchi v. City of San Diego, 214 Cal. App. 3d 563, 567 (1989).

Applicant, however, cites to Gelman v. Board of Retirement, 85 Cal. App. 3d 92 (1978) and Lundak v. Board of Retirement, 142

Cal. App. 3d 1040 (1983) as authority for the proposition that "an employer takes his employee as he finds him and any acceleration or aggravation of a preexisting disability becomes a service-connected injury of that employment." Gelman, 85 Cal. App. 3d at 96. While this may be true for public retirement systems created under the 1937 Retirement Law, it is not true for the City of San Diego.

Unlike the definition for disability used by county public retirement systems created under the 1937 Retirement Law set forth in Government Code section 31720, our definition requires the incapacity to be "the" result rather than "a" result of the workplace.F

In addition, those who became members of the City's Retirement System on or after September 3, 1982, are subject to additional criteria. Disability retirements are not available if based on stress or a preexisting medical condition.

The distinction is critical and permissible.

It is critical because the City's Retirement System has adopted a standard for industrial disability retirements which is more restrictive than that adopted by other public agencies. Under the City's standard, the incapacity must be the result of the workplace. Thus, while the Retirement Board has not historically required the workplace to be the sole cause of the incapacity, it has required that the workplace be the substantial cause. In practice, a minimum fifty percent (50%)

industrial-causation test has been used.

This distinction is also permissible because the City is a charter city. As a charter city, the City "can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law." Grimm v. City of San Diego, 94 Cal. App. 3d 33, 37 (1979). Charter cities are given full power to provide for the compensation of their employees. Cal. Const., Article XI, Section 5, subdivision (b). "It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." Id.

In light of the foregoing, the more restrictive test for industrial disability retirement in the City's Retirement System is both permissible and lawful. As such, the cases cited by applicant are not on point. Moreover, with respect to case law interpreting the "a" versus "the" distinction, the courts have suggested that their holdings would have been different if the statute at issue in those cases required the injury to be "the" result of the workplace rather than "a" result of the workplace.

Gelman v. Board of Retirement, 85 Cal. App. 3d 92, 97 (1978); Gurule v. Board of Pension Commissioners, 126 Cal. App. 3d 523, 527 (1981).

The City has chosen the more restrictive language. As such, disability retirements are available only when the workplace has been found to be the substantial cause of the permanent incapacity.

2. California Labor Code section 3212 does not apply in pension hearings.

California Labor Code section 3212 provides in pertinent part: "Such hernia, heart trouble or pneumonia so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment." This section, however, applies to Workmen's Compensation proceedings. It is not available in proceedings before the Retirement Board. French v. Rishell, 40 Cal. 2d 477, 481 (1953); Garrick v. Board of Pension Commissioners, 17 Cal. App. 3d 243, 246 (1971); Geoghegan v. Retirement Board, 222 Cal. App. 3d 1525, 1531 at n.6 (1990).

#### CONCLUSION

Workers' Compensation proceedings are separate and distinct from pension proceedings. Findings made by the WCAB are not binding on the City's Retirement Board. In addition, the presumption of industrial-causation for "heart trouble" contained in California Labor Code section 3212 does not apply in the City's disability hearings. Under the Board Rules, the Board can:

1. Approve and adopt the proposed findings and the recommendations of the Board Adjudicator.
2. Require a transcript or summary of all testimony, plus any other evidence received by such Board Adjudicator.
3. Refer the matter back with or without instruction to the Board Adjudicator for further proceedings.

City Employees' Retirement System, Rules of the Retirement Board of Administration, Rule 15, paragraph 6(c) 14 (1982).

I hope this Memorandum of Law has addressed your concerns. Please contact me if I can be of further assistance.

JOHN W. WITT, City Attorney  
By

Loraine L. Etherington  
Deputy City Attorney

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