**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**TONY FERNANDO (DECEASED),** ***Applicant***

**vs.**

**STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS AND REHABILITATION – CTF, LEGALLY UNINSURED; ADMINISTERED BY STATE COMPENSATION INSURANCE FUND,** ***Defendants***

**Adjudication Number: ADJ7555655; ADJ11035143**
**Salinas District Office**

# OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the March 3, 2022 Order Rescinding Findings of Fact, Award, Orders and Opinion on Decision and Amended Findings of Fact, Award, Orders and Opinion on Decision (F&A), wherein the presiding workers' compensation administrative law judge (WCJ) found that in Case No. ADJ7555655,[1] applicant while employed as a Correctional Officer during the cumulative injury period ending November 23, 2010, sustained industrial injury to his bilateral knees and in the form of coronary artery disease, hypertensive cardiovascular disease, and tinnitus. The WCJ further found in Case No. ADJ11035143 that applicant, while employed as a Correctional Officer during the period ending December 29, 2012, sustained cumulative injury in the form of coronary artery disease and hypertensive cardiovascular disease. The WCJ found in relevant part that the claim for death benefits in ADJ11035143 was untimely because it was filed more than 240 weeks from the date of injury.

[1] Findings of Fact Nos. 1 and 9-13 mistakenly refer to case number ADJ7555655 as ADJ755655.

Applicant contends that the date of injury under Labor Code[2] section 5412 was no earlier than May 15, 2015, thus rendering the application for death benefits timely. Applicant further contends that the WCJ's interpretation of section 5406 conflicts with the liberal construction requirement of section 3202 and that a reasonable interpretation of the statute renders applicant's claim timely.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the WCJ's Findings of Fact except that we will amend the decision to reflect the correct case number of ADJ7555655 and to include a finding that the section 5412 date of injury in ADJ11035143 was December 29, 2012.

**FACTS**

In Case No. ADJ7555655, decedent Tony Fernando (decedent) claimed injury to his bilateral knees and in the form of coronary artery disease, hypertensive cardiovascular disease, and tinnitus, while employed as a correctional officer by defendant State of California Department of Corrections & Rehabilitation, Correctional Training Facility, from March 2, 1983 to November 23, 2010.

In Case No. ADJ11035143, Ellen Fernando (applicant) claimed that her husband, Tony Fernando, sustained industrial injury to his heart and circulatory system while similarly employed from March 2, 1983 to December 29, 2012, resulting in death on February 17, 2017.

The parties have selected multiple medical-legal evaluators, including in relevant part, Edwin Kingsley, M.D., as a Qualified Medical Evaluator (QME) in orthopedic medicine, William Lewis, M.D., as the QME in otolaryngology, Paul Anderson, M.D., as the QME in internal medicine, Jeffrey Holmes, M.D., as the Agreed Medical Evaluator (AME) in orthopedic medicine, and Roger Nacouzi, M.D., as the QME in internal medicine.

On May 9, 2011, decedent underwent a right total knee arthroplasty. (Ex. J-5, Report of Ewin Kingsley, M.D., dated August 22, 2012.)

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

On November 11, 2011, QME Dr. Anderson evaluated decedent and noted a prior history of heart trouble. Dr. Anderson wrote, "[t]here is no doubt that his condition is worse now than it was in 1999. This is again because he has continued to work as a correctional officer and because there is a natural progression of coronary artery disease with time. It is not possible to accurately apportion part to the natural progression and part to continuing occupational stresses … Mr. Fernando should be doing something else at this time besides working as a correctional officer in a high-risk prison setting." (*Id.* at p. 2.)

On December 29, 2012, applicant retired after applying for an Industrial Disability Retirement (IDR). (Minutes of Hearing and Summary of Evidence, dated November 29, 2021, at p. 6:9.)

On July 12, 2013, independent medical evaluator Jeffrey Caren, M.D., issued a report in connection with decedent's application for IDR with CalPERS. (Ex. J-7, Report of Jeffrey Caren, M.D., dated July 12, 2013.) Therein, Dr. Caren confirmed that decedent was "substantially incapacitated to perform from the performance of his duties," and that decedent's "employment by the California Department of Corrections was a real and measurable contributing factor the development of coronary artery disease and the symptomatic episode that resulted in heart surgery." (*Id.* at p. 25.)

On May 15, 2015, internal medicine QME Dr. Anderson issued a supplemental report asserting that apportionment to decedent's prior cardiac injury was not feasible and further reiterating that "Mr. Fernando should not return to work as a Correctional Officer in any capacity but should be medically retired at this time. I am not certain why he was not returned earlier, but, he should retire at the present time." (Ex. J-8, Report of Paul Anderson, M.D., dated May 15, 2015, at p. 2.)

On February 17, 2017, decedent died of cardiac arrest and multi-system failure. (Ex. J-12, Report of Paul Anderson, M.D., dated July 31, 2018, at p. 9.)

On March 28, 2017, applicant petitioned to be "substituted" in place of decedent as the applicant in case ADJ7555655.

On August 21, 2017, applicant filed an application for death benefits, alleging decedent's death arose out of injury to the heart and circulatory system sustained from March 2, 1983 to December 29, 2012.

On July 31, 2018, Dr. Anderson issued a supplemental report in which he opined that decedent's death was "the result of the natural progression of his very serious cardiac condition," and that "the nature of his work as a Correctional Officer is stressful, and this stress continued until his last day of work." (Ex. J-12, Report of Paul Anderson, M.D., dated July 31, 2018, at p. 9.)

On October 24, 2019, internal medicine QME Roger Nacouzi, M.D., issued a medical-legal report finding industrial contribution to decedent's death by cardiac arrest. Dr. Nacouzi further addressed, in relevant part, the issue of disability as follows:

> It is clear that the medical records document subjective and objective factors of cardiac aggravation that continued to develop through the last day of employment. Officer Fernando first suffered disability on December 29, 2012. The cumulative trauma through December 29, 2012 contributed to the heart trouble that developed and manifested during Officer Fernando's employment with the State of California Department of Corrections and Rehabilitation.

(Ex. J-17, Report of Roger Nacouzi, M.D., dated October 24, 2019, at p. 27.)

On November 29, 2021, the parties proceeded to trial and framed for decision, in relevant part, the issue of the nature and number of injuries sustained by decedent, and the compensability of applicant's claim for death benefits, including whether such claim was barred under applicable provisions of section 5406. (Minutes of Hearing and Summary of Evidence, dated November 29, 2021, at p. 2:24.) Applicant testified in relevant part that her husband's last day of work was approximately December 29, 2012, when he retired. (*Id.* at p. 6:9.) Applicant confirmed that she is a physician and was aware that her husband had "heart issues," and that she had helped him fill out the paperwork attendant to a disability retirement. (*Id.* at p. 6:22.) Applicant knew that her husband's heart was "being hurt at work when they were filling out the paperwork." (*Id.* at p. 7:1.) Applicant further confirmed her belief that decedent's "work was making his heart worse, but he continued to work until the date of retirement." (*Id.* at p. 7:10.)

On March 3, 2022, the WCJ issued his F&A, determining in relevant part that decedent sustained two distinct cumulative injuries. In ADJ7555655, decedent sustained cumulative injury through November 23, 2010 in the form of coronary artery disease, hypertensive cardiovascular disease, tinnitus, and to the right and left knees. (Finding of Fact No. 9.) In ADJ11035143, decedent sustained cumulative injury through December 29, 2012 in the form of coronary artery disease and hypertensive cardiovascular disease. (Finding of Fact No. 14.) With respect to applicant's claim for death benefits, the WCJ determined that the claim was barred as untimely

because proceedings for the collection of benefits were not instituted until more than 240 weeks from the date of injury in contravention of section 5406(b).

Applicant's Petition contends the medical-legal evidence supports a finding that the date of injury is no earlier than May 15, 2015 based on the reporting of QME Dr. Anderson, when decedent first received a medical opinion indicating that his heart condition and hypertension were permanent and stationary resulting in permanent impairment. (Petition, at p. 5:4.) Applicant asserts that WCJ failed to liberally construe section 5406 as is required by section 3202, and that in any event, that the running of the statute of limitations was tolled by inadequate notice to applicant of the timeline within which she would be required to file a claim. (*Id.* at p. 8:8.)

Defendant's Answer avers there was but one cumulative injury, with a concomitant date of injury on August 22, 2011, and even if there are two injuries, the date of injury applicable to the later injury is decedent's last date of work on December 29, 2012. (Answer, at p. 3:8.) Defendant also contends that applicant was properly notified of the time limits in which to file a death claim and knew of the industrial nature of her husband's condition as early as 2012. (*Id.* at p. 10:1.)

The WCJ's Report observes that for purposes of the 240-week limitation of section 5406, the appropriate inquiry under section 5412 concerns the applicant's knowledge of the industrial nature of the injury, rather than decedent's knowledge. Following a review of the evidentiary record, the WCJ concludes that the existence of industrial disability and applicant's knowledge that such disability was work-related both coincided in 2012. Accordingly, the WCJ recommends we deny the Petition.

## DISCUSSION

The WCJ has determined that applicant's claim is barred by section 5406(b) because it was filed more than 240 weeks from the date of injury. Applicant challenges the date of injury identified by the WCJ, averring the record supports a date of injury no earlier than 2015, and that the 2017 application for death benefits was thus timely.

The allowable period for the commencement of proceedings to collect death benefits (Lab. Code, § 4700 et seq.) is set forth in section 5406, which states:

> (a) Except as provided in Section 5406.5, 5406.6, or 5406.7, the period within which may be commenced proceedings for the collection of the benefits provided by Article 4 (commencing with Section 4700) of Chapter 2 of Part 2 is one year from:

(1) The date of death if death occurs within one year from date of injury.

(2) The date of last furnishing of any benefits under Chapter 2 (commencing with Section 4550) of Part 2, if death occurs more than one year from the date of injury.

(3) The date of death, if death occurs more than one year after the date of injury and compensation benefits have been furnished.

(b) 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.)

Pursuant to section 5406(b), an application to collect death benefits must be filed within one year of the date of the injured worker's death and within 240 weeks from the date of injury. (*Ruiz v. Industrial Acci. Com.* (1955) 45 Cal.2d 409, 413-414 [20 Cal.Comp.Cases 265] (*Ruiz*).) The burden of proof as to whether an application for adjudication of a death claim is barred by section 5406 rests with defendant. (Lab. Code, §§ 5409, 5705.)

Here, decedent's date of death was February 17, 2017. Decedent's spouse commenced proceedings for the collection of benefits by the filing of an application on August 21, 2017, alleging a cumulative injury ending on decedent's last day worked of December 29, 2012. The parties do not dispute that pursuant to section 5406(c), the August 21, 2017 application was filed within one year of the date of death of February 17, 2017.

The issue at bar is whether proceedings for the collection of death benefits were commenced within 240 weeks of the date of injury. And in this regard, we observe that the case of *Berkebile v. Workers' Comp. Appeals Bd.* (1983) 144 Cal.App.3d 940 [48 Cal.Comp.Cases 438] is relevant. In *Berkebile*, decedent filed an inter vivos application for benefits on June 9, 1980 alleging asbestos-related lung injury arising out of and in the course of his employment from July 13, 1934 to September 30, 1942. (*Id.* at pp. 941-943.) Decedent died on October 7, 1980 and his widow (applicant) filed her application for death benefits on November 13, 1980. The issues thus presented included whether the application had been filed within 240 weeks of the applicable date of injury pursuant to section 5406(c). The *Berkebile* court first noted that it is "well settled" that "a dependent's right to the statutory death benefits is not derived from the rights of the deceased employee." (*Id.* at p. 944; see also *Clark v. Workers' Comp. Appeals Bd.* (1991) 230 Cal.App.3d 684 [56 Cal.Comp.Cases 331, 336].) Indeed, an application for death benefits is not derivative of an inter vivos claim either made or not made by the injured worker. (*Glavich v. Industrial Acc.*

*Com.* (1941) 44 Cal.App.2d 517 [6 Cal.Comp.Cases 123].) Accordingly, *decedent's* knowledge regarding the industrial injury is not dispositive in a claim involving a cumulative injury, but rather *applicant's* knowledge is "the pertinent 'date of injury' for purposes of a death claim." (*Id.* at pp. 944-945.)

Here, the WCJ has not entered a specific finding of fact with regard to the date of injury arising out of applicant's cumulative injury ending December 29, 2012. However, the WCJ notes in his report that his analysis addressed the question of when *applicant* (i.e., decedent's spouse) knew that decedent had sustained disability and that the disability was industrially related. (Report, at p. 5) The WCJ observes:

> In Ms. Fernando's deposition on November 16, 2017 (exhibit K-selected pages). The witness was asked if she was concerned that her husband's heart condition had gotten worse since November 1, 1999 and she responded that she was. It was clarified that this was realization came between September 24 and September 27 of 2010 following treatment in the hospital emergency department. The witness then testified that she helped the decedent fill out the paperwork for the second workers' compensation claim he filed. This is believed to be the basis of the November 23, 2010 application. Therefore, the applicant (Ms. Fernando) had knowledge that the applicant [had lost work] and believed there was an industrial component satisfying the requirements of Labor Code §5412 as of November 23, 2010. Additionally, in Ms. Fernando's deposition on November 16, 2017 (exhibit K-selected pages), [t]he applicant testified that she was helping her husband fill out the paperwork for his retirement. She testified that he told her he was trying to get industrial disability retirement. This was reiterated by her testimony at time of trial that she knew the heart was being hurt at work when they were filing filling out the paperwork for the December 29, 2012 retirement. (MOH/SOE Page 2:25) Therefore, pursuant to the discussion above, there was disability and knowledge again as of the applicant's last day of work of December 29, 2012. The 240 week period to file for death benefits would expired August 6, 2017. According to Exhibit 4; the application for death benefits was filed on August 21, 2017 after the time constraints delineated in Labor Code §5406 as discussed below.

(Report, at pp. 5-6.)

Thus, the WCJ's assessment of a date of injury of December 29, 2012 was the basis for the determination that the death claim was not compensable under section 5406(c). (Finding of Fact No. 16.)

Applicant's Petition contends, however, that the date of injury is no earlier than May 15, 2015 based on the reporting of QME Dr. Anderson. Therein, the QME determined in relevant part that applicant's condition "has worsened to such an extent that he should not continue to work as

a correctional officer because he is at risk to himself, other officers, and to the inmates themselves as he may not be able to protect them or himself," and that "Mr. Fernando should not return to work as a Correctional Officer in any capacity but should be medically retired at this time." (Ex. Ex. J-8, Report of Paul Anderson, M.D., dated May 15, 2015, at p. 2.) Applicant contends that this was the first report in the record to address the issue of permanent disability after decedent stopped working in 2012. Applicant posits, "all of the medical legal reporting regarding Mr. Fernando's heart disease and hypertension from before [May 15, 2015] issued during a period when Mr. Fernando was still actively working, without restrictions - i.e. when he had not sustained disability - and when Mr. Fernando's condition was continuing to worsen due to ongoing injurious exposure." (*Id.* at p. 4:20.) Accordingly, "the evidence supports a finding that the legal date of injury is the date when Mr. Fernando first received a medical opinion indicating that his heart condition and hypertension were permanent and stationary, that he had sustained permanent impairment, and that the impairment was industrially related, i.e. the first date when there was evidence that Mr. Fernando would be entitled to permanent disability for his heart condition." (*Id.* at p. 5:7.)

The date of injury in cumulative injury cases is governed by section 5412, which 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.

(Lab. Code, § 5412.)

The Court of Appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579] (*Rodarte*).)

Regarding the "knowledge" component of section 5412, whether an employee knew or should have known his disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*).)

Applicant asserts that because decedent was not permanent and stationary prior to at least 2015, there could be no permanent disability and no corresponding date of injury. (Petition, at p. 5:7.) However, the disability required under section 5412 as part of a date of injury analysis is not limited to permanent disability after permanent and stationary status but may also be demonstrated through compensable temporary disability or permanent disability reflected in medical treatment. (*Rodarte, supra*, 119 Cal.App.4th 998, 1005.) In any of these instances, the "disability" described in section 5412 reflects an impairment of bodily functions that results in an impairment of earning capacity. (*J.T. Thorp v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224]; see also *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631].)

And in this respect, applicant's trial testimony is germane. Applicant testified that prior to decedent's industrial disability retirement on December 29, 2012, applicant was aware that her husband had "heart issues," and that she had helped him fill out the paperwork attendant to a disability retirement. (Minutes, at p. 6:22.)

Decedent retired after preparing and submitting an application for IDR. Decedent's industrial disability precluded his continued usual and customary work activities, resulting in impairment to decedent's earning capacity. (*Chavira, supra,* 235 Cal.App.3d 463, 472-473 56 Cal.Comp.Cases 631] ["a disability is compensable if it results in impairment of earning capacity, even if the employee is able to perform the duties of his ordinary occupation"]; see also *Marsh v. Industrial Acc. Com.* (1933) 217 Cal. 338, 344 [18 P.2d 933].)

In addition, QME Dr. Anderson discussed applicant's disability in 2011, noting:

> [Decedent's] job has the potential to expose him to high-stress, life-threatening situations where he is required to climb flights of stairs and then engage in hand-to-hand combat with inmates, carry heavy weights up stairs, run for two-hundred yards, and so forth. Mr. Fernando is at considerable risk for being unable to protect himself, his fellow officers, or inmates. Mr. Fernando's cardiac condition has progressively worsened over time, and he should not continue to serve as a correctional officer. He has served sufficient years to be medically retired at this time and should do so.

(Ex. J-3, Report of Paul Anderson, M.D., dated September 27, 2011, at p. 12.)

When the parties asked Dr. Johnson in 2019 when the decedent first suffered permanent disability, the QME opined:

> The date that Mr. Fernando put in for retirement was well after the time that he "either knew, or in the exercise of reasonable diligence should have known, that

> such disability was caused by his present or prior employment." He could not continue to safely work as a prison guard. Mr. Fernando's wife, a physician from the Philippines, noted that she finally persuaded him to retire on December 29, 2012. This is the date that Mr. Fernando first suffered disability to his heart.

(Ex. J-16, Report of Paul Anderson, M.D., dated May 1, 2019, at p. 2.)

The WCJ also determined that applicant's knowledge of the work-relatedness of decedent's cardiac and circulatory conditions was established in the evidentiary record no later than decedent's last day worked. Applicant's unrebutted trial testimony establishes that she knew that her husband's heart was "being hurt at work when they were filling out the paperwork." (Minutes, at p. 7:1.) Applicant further confirmed her belief that decedent's "work was making his heart worse, but he continued to work until the date of retirement." (Id. at p. 7:10.) In addition, applicant's prior work as a practicing physician in the Philippines would provide additional support for her ability to recognize the relationship between decedent's work exposures and resulting industrial disability. (*Johnson, supra*, 163 Cal.App.3d 467, 473 ["an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability"].)

We therefore agree with the WCJ's determination that the applicant possessed the requisite knowledge that decedent's disability was work-related no later than the date on which Mr. Fernando retired and sought industrial disability retirement on December 29, 2012. Because the section 5412 date of injury was December 29, 2012, the filing of the application for death benefits on August 21, 2017 was beyond the 240 weeks allowed under section 5406(b).

We will affirm the Findings of Fact, accordingly, except that we will amend them to include a Finding that the section 5412 date of injury in case no. ADJ11035143 was December 29, 2012, and to replace any references to ADJ755655 with the correct case number of ADJ7555655.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Amended Findings of Fact, Award, Orders and Opinion on Decision issued on March 3, 2022 is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

1. Applicant, Tony Fernando, deceased as of February 17, 2017, while employed by the State of California, Department of Corrections and Rehabilitation as a Correctional Officer, Occupational Group 490, claims to have sustained an injury in ADJ7555655 or in ADJ11035143. There is a dispute as to the date of injury being a cumulative trauma ending on November 23, 2010 or a cumulative trauma ending on December 29, 2012 associated with those ADJ numbers.

…

9. In ADJ7555655 there was a cumulative injury ending on November 23, 2010 resulting in injury manifesting in coronary artery disease, hypertensive cardiovascular disease, tinnitus, and to the right and left knees.
10. In ADJ7555655, applicant reached permanent and stationary status on August 23, 2011.
11. In ADJ7555655, permanent disability is payable beginning August 24, 2011.
12. In ADJ7555655, applicant is entitled to the 15% increase in permanent disability pursuant to Labor Code 4658 effective October 22, 2011.
13. In ADJ7555655, applicant was permanently disabled, warranting weekly payments at $270 per week beginning on August 24, 2011 and then $270 per week plus a 15% increase per Labor Code §4658, beginning on October 22, 2011 until the date of his death.

14. In ADJ11035143 there was a cumulative injury ending on December 29, 2012, manifesting as additional coronary artery disease and hypertensive cardiovascular disease.

14.1. In ADJ11035143, the Labor Code section 5412 date of injury was December 29, 2012.

…

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ CRAIG L. SNELLINGS, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 27, 2026**

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

**ELLEN FERNANDO**
**DAVID FERNANDO**
**DILLES LAW GROUP**
**STATE COMPENSATION INSURANCE FUND**

**SAR/abs**

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