WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DOROTHY GONZALES;
MICHAEL GONZALES (deceased), *Applicant*

vs.

CITY OF MONTEBELLO, permissibly self-insured,
administered by YORK RISK SERVICES GROUP, INC., *Defendants*

Adjudication Number: ADJ10349312
Long Beach District Office

OPINION AND DECISION AFTER RECONSIDERATION

We issued an Opinion and Order Granting Petition for Reconsideration in this matter on November 29, 2021 to provide an opportunity to study further the legal and factual issues raised by applicant's Petition for Reconsideration. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact (Findings) issued on September 9, 2021 by a workers' compensation administrative law judge (WCJ). The WCJ found that decedent's date of injury was December 19, 1996, and that applicant's application for adjudication of claim for the death of Michael Gonzales is barred by the statute of limitations.

Applicant contends that defendant failed to meet its burden to produce evidence that applicant knew, or in the exercise of reasonable diligence should have known that decedent's death was due to industrial causes prior to March 15, 2016, and therefore, applicant's Application for Adjudication of Claim was timely filed under either Labor Code[1] sections 5406 or 5406.7. In addition, applicant contends that the WCJ failed to consider the guidance of the prior Workers' Compensation Appeals Board (WCAB) panel decision in this case to apply the standard for determining a death claimant's date of injury in a cumulative trauma case, as set forth in *Berkebile v. Workers' Comp. Appeals Bd.* (1983) 144 Cal.App.3d 940, 944 [48 Cal.Comp.Cases 438] (*Berkebile*).

[1] All further references are to the Labor Code unless otherwise noted.

Defendant filed an Answer to Applicant's Petition for reconsideration (Answer). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), wherein it was recommended that the Petition for Reconsideration be denied.

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons set forth below, it is our decision after reconsideration to rescind the Findings and return this case to the trial level for further proceedings consistent with this decision and our prior decision in this case, *Gonzales v. City of Montebello*, 2019 Cal. Wrk. Comp. P.D. LEXIS 500. If new findings, orders and/or awards issue, any aggrieved person may then seek timely reconsideration.

I.

On November 1, 2019, we issued an Opinion and Decision after Reconsideration (2019 Decision) in this case, wherein we rescinded the Findings of Fact issued on September 14, 2017 by the WCJ (Findings) and returned the case to the WCJ "for further proceedings *consistent with this decision*." (*Gonzales v. City of Montebello*, 2019 Cal.Wrk.Comp. P.D. LEXIS 500, *9, emphasis added.) The WCJ is correct that this matter was returned for further proceedings to determine the date of injury. However, the 2019 Decision also set forth the applicable analysis to be applied in this cumulative trauma injury case as set forth in *Berkebile.* In addition, there remained for determination the issue of which statute of limitations applies in this case, i.e., section 5406 or section 5406.7.[2]

The WCJ failed to apply the analysis of *Berkebile* to this case, but instead declared a "split in thought" in the courts between *Berkebile* and *Arndt v. Workes' Comp. Appeals Bd*. (1976) 56 Cal.App.3d 139 [41 Cal.Comp.Cases 151] on the one hand, and *Ruiz v. Industrial Acci. Com.* (1955) 45 Cal.2d 409 [1955 Cal. LEXIS 330] and *Massey v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 674, 678 [58 Cal.Comp.Cases 367] (*Massey*) on the other:

> Under *Ruiz* and *Massey*, the California Supreme Court has held that the 240-week period is a qualifying condition and a dependent may not bring a claim if an employee dies more than 240 weeks after an injury. Although the date of

[2] Section 5406.7 applies to police officers such as the decedent in this case, who has a dependent on the date of death; who sustained an injury causing death due to cancer (Lab. Code, § 3212.1); tuberculosis (Lab. Code, § 3212.6); or, blood-borne infectious disease or methicillin-resistant Staphylococcus aureus skin infection (Lab. Code, § 3212.8); and, whose date of injury is during his or her active service. (Lab. Code, § 5406.7(a)(3).)

> injury for the purposes of the 240-week period was not directly addressed in either case, both barred claims by dependents when the death occurred more than 240 weeks from the decedent's date of injury. Under *Arndt* and *Berkebile*, the Court of Appeal has held that dependents have an independent claim to death benefits and the date of injury is based on when the dependents knew or should have known that the decedent's death was industrial in nature.
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> Both of the above stated approaches have been found to be acceptable in various courts in California in determining the date of injury. The undersigned believes that the dependent's claim is derivative of the decedent's original injury; simply put, the dependents would not have a cause of action unless the original injury took place. Therefore, the undersigned finds that the date of injury is the last day of the applicant's continuous trauma or 12/19/1996. (Findings, Opinion on Decision, pp. 3-4, footnotes ommitted.)

Thus, the WCJ chose to apply *Massey* and *Ruiz* based on the conclusion that because a death claim is derivative, the "date of injury" is the decedent's "date of injury." The WCJ is mistaken. It is "well settled" that a death claim is "different and distinct" from the injured workers' disability claim. (*Berkebile, supra,* 144 Cal.App.3d 940, 944 citing *Zenith Insurance Co. v. Workers' Comp. Appeals Bd.* (1981) 124 Cal.App.3d 176 [46 Cal.Comp.Cases 1126]; see also *Clark v. Workers' Comp. Appeals Bd*. (1991) 230 Cal.App.3d 684 [56 Cal.Comp.Cases 331].) Indeed, the issue was determined in 1941 by the Court in *Glavich v. Industrial Acc. Com*. (1941) 44 Cal.App.2d 517 [6 Cal.Comp.Cases 123].[3] There, the Court held that "[d]eath benefit and burial expenses are different and distinct obligations provided for by statute for the benefit of each and all of the individuals dependent upon the workman," and that "[t]o hold otherwise "would render nugatory the provisions of section 5408, and would apparently defeat the wholesome purpose of section 4701." (*Id.*, p. 521.)

Next, and as noted by the WCJ, the Supreme Court was not asked to address the "date of injury" in *Massey* or *Ruiz.* In *Ruiz*, issued in 1955, the issue raised was whether section 5406 offered the option to file within one year from the date of death, *or* within 240 weeks from the date of injury. (*Ruiz, supra,* 45 Cal.2d at p. 411, 413.) *Ruiz* can therefore be distinguished as the Court "had before it no contention or evidence industrial causation of the worker's death was not known or in the exercise of reasonable diligence would not have been known to the applicant within one year after the date of death or within two hundred forty weeks after the date of injury. (*Arndt,*

[3] Disapproved for other reasons in *Bianco v. Ind. Acc. Com. (*1944) 24 Cal.2d 584, 591 and *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 694.

supra, 56 Cal.App.3d at p. 149.)" (*Clark v. Workers' Comp. Appeals Bd.* (1991) 230 Cal.App.3d 684, 694 [56 Cal.Comp.Cases 331] citing *Arndt v. Workes' Comp. Appeals Bd.* (1976) 56 Cal.App.3d 139, 143 [41 Cal.Comp.Cases 151].)

We also acknowledge and defer to the holding in *Ruiz* that the 240-week time limitation is "not a normal statute of limitations, but rather...a qualifying condition in the exercise of any right to death benefits." (*Ruiz, supra,* 45 Cal.2d at p. 414; accord, *Massey, supra,* 5 Cal.4th at p. 680.)[4] However, there is no contradiction between this holding in *Ruiz* and the holding in *Berkebile* that a section 5412 "date of injury"[5] is *determined* by reference to the death claim applicant's knowledge, and not to the decedent injured workers' knowledge. (See *Berkebile, supra*, 144 Cal.App.3d at 945.) Section 5406, subdivision (b), states that death claim proceedings "shall not be commenced more than one year after the date of death, nor more than 240 weeks from *the date of injury*." (Lab. Code, § 5406(b), emphasis added.)[6] Therefore, the calculation of when the 240 weeks runs *depends on the date of injury*. Thus, the Court in *Berkebile* did not unlawfully extend the qualifying condition in section 5406, subdivision (b); rather, the Court simply addressed *how* to determine the section 5412 date of injury in a death claim:

> In that the applicant's right to workers' compensation death benefits are independent and severable from the decedent's inter vivos rights, a determination as to the decedent's knowledge of the industrial origin of his disability is not dispositive of the statute of limitations issue. The date of the applicant's knowledge of the industrial nature of the decedent's condition is the pertinent "date of injury" for purposes of the death claim. (*Berkebile, supra*, 144 Cal.App.3d at 945.)

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[4] "Accordingly, the time limitation appears to be not a normal statute of limitations, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits. Diligence in the presentation of the claim, so as not to be guilty of sleeping on one's rights, apparently has no bearing if the specified time provisos are not satisfied. Petitioner claims that the application of the statute so as to cut off any right to death benefits before it accrues would be unconstitutional as a deprivation of property without due process of law. (U.S. Const., Fourteenth Amend.; Cal. Const., art. I, § 13.) However, her right to recover death benefits is wholly statutory, and her constitutional objection has no bearing on the issue." (*Ruiz, supra*, 45 Cal.2d at p. 414.)

[5] "The *date of injury in cases of occupational diseases or cumulative injuries* is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412, emphasis added.)

[6] Should section 5406.7 apply in this case, the 240-week time limitation is extended to 420 weeks. (Lab. Code, § 5406.7(a) ["...may be commenced after 240 weeks from the date of injury and no later than 420 weeks from the date of injury..."].)

In *Massey*, issued in 1993, the California Supreme Court was not presented with an issue regarding the "date of injury" under section 5406, subdivision (b). Indeed, petitioners there *conceded* that the 240-week period had run for all dependents except for the youngest. (*Massey, supra,* 5 Cal.4th at p. 678.) The specific issue raised in *Massey* was whether the 240-week provision was tolled until the youngest dependent's 18th birthday. (*Ibid.*) However, and most relevant to the case before us, the Supreme Court in *Massey* cited to *Berkebile* for determination of the "date of injury" in cases involving section 5412, i.e., occupational disease or cumulative trauma injuries:

> Thompson's date of injury was the initial date of his disability, i.e., October 19, 1979. Section 5412 provides: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." **For purposes of death benefit claims, the date of injury may depend on the claimant's knowledge of the industrial nature of the injury causing death.** (*Berkebile v. Workers' Comp. Appeals Bd.* (1983) 144 Cal.App.3d 940, 945 [193 Cal.Rptr. 12].) (*Massey, supra,* 5 Cal.4th at p. 678, fn. 1, emphasis added.)

The WCJ also states that because decedent sustained a cumulative trauma injury involving heart disease resulting in death, it should be distinguished from those cumulative trauma injuries involving a latency period, given that the latter can only be identified *after* a worker's death. (Report, pp. 2-3.) However, the WCJ cites to no medical evidence or legal authority for this distinction, and we find none to support it. Moreover, as far back as 1933, the California Supreme Court determined that in the case of "latent and *progressive* disease," the date of injury in a death claim should be based on the *dependent's* knowledge. (*Arndt, supra*, 56 Cal.App.3d at p. 143 citing to *Marsh v. Industrial Acc. Com*. (1933) 217 Cal. 338, 350-351, emphasis added.)[7] The *Marsh* rule "has been uniformly followed throughout the years." (*Arndt, supra*, 56 Cal. App. 3d at p. 144, fn. 4.)

[7] The *Marsh* decision predated *Fruehauf Corp. v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 569 [33 Cal.Comp.Cases 300], wherein it was found that "it was the Legislature's intention to classify injuries resulting from continuous cumulative traumas which are minor in themselves but eventually result in disability as occupational diseases." (*Freuhauf, supra,* 68 Cal.2d at p. 576.) However, the *Marsh* Court cited to cases involving *progressive* diseases such as the progressive disability resulting from a lumbar fracture; eye injury (ultimately resulting in blindness); electric shock; pneumoconiosis (ultimately developing into tuberculosis and/or death). (*Marsh, supra,* 217 Cal. at pp. 350-351.)

We therefore disagree that there is a split of opinion in the existing state of the law on the question of how to determine the "date of injury" (Lab. Code, § 5406(b)) in a death claim subject to section 5412, and that the Court in *Berkebile* provides the proper analysis of the issue.

The WCJ's citation to several Workers' Compensation Appeals Board panel decisions cannot be used as an independent basis to disregard our prior direction in *Gonzales v. City of Montebello*, 2019 Cal. Wrk. Comp. P.D. LEXIS 500, to apply *Berkebile* in this case. (Findings, Opinion on Decision, pp. 3-4, fn. 1 [citing *Earley v. Workers' Comp. Appeals Bd.* (2003) 68 Cal.Comp.Cases 1707 (writ den.);[8] *Leverton v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 874 (rev. den.);[9] *Brezensky v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 1201 (writ den.);[10] *Lockett v. City of Los Angeles*, 2012 Cal.Wrk.Comp. P.D. LEXIS 193].[11])

Panel decisions are not binding precedent (as are en banc decisions). (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Bd. en banc).) Although the Appeals Board and WCJs may consider panel decisions and digests of writ denied

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[8] The Petition for Reconsideration in *Early* was denied because it was not verified. (*Earley, supra,* 68 Cal.Comp.Cases at p. 1709.) The Appeals Board panel determined that even if it had been verified, it would have been denied on its merits pursuant to the WCJ's conclusion that "there was not a separate date of injury for Decedent's sons when Decedent's date of injury has already been determined inter vivos." (*Ibid*.) The WCJ failed to support this conclusion with any legal authority, and the conclusion is contrary to the published Appellate Court decisions in *Glavich, Arndt* and *Berkebile*, which all hold that a claim for death benefits is distinct from any inter vivos claim previously filed by the deceased worker, and the holding in *Berkebile* that a death claimant's knowledge in a case subject to section 5412 is the key to calculating whether the death claim was filed within 240 weeks of that knowledge.

[9] The Appeals Board panel in *Leverton* failed to address *Berkebile* and the impact of section 5412 on the determination of the "date of injury." (*Leverton, supra,* 74 Cal.Comp.Cases at pp. 875-876.)

[10] The Appeals Board panel in *Brezensky* found that the "date of injury" referred to in Labor Code § 5406 may depend on the claimant's knowledge of the industrial nature of the injury causing death, but that "'the date on which a dependent gains knowledge that the injured worker's death was industrially caused is irrelevant if the death occurs more than 240 weeks after the industrial injury because the 240-week time provision is a condition that must exist in order for any claim for dependent death benefits to accrue.'" (*Brezensky, supra,* 76 Cal.Comp.Cases at pp. 1202-1203.) The Appeals Board panel in *Brezensky* failed to address *Berkebile,* which was binding precedent at the time of their decision in 2011, and provided no legal support for its conclusion. In addition, the result is illogical in that if the death claimant's knowledge is the key to determining when the 240 weeks runs – then it would be impossible to determine whether the 240 weeks has run *until addressing the death claimant's knowledge*.

[11] The Appeals Board panel adopted the WCJ's Report and Recommendation on Petition for Reconsideration in the *Lockett* case. (*Lockett, supra,* at pp. 1-2.) The WCJ in *Lockett* determined that based on *Early*, the death claim was barred because the cumulative trauma date of injury was determined in the inter vivos case filed by the decedent, and the death claim was filed more than 240 weeks from that date. (*Id.*, at pp. 8-11.) Please refer to footnotes 9 and 11.

panel decisions to the extent they find their reasoning persuasive (see *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Bd. en banc)), they cannot rely on a panel decision or the digest of a writ denied case to *disregard* binding precedent.

Berkebile is a published appellate opinion, and is therefore binding precedent on all Appeals Board panels and all WCJs. (See *Gee, supra.*) There is no contrary published decision by the Supreme Court or another Court of Appeal. In fact, the California Supreme Court in *Massey* cited the holding in *Berkebile* related to the determination of a section 5412 "date of injury" in a death claim. "Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court. (citations)" (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [1062 Cal. LEXIS 186].) Thus, *Berkebile* is controlling authority in this case.

> Like other inferior courts, the board was and is jurisdictionally required to adhere to and follow the decisions of the Court of Appeal. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455 [20 Cal. Rptr. 321, 369 P.2d 937]; *Ryerson Concrete Co. v. Workmen's Comp. Appeals Bd*. (1973) 34 Cal. App. 3d 685, 688 [110 Cal. Rptr. 319].) Neither the presence of a dissent in *Cooper*, nor the passing criticism of it in obiter dictum in a later decision (*Rodriguez, supra*, 21 Cal. App. 4th at p. 1760, fn. 4), authorized disregarding *Cooper's* holding. (*Brannen v. Workers' Comp. Appeals Bd. (*1996) 46 Cal.App.4th 377, 384, fn. 5.)

Moreover, the most recent Appeals Board panel decisions addressing the issue have applied the "date of injury" analysis as set forth in *Berkebile*. (See *Dependent v. Orange County Fire Auth.*, 2019 Cal.Wrk.Comp. P.D. LEXIS 421; *Razo-Galiana v. Las Posas Country Club*, 2019 Cal.Wrk.Comp. P.D. LEXIS 60; *Timmons v. County of Los Angeles, PSI* (2017) 83 Cal.Comp.Cases 411 [2017 Cal.Wrk.Comp. P.D. LEXIS 504]; *Albano v. Cal Amp Corporation, et al*., 2017 Cal.Wrk.Comp. P.D. LEXIS 356; *Sir Walters, et al. v. California Dept. of Corrections, et al.,* 2017 Cal.Wrk.Comp. P.D. LEXIS 401; see also, *McGhee v. Workers' Comp. Appeals Bd*. (2004) 69 Cal.Comp.Cases 1044 (writ den.).)

Finally, the WCJ also argues that to follow *Berkebile* would be to "open the floodgates of litigation." (Report, p. 3.) However, *Berkebile* issued in 1983 and there has been no resulting flood of litigation.

Accordingly, given that the WCJ disregarded our prior direction in *Gonzales v. City of Montebello*, 2019 Cal. Wrk. Comp. P.D. LEXIS 500, to apply *Berkebile* in this case to determine the "date of injury" (Lab. Code, § 5406(b)), and failed to determine whether this case is subject to section 5406.7, it is our decision after reconsideration to rescind the Findings and return this case to the trial level for further proceedings consistent with this decision and our prior decision (*Gonzales v. City of Montebello*, 2019 Cal. Wrk. Comp. P.D. LEXIS 500). If new findings, orders and/or awards issue, any aggrieved person may then seek timely reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on September 9, 2021 by a workers' compensation administrative law judge is **RESCINDED** and this case is **RETURNED** to the trial level for further proceedings consistent with this decision and the panel's prior decision in this case, *Gonzales v. City of Montebello*, 2019 Cal. Wrk. Comp. P.D. LEXIS 500.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 17, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

DOROTHY GONZALES
GOLDMAN, MAGDALIN & KRIKES, LLP
HITZKE & FERRAN, LLP

AJF/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS