

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**ESTHER LEMUS SALDANA (decedent);  
FELIPE SALDANA RODRIGUEZ and  
FELIPE SALDANA (dependents), *Applicants***

**vs.**

**TAO TAI HOMES CORPORATION;  
and INSURANCE COMPANY OF THE WEST GROUP, *Defendants***

**Adjudication Number: ADJ12910087<sup>1</sup>  
Oakland District Office**

**OPINION AND ORDER GRANTING  
PETITION FOR RECONSIDERATION AND  
DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact (Findings) issued on May 14, 2025 by a workers' compensation administrative law judge (WCJ). The WCJ found that decedent Esther Lemus Saldana sustained a specific injury arising out of and in the course of her employment to her lumbar spine on February 4, 2019; that claimed that decedent sustained a cumulative injury arising out of and in the course of her employment to "other body systems" resulting in death on January 20, 2023; the Application for Adjudication of Claim (Death Case) (death case Application) was filed on January 2, 2024 and dated December 29, 2023; the death case Application was filed within one year of the date of decedent's death, but was filed more than 240 weeks after decedent's date of injury; Based on these findings of fact, the WCJ found the death claim Application barred by Labor Code<sup>2</sup> section 5406, subdivision (b) (section 5406(b)), and "[a]ll further proceedings, including medical-legal discovery," to be moot.<sup>3</sup>

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<sup>1</sup> ADJ12910087 is the adjudication number that was assigned to decedent's *inter vivos* application for adjudication of claim. The Application for Adjudication of Claim (Death Case) filed on January 2, 2024 by dependents Felipe Saldana Rodriguez and Felipe Saldana (dependents or applicants), has yet to be assigned a separate adjudication number, but this decision is issued in *both* cases.

<sup>2</sup> All further references are to the Labor Code unless otherwise noted.

<sup>3</sup> It is not clear whether there are any remaining issues to be determined in decedent's *inter vivos* case, ADJ12910087, or whether the WCJ intended to find that any such remaining issues would be rendered moot by the finding that dependents' death claim was barred by the statute of limitations. Given our disposition to rescind the Findings, we do not need to substantively address this question.

Applicant contends that it is the cumulative injury to “other body systems” that is at issue in the death claim and not the specific injury of February 4, 2019, and therefore, the WCJ erred in using the specific injury date as the “date of injury” in applying the statute of limitations to bar the death claim. Instead, applicant contends that the “date of injury” in the death claim is the date the dependents knew or should have known that decedent’s injury contributed to her death pursuant to *Berkebile v. Workers’ Comp. Appeals Bd.* (1983) 144 Cal.App.3d 940 [48 Cal.Comp.Cases 438] (*Berkebile*), and defendant failed to produce evidence that dependents here knew or should have known more than 240 weeks prior to the filing of the death case Application on January 2, 2024.

Defendant filed an Answer to Petition for Reconsideration contending that decedent only sustained one injury, a specific injury, on February 4, 2019 and therefore, the death case Application is barred by the statute of limitations regardless of the holding related to cumulative injuries in *Berkebile*. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied.

We have reviewed the record, the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report. Based on the record and for the reasons set forth below, we grant reconsideration. It is our decision after reconsideration to rescind the Findings and return this case to the trial level for further proceedings.

## I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
  - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
  - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on July 2, 2025, and 60 days from the date of transmission is August 31, 2025. This decision is issued by or on August 31, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to Events, the case was transmitted to the Appeals Board on July 2, 2025 and 60 days from the date of transmission is Sunday, August 31, 2025. The next business day that is 60 days from the date of transmission is Tuesday, September 2, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)<sup>4</sup> This decision is issued by or on Tuesday, September 2, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on July 2, 2025, and the case was transmitted to the Appeals Board on July 2, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 2, 2025.

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<sup>4</sup> WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that: “Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers’ Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.”

## II.

The only issue presented for trial in this matter was “whether or not the claim for death benefits is barred by the statute of limitations.” (Minutes of Hearing and Summary of Evidence, March 18, 2025, p. 2:35-38.) The running of the statute of limitations is an affirmative defense, and therefore, the burden of proof as to whether an application for adjudication is barred by the statute of limitations rests with defendant. (Lab. Code, §§ 5409, 5705; see *City of Fresno v. Workers’ Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].) “Limitations provisions in the workmen’s compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in a right being lost before it accrues. [Citations.]” (*Fruehauf Corp. v. Workmen’s Comp. App. Bd.* (1968) 68 Cal.2d 569, 577 [33 Cal.Comp.Cases 300].) The applicable statute of limitations in a death case is section 5406:

(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), therefore, an application to collect death benefits must be filed within one year of the date of the injured workers’ death *and* within 240 weeks from the date of injury. (*Ruiz v. Industrial Acci. Com.* (1955) 45 Cal.2d 409, 413-414 [1955 Cal. LEXIS 330] (*Ruiz*).) In this case, it is undisputed that decedent died on January 23, 2023 and that dependents filed the death case Application on January 2, 2024. (Def. Exh. A, Death Certificate; death case Application, filed January 2, 2024). Therefore, it is undisputed that the death case was commenced

within one year of decedent's death. However, the parties dispute the nature of the underlying injury to be used in the calculation of the "date of injury" and thus, whether the death case was commenced within 240 weeks from the "date of injury" pursuant to section 5406(b). Specifically, defendant contends that "the mechanism was that of a routine specific injury" to decedent's lumbar spine on February 4, 2019 and dependents contend that decedent's death was caused by a cumulative injury involving "other body systems." (See eg., Answer, pp. 2-3.)

As an initial matter, defendant complains that the death case Application identifies only one date of injury, i.e., February 4, 2019, and thus is not plead as a cumulative injury matter. (Answer, p. 2.)<sup>5</sup> This is not dispositive. The workers' compensation form application for adjudication of claim in a death case does not actually provide a space to plead a cumulative injury and regardless, workers' compensation "[p]leadings may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., tit. 8, § 10517.) After all, "claims should be adjudicated on substance rather than formality of statement." (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502] (*Bassett-McGregor*).) **We note that the amendment of an application to allege cumulative injury instead of specific injury is *not* a new cause of action and therefore, the original date of filing remains the date of commencement of the action for purposes of the statute of limitations.** (*Bassett-McGregor, supra*, 205 Cal.App.3d at p. 1116; *Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 199-200 (*Rubio*).)

"If a party is disadvantaged by the insufficiency of a pleading, the remedy is to grant that party a reasonable continuance to permit it to prepare its case or defense. (citations)" (*Rubio, supra*, 165 Cal.App.3d at pp. 200-201.) The Board's procedural rules "serve the convenience of the tribunal and the [litigants] and facilitate the proceedings. They do not deprive the tribunal of the power to dispense with compliance when the purposes of justice require it, particularly when the violation is formal and does not substantially prejudice the other party. (citations)" (*Id.*, at p. 200.) Given that discovery has yet to commence in the death case as to the nature, mechanism, and cause of decedent's death (Lab. Code, § 3600), it would be difficult to argue prejudice at this early stage

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<sup>5</sup> Given defendant's apparent confusion as to what a cumulative injury is in workers' compensation, section 3208.1 defines a cumulative injury as resulting from the "combined effect" of "repetitive mentally or physically traumatic activities extending over a period of time." (Lab. Code, § 3208.1.)

and makes it impossible for any finder of fact to resolve the parties' dispute over the nature of the injury involved in the death case.

In other words, to determine the "date of injury," it is first necessary to identify the injury for which the date is being determined. The *only* evidence addressing decedent's cause of death is the death certificate, which we conclude is not substantial medical evidence as to the cause of decedent's death. (Def. Exh. A, Death Certificate.) The death certificate was issued by Mujeeb Altaf, M.D., who listed "cardiac arrest" and "acute myocardial infarction" as causes of decedent's death. (*Ibid.*) However, there is no accompanying report indicating how Dr. Altaf reached such conclusions, whether relevant legal standards were considered regarding causation in a workers' compensation case, and/or whether Dr. Altaf reviewed decedent's prior medical history before reaching such conclusions. (*Ibid.*) The other medical evidence in the record was produced in decedent's *inter vivos* case prior to her death and raises more questions than certainty regarding the cause of her impairment. (See eg., Def. Exh. J, Deposition of Panel Qualified Medical Evaluator in the *inter vivos* case, Victor Kerenyi, D.C., taken June 21, 2021, pp. 13-15, 17-18, 34, 38-39, 41-42, 43-45, 56, 61-62, 65-69 [QME found decedent credible; found decedent medically ineligible to engage in gainful employment; but, was unable to articulate the cause of decedent's increased impairment over time].)

Employment need only be a contributing cause of decedent's death. (*South Coast Framing, Inc., et al. v. Workers' Comp. Appeals Board (Clark)* (2015) 61 Cal.4th 291, 297-299 [2015 Cal. LEXIS 3896]; *Wickham v. North American Rockwell Corp.* (1970) 8 Cal.App.3d 467, 473 [35 Cal.Comp.Cases 751] citing *Madin v. Industrial Acc. Com.* (1956) 46 Cal.2d 90, 92-93.) "[I]ndustrial causation itself need not be certain, but only 'reasonably probably.'" (*McAllister v. Workmen's Comp. Appeals Board* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660] (*McAllister*)). However, a WCJ's decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc)), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310].) A medical opinion is not substantial evidence if it is based on "inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-21 (Appeals Bd. en banc).)

Accordingly, given the lack of substantial medical evidence in the record, it must be our decision to grant reconsideration. It is our decision after reconsideration to rescind the Findings and return this matter to the trial level for further proceedings consistent with this decision, which will be issued and filed in the Electronic Adjudication Management System record of ADJ12910087 (decedent's *inter vivos* claim). Upon return to the trial level, and to avoid confusion in the proceedings and in the record, the parties are directed to obtain a separate adjudication file and number for the death case, which is an independent and severable action from the *inter vivos* claim. (*Berkebile*, *supra*, 144 Cal.App.3d at 945; see *Glavich v. Industrial Acci. Com.* (1941) 44 Cal.App.2d 517, 521-523 [6 Cal.Comp.Cases 123] (*Glavich*).) **The new adjudication file and number will *not* affect the original filing date of the death case Application of January 2, 2024.** (See *Bassett-McGregor*, *supra*; *Rubio*, *supra*.)

Although we are unable to reach the issue of whether the death case Application was filed within 240 weeks of the “date of injury” under section 5406(b), we note that the WCJ may have misunderstood the holding in *Berkebile*. The “date of injury” for a cumulative injury “shall be the date determined under Section 5412.” (Lab. Code, § 3208.1.) Section 5412 defines the “date of injury” for cumulative injuries (and occupational diseases) as “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.)

However, in *Berkebile*, the Court held that “[t]he 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, emphasis added; cited with approval in *Massey v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 674, 678, fn. 1 [58 Cal.Comp.Cases 367].)<sup>6</sup> The reason that the death applicant’s knowledge is material to the determination, and *not* the decedent’s knowledge, is because “the applicant’s right to workers’ compensation death benefits are independent and severable from the decedent’s *inter vivos* rights” and therefore, “a determination as to the decedent’s knowledge of the industrial origin of his disability is not dispositive of the statute of limitations issue.” (*Ibid.*)<sup>7</sup>

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<sup>6</sup> “Applicant” in the context of a death case means the dependent or dependents and does *not* mean the decedent.

<sup>7</sup> See *Glavich*, *supra*, 44 Cal.App.2d at p. 522 [*inter vivos* case and death case separate “transactions” (different injuries) under section 5303].

*Berkebile* is a published, appellate decision and would be controlling authority in a death case where the issue to be determined was the “date of injury.” (See *Gonzales v. City of Montebello*, 2022 Cal.Wrk.Comp. P.D. LEXIS 38, \*9-10.) Moreover, the “date of injury” analysis set forth in *Berkebile* has been applied in all recent Appeals Board panel decisions addressing the issue presented in this case. (*Id.*, at \*11.)<sup>8</sup> Prior panel decisions inconsistent with *Berkebile* are not persuasive. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236] [panel decisions are not binding precedent (as are en banc decisions)]; see also, *Gonzales, supra*, at \*9 and fns. 8-11.)

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<sup>8</sup> See *Timmons v. County of Los Angeles, PSI* (2017) 83 Cal.Comp.Cases 411 [2017 Cal.Wrk.Comp. P.D. LEXIS 504]; *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; *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.).



For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings of Fact issued on May 14, 2025 by a workers' compensation administrative law judge is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on May 14, 2025 by a workers' compensation administrative law judge is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**



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

**SEPTEMBER 2, 2025**

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

**FELIPE SALDANA RODRIGUEZ  
FELIPE SALDANA  
LAW OFFICES OF KNOPP & PISTIOLAS  
D'ANDRE LAW**

**AJF/mc**

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