S215637

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTH COAST FRAMING, INC. *et al.*, Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD *et al.*, Respondents. JOVELYN CLARK (*Widow*) *et al.*, Real-Party-in-Interest.	Supreme Court Case No.: 4 Civil No.: D063945 (WCAB Case No.: ADJ7324566)

PETITION FOR REVIEW

After Decision by the Court of Appeal
Fourth Appellate District
Division One

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CERTIFICATE OF COMPLIANCE
(Cal. Rules of Court, Rule 14 (c))

I, Daniel J. Palasciano of the Law Offices of O'Mara & Hampton, attorneys for Petitioners Jovelyn Clark (*Widow*), *et al.*, do hereby certify that the word count of this Petition for Review, including footnotes, is 4,204 according to the computer calculation utilizing WordPerfect "File/Properties/ Information".

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 01/21/2014 Signed: _____

DANIEL J. PALASCIANO
ATTORNEY FOR PETITIONERS,
JOVELYN CLARK (*Widow*), *et al.*

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTH COAST FRAMING, INC. *et al.*, Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD *et al.*, Respondents. JOVELYN CLARK (*Widow*) *et al.*, Real-Party-in-Interest.	Supreme Court Case No.: 4 Civil No.: D063945 (WCAB Case No.: ADJ7324566)

PETITION FOR REVIEW

After Decision by the Court of Appeal
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TO THE HONORABLE CHIEF JUSTICE
AND THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

INTRODUCTION

Petitioner/Real-Party-in-Interest Jovelyn Clark (*widow*) *et al.* (hereinafter "Petitioners") respectfully petition this Honorable Court for review of the Decision and Opinion on the Petition for

Writ of Review filed by the Court of Appeal, Fourth Appellate District, Division One, on 12/9/13. Under California Rules of Court §8.500(b)(1), Petitioners respectfully seek review by this Honorable Court on the basis that review is necessary to address an important question of law, and to secure uniformity of decision. The instant Petitioner did not file a petition for rehearing with the Court of Appeal.

In its unpublished Opinion[1], the Appellate Court reversed the findings of the Workers' Compensation Appeals Board (hereinafter "WCAB") and the Trial Judge (hereinafter "WCJ"), thus denying death benefits to the widow and three minor children, by finding that there was not a sufficient causal connection between the death of the Decedent, Brandon Clark, and his industrial injury. In doing so, the Court of Appeal appears to have created a new causation standard and burden of proof applicable only to death cases. This new rule appears to require that an industrial injury be a "material factor" contributing to the death of an applicant.

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[1]Petitioners below filed a Request for Publication on 12/26/13, which was denied by the Court of Appeal on 12/30/13. The Request for Publication was then filed in this Honorable Court on 1/2/14.

Regarding this issue of a new causation standard for death cases, this Honorable Court should find this issue appropriate for review because, to the extent that a new standard is being imposed on the Workers' Compensation legal community by the Court of Appeal, an important question of law is presented for this Honorable Court. Further, there is a conflict with other Courts of Appeal in that no other Court of Appeal has ever imposed the standard endorsed by this Court of Appeal. As such, uniformity of decision is required on this important issue.

TIMELINESS OF PETITION

This petition is timely filed within 10 days after the Decision of the Court of Appeal became final as to that Court, pursuant to California Rules of Court §8.500(e)(1).

QUESTION PRESENTED

DOES A CLAIM FOR WORKERS' COMPENSATION DEATH BENEFITS HAVE A SEPARATE AND DISTINCT CAUSATION STANDARD AND BURDEN OF PROOF REQUIRING THAT AN INDUSTRIAL INJURY CONSTITUTE A "MATERIAL FACTOR" CONTRIBUTING TO THE EMPLOYEE'S DEATH?

STATEMENT OF FACTS

The deceased, Brandon Clark, suffered an admitted industrial injury on 9/5/08, when he fell approximately eight

to ten feet from one floor of a construction site to another below. He suffered injuries to his neck, back and head. On 7/20/09, Mr. Clark passed away, leaving behind a widow and three minor children, and his death was determined by the County Medical Examiner to have been primarily caused by an accidental toxicity of four medications: Gabapentin and Amitriptyline-which were being prescribed by Mr. Clark's Workers' Compensation doctors-and Xanax and Ambien, which were being prescribed by Mr. Clark's private physician.

A claim for death benefits was filed on behalf of Mrs. Jovelyn Clark and her three minor children. After deposing Mrs. Clark, the Respondents sought an independent medical-legal opinion from Daniel Bressler, M.D. Dr. Bressler's expert opinion was that Mr. Clark's death was an injury AOE/COE caused by his industrial injury.

The parties later obtained opinions from Thomas Bruff, M.D., in the capacity of Panel Qualified Medical Evaluator.[2] Dr. Bruff's initial report dated 6/28/11 concluded that the interaction of Xanax and Ambien was the primary cause of Mr. Clark's death. Dr. Bruff found that the other two

[2]The Court of Appeal opinion referred to Dr. Bruff as an "Agreed Medical Examiner". In fact, Dr. Bruff was a Panel Qualified Medical Evaluator.

medications were not found in high enough concentrations to have caused "any coincident drug interaction".

During his subsequent deposition on 3/29/12, Dr. Bruff, while affirming his prior opinion that the Xanax and Ambien were the primary causes of Mr. Clark's accidental overdose causing his death, clearly testified that the industrially-prescribed Amitriptyline, while not found in sufficient amounts to be solely causative of Mr. Clark's death, was a part of the "causation pie" contributing thereto. While Dr. Bruff was not able to give a specific numerical percentage of causation to the Amitriptyline, he clearly indicated at the time of his deposition that he had arrived at the opinion the Amitriptyline was at least partially causative of Mr. Clark's death.

At the trial level, the WCJ reached the factual conclusion that Mr. Clark had been suffering from chronic pain as a result of his industrial injury, which caused him sleep difficulty. On appeal, the WCAB affirmed this finding of the WCJ. The evidentiary record shows that the widow in this matter, Mrs. Clark, testified that her husband had obtained a prescription for Ambien because he was not getting enough sleep. She

testified — and the subpoenaed records obtained by the Defendant confirmed — that Mr. Clark had never had a prescription for Ambien prior to his industrial injury.

Further, Mrs. Clark testified that she had a conversation with the Decedent's sister prior to Mr. Clark's death regarding the fact that Mr. Clark had been having issues regarding "blackouts" and "taking naps". The subpoenaed records of the County of San Diego Medical Examiner's Office also documented that the Decedent's brother, with whom he worked regularly as a construction worker, had told the Medical Examiner's Office that his brother had been "blacking out", which the Decedent's brother further clarified as meaning "falling asleep". The Decedent's brother indicated that Mr. Clark had said he had not been getting enough sleep at night.

Mrs. Clark also submitted unrebutted testimony that at the time leading up to her husband's death, he was still having problems with his neck and back, and in fact indicated that those problems had been getting worse. Mrs. Clark also testified that at the time of her husband's death, he had not been complaining about any other physical issues other than his neck and back.

Further, regarding the issue of Mr. Clark's sleep problems, it is correct, as documented by the Court of Appeal, that on 1/29/09 Mr. Clark's private physician prescribed him Ambien due to Mr. Clark reporting that three to four times per week he was having difficulty sleeping. The doctor also reported that Mr. Clark was not aware of any anxiety, obsessive thoughts, pain or urinary urgency during these times.

However, most significantly, a few days *before* this visit to his personal physician, Mr. Clark had reported to his Workers' Compensation physicians, on 1/21/09, that he was continuing to suffer from significant and constant pain, and the medical report regarding that visit specifically indicated that Mr. Clark ". . . use[d] the pain medication mostly at night to help him get comfortable for sleep". The Court of Appeal reporting of this statement does not make entirely clear the fact that, again, this was the statement of the Workers' Compensation medical provider based upon their interaction with Mr. Clark on 1/21/09. The very clear inference regarding the fact that Mr. Clark was using his pain medication to help him get comfortable for sleep is that Mr. Clark was having sleep difficulties due to the chronic pain caused by his industrial injury. And, again, Mr. Clark reported this to his Workers' Compensation doctors only a week before requesting sleep medication from his personal doctor.

Additionally on this issue, the subpoenaed records from Concentra Occupational Medical Center also noted a 3/16/09 entry where the physician reported "[s]ymptoms are worsened with prolonged activity and *at night . . .*". *(Emphasis added.)*

Further, Mrs. Clark testified that she was aware that her husband had taken Tylenol PM in an attempt to help him sleep prior to his death. She thought had been prescribed the Ambien because the Tylenol PM was not working. When asked about her knowledge as to how long her husband had taken Tylenol PM, Mrs. Clark testified that she did not know. She further testified that she thought her husband, prior to his industrial injury, had taken Tylenol PM "off and on", but she did not say for how long, with what frequency, etc.

ARGUMENT

DOES A CLAIM FOR WORKERS' COMPENSATION DEATH BENEFITS HAVE A SEPARATE AND DISTINCT CAUSATION STANDARD AND BURDEN OF PROOF REQUIRING THAT AN INDUSTRIAL INJURY CONSTITUTE A "MATERIAL FACTOR" CONTRIBUTING TO THE EMPLOYEE'S DEATH?

In its Opinion overturning the Award of death benefits to the Decedent's widow and three minor children, the Court of Appeal found the evidence insufficient to show a causal connection between the medication being taken by Mr. Clark

at the time of his death and his industrial injury, and that the Decision of the WCJ, affirmed by the WCAB, was not supported by substantial evidence.

In discussing the legal authority under which it analyzed this case, the Court of Appeal correctly noted that traditional notions of proximate causation do not apply to Workers' Compensation, despite the requirement that a worker must show that an injury arose out of and in the course of his employment and "[was] proximately caused by his employment . . ." (Labor Code §3600(a)(2) and (3)). The Court cited *Guerra v. Workers' Compensation Appeals Board* (1985) 168 Cal. App. 3d 195, 199 (214 Cal. Rptr. 58) for the proposition that, "[t]he tort concept of proximate causation requiring a sole cause is not followed in Workers' Compensation. *[Citation.]* Instead, the causal connection between employment and the injury is sufficient if the employment is a *contributing cause* of the injury." *(Emphasis added.)* In fact, this principle was previously endorsed by this Honorable Court in *Madin v. Industrial Accident Commission (IAC)* (1956) 46 Cal. 2d 90, 92; 292 P. 2d 892, wherein the Court stated: "If we look for a causal connection between the employment and the injury, such connection need not be the sole cause; it is sufficient if it is a *contributing cause*." *(Emphasis added.)*

Also instructive is the case of *State Compensation Insurance Fund v. IAC (Wallin)* (1959) 176 Cal. App. 2d 10; 1 Cal. Rptr. 73; 1959 Cal. App. LEXIS 1438. That case involved an applicant who sustained an admitted industrial injury to his eye, who then later accidentally amputated his finger while using a power saw. The Court in that matter found that the injury to the finger was a compensable consequence of the original industrial eye injury. The Appellate Court specifically stated, in the context of discrediting the petitioner's negligence argument, that, "the first injury need not be the exclusive cause of the second, but only a *contributing factor* to it . . .. So long as the original injury operates even in part as a *contributing factor*, it establishes liability." (*Wallin* at p. 17.) *(Emphasis added.)*

The problem with the Court of Appeal's analysis in the instant matter is that the Court of Appeal has established a new standard of causation applicable only to claims for death benefits, stated by the Court of Appeal as follows:

> In a death case, "[s]o long as the industrial injury and employment generally constituted material factors in contributing to the employee's death, the proximate cause test of . . . §3600 is met." (1 St. Clair, *Cal. Workers' Compensation Law and Practice* (5th Ed. 1996) §11.1.4, p. 755.)

A review of the St. Clair treatise indicates the author was relying on a case decided by this Honorable Court, *Pacific Gas & Electric Co. v. IAC, Sally Mary Drew* (1961) 56 Cal. 2d 219; 363 P. 2d 596; 14 Cal. Rptr. 548.

In that matter, the Decedent, prior to his industrial injury, was suffering from a non-industrial kidney carcinoma. While suffering from that condition, he fell at work and injured his back. His medical condition then deteriorated to the point he became a paraplegic, approximately six months after the industrial injury, and then died approximately nine months after that. The medical evidence in the case showed that while the non-industrial kidney carcinoma would have brought about the employee's death regardless, the industrial injury had caused him to die sooner than he would have otherwise.

The IAC found that the Decedent's death was industrial, however, the defendants did not appeal that portion of the IAC opinion. Rather, the appeal argued that the death benefit should have been apportioned to account for the presence of the non-industrial kidney carcinoma. This Honorable Court analyzed the issue, primarily within the context of the statutory language of Labor Code §§4663 and 4702, as well as former Labor Code §§4750-4755, and found no basis for apportionment of death benefits between industrial and non-industrial causes.

Particularly relevant is the fact that this Honorable Court's opinion in *Pacific Gas* neither specifically discusses the standard of causation and burden of proof for establishing a death claim in the first place, nor does it ever even use the term "material factors". This term apparently was employed by the treatise author in creating a case summary; however, this Honorable Court never used such language. The word "material" does not even appear in the opinion. The word "factor" appears only three times, with the only relevant usage as follows: "Petitioner argues the unfairness of placing the full burden of compensation for death upon it where pre-existing disease is a contributing factor, but the whole theory of the Workmen's Compensation Act is to put a burden in limited amounts upon employers for all industrial-caused injuries and deaths regardless of fault . . .." (*Pacific Gas* at p. 223.) This Honorable Court then further discusses this rule in the context of the larger legislative and policy considerations behind Workers' Compensation law.

As noted, the only use of the word "factor" in this opinion relied upon by St. Clair, and thus relied upon by the Court of Appeal, is in the context of identifying "pre-existing disease" as a "contributing factor". No other cases are cited in the St. Clair treatise to support the "material factors" language used by the treatise author.

Nor is the term "material factors" ever defined by the treatise author or the Court of Appeal. Thus, the Court of Appeal's ultimate conclusion is vague and conclusory, as there is no way of knowing what the phrase "material factors" means in terms of the Court of Appeal's newly created standard of causation and burden of proof for death claims.

The creation of a new test — and its appropriateness — is crucial to this matter because the Court of Appeal in the instant matter stated that:

> Liberally construing Dr. Bruff's testimony and report in its totality, we conclude the evidence did not establish industrial causation. Rather, the evidence demonstrates that if Amitriptyline played a role at all, it was not significant such that it constituted a *material factor* contributing to Brandon's death. *(Emphasis added.)*

As is obvious from this language, the Court of Appeal seems to indicate that the Amitriptyline needed to have been a "material factor" in contributing to the death of Mr. Clark for the Court to find evidence of industrial causation.

The Court of Appeal's Opinion in the instant matter, requiring that an employee show that the industrial injury and employment were "material factors" contributing to the employee's death, is inappropriate as without precedent. Further, a review of the existing case law shows that no other Court of

Appeal district has used this newly-created standard of causation and burden of proof in reviewing claims for Workers' Compensation death benefits.

Additional problems exist with the Court's analysis in this matter. While it is of course true, as the Court of Appeal notes in quoting from Dr. Bruff's deposition testimony, that the doctor makes statements indicating he could not fix the *precise percentage* of industrial causation regarding the Amitriptyline, stating "it would be closing your eyes and throwing a dart at a dartboard", the Court then goes on to state that a precise percentage of causation it not required; rather, a reasonable probability of industrial causation is required. *(Citing McAllister v. Workers' Compensation Appeals Board (1968) 69 Cal. 2d 408, 413 (71 Cal. Rptr. 697; 445 P. 2d 313), and Bracken v. Workers' Compensation Appeals Board, Commercial Carriers, Inc. (1989) 214 Cal. App. 3d 246 (262 Cal. Rptr. 537).)*

However, even with this analysis, the Court of Appeal's Opinion is inconsistent in that, after stating that a precise percentage of causation is not required, the Court notes that Dr. Bruff stated it was difficult to establish a "reasonable medical analysis" of the *precise* percentage of causation. What is overlooked, or at least undervalued, by the Court

is the fact that Dr. Bruff's opinion was clear that Amitriptyline was part of the "causation pie" regarding Mr. Clark's death — an opinion he added to his analysis at the time of his 3/29/12 deposition, which occurred subsequent to his 6/28/11 written report.

In a long narrative answer to questions from the Petitioners below (South Coast), Dr. Bruff, expanding on the opinions in his written report, stated, as noted by the Court of Appeal, that with regard to the industrial medications, the Gabapentin could not be part of the "causation pie". However, Dr. Bruff indicated the industrially-prescribed Amitriptyline "[could] be additive". The doctor also stated he could not "slam the door and say [Amitriptyline] had no effect . . ." regarding causation of Mr. Clark's death. In fact, Dr. Bruff felt it was reasonable to conclude that the Amitriptyline was a part of the "causation pie", stating that ". . . on further reflection, Amitriptyline could be an incremental contributor".

As noted in the Court of Appeal Opinion, Dr. Bruff specifically stated that it would be nearly impossible to ascribe an exact percentage of causation to the Amitriptyline. However, at various points of his deposition, he indicated the range could at least be between one-half percent and five percent, but not

as high as 20 percent, stating: "It's not zero, but it's certainly not 20 percent either, where it's a no-brainer." While Dr. Bruff repeatedly indicated Amitriptyline alone was not toxic enough to cause death, he reiterated multiple times that it was part of the "causation pie".

Thus, while it is true, as pointed out by the Court of Appeal, that Dr. Bruff could not with reasonable medical probability establish a *precise percentage* of industrial causation as to the Amitriptyline, it is equally clear that he changed his opinion on this issue between the time of his initial report and the date of his deposition, by which point he had arrived at the conclusion that the Amitriptyline was a causative factor in Mr. Clark's death.

Therefore, pursuant to *Guerra*, *Madin* and *Wallin*, it appears reasonable to conclude that the Amitriptyline was at least a "contributing cause" or "contributing factor" in Mr. Clark's death. Whether the Amitriptyline was a "material factor" under the Court of Appeal's newly-minted causation standard for death cases is unknowable since that term was never defined by the Court of Appeal in its Opinion.

Additional considerations further weigh against the Court of Appeal's "material factors" test. The appropriate burden of

proof in a Workers' Compensation claim, whether it be an *inter vivos* or death claim, should be Labor Code §3202.5, which states in relevant part: "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence . . .." This Labor Code section does not distinguish between a death claim and an *inter vivos* claim.

Further, if the Legislature wanted to impose a different causation standard for a death claim, it certainly knows how to do so. For example, Labor Code §3208.3, dealing with the standard of causation for psychiatric injuries, indicates that for certain psychiatric injuries resulting from violent acts (Labor Code §3208.3(a)(2)), the applicant is held to a "substantial cause" standard, which is specifically defined in Labor Code §3208.3(a)(3) as follows: "For the purposes of this section, 'substantial cause' means at least 35 to 40 percent of the causation from all sources combined."[3]

In addition, Labor Code §3208.3(c) specifically states: "It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for

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[3]*See also Labor Code §3208.3(h).*

psychiatric injury under this division." Again, the Legislature knows how to delineate specific, higher or different standards of causation for certain types of industrial injury. Regarding death claims, the Legislature chose not to do so.

This principle is further strengthened by the "presumption" statutes which apply to various police officers, firefighters, etc., where evidentiary burdens are significantly relaxed to the point of an injury being presumed to be industrial in origin under certain conditions. *(See Labor Code §§3212-3213.2.)* If the Legislature intended a higher or different standard of proof for death cases it could have enacted such a standard. It has not, and as such, the Court of Appeal has impermissibly created a different, and apparently higher causation standard and burden of proof where the Legislature has knowingly chose not to do so.

A final issue related to the new "material factors" test is whether this test applies to factual findings of the WCAB. The Court of Appeal did cite *Guerra* in its opinion for the proposition that:

> Whether an employee's injury is proximately caused by his employment is a question of fact. *[Citation.]* Judicial review of the Board's decision on factual matters is limited to determining whether the decision,

> based on the entire record, is supported by substantial evidence. *[Citations.]* This standard of review is not met by simply isolating evidence which supports the Board and ignoring other relevant facts of record which rebut or explain that evidence. *[Citation.]*" (*Guerra, supra*, 168 Cal. App. 3d at p. 199.)

It appears based on the foregoing that the "material factors" test does not apply to appellate review of factual findings of the WCAB, although in the context of the entire opinion it is not clear. It must be emphasized that the WCJ and WCAB made a finding that the Decedent in this matter had industrially-caused chronic pain that led to sleep difficulties, meaning that the Ambien the Decedent took was needed, at least in part, due to his industrial injury.

While the Court of Appeal did cite *Guerra* as noted above regarding review of factual issues, other standards of review are equally relevant. As a general matter, the resolution of questions of fact is left to the WCAB. For example, in *Western Electric Co. v. Workers' Compensation Appeals Board* (1979) 99 Cal. App. 3d 629, 644 (160 Cal. Rptr. 436), the Court stated — after citing Labor Code §5953 regarding the principle that findings and conclusions of the WCAB on questions of fact are conclusive and final and not subject to review — that, "[t]hus if the board's findings 'are supported by inferences

which may fairly be drawn from the evidence, even though the evidence is susceptible of opposing inferences, the reviewing Court will not disturb the award'". *(Citing Riskin v. IAC (1943) 23 Cal. 2d 248, 254; 144 P. 2d 16.) (See also Judson Steel Corp. v. WCAB (1978) 22 Cal. 3d 658, 664; 586 P. 2d 564.)*

Additionally, an Appellate Court may not re-weigh the evidence or substitute its choice of the most convincing evidence for that of the WCAB. *(See, e.g., Western Growers Ins. Co. v. WCAB (1993) 16 Cal. App. 4th 227, 233; 20 Cal. Rptr. 2d 26.)*

Finally, while the Appellate Court should not overturn an award because it is susceptible to inferences, it does not have to accept factual findings which are illogical, unreasonable, improbable or inequitable, considering the entire record and overall statutory scheme. *(Judson Co. at p. 664.)*

The Court of Appeal in the case at bar reviewed this issue briefly, and then simply stated: "Based on our review of the record, the evidence is insufficient to establish that Brandon used Ambien as a result of pain from his industrial injury." The Court's analysis does not make clear if the evidence of industrially-caused sleep problems was not a "material factor" in Mr. Clark's death, or if the evidence was not "substantial evidence" per *Guerra*. If the "material factor" test does apply

to the review of factual matters, the Court of Appeal does not address how, or whether, that new test interacts with the "substantial evidence" test, or, whether the "material factor" test replaces the "substantial evidence" test, thereby creating a new standard of appellate review regarding WCAB decisions on factual matters.

Based on the totality of the evidence, the WCJ and the WCAB reached the conclusion that the Applicant was having sleep difficulties which were, at least in part, caused by his industrial injury, and therefore made the reasonable inference that the Ambien which was prescribed by his non-industrial physicians was used by Mr. Clark to treat his industrial injury. While there is some evidence in the record which can support the opposing inference, it clearly cannot be said that the WCAB's factual findings were illogical, unreasonable, improbable or inequitable, especially given that there is no other evidence in the record that affirmatively shows any other explanation for Mr. Clark's sleep problems other than his industrial injury.

Rather, the only documented affirmative reasons for Mr. Clark's sleep problems in the evidentiary record, as provided

by his wife's testimony and records from the occupational medical provider and coroner, were that he was having difficulty sleeping, including "black outs" and "taking naps"; that the only physical problems he had at the time of his death was his chronic pain caused by work-related neck and back injuries; and that he specifically told his occupational medicine doctors that he was using pain medicine to make himself comfortable for sleeping, just days before obtaining a prescription for Ambien from his private physician.[4]

Again, it is not clear if the Court of Appeal was applying the "material factors" test to the factual question of whether the Decedent's sleep problems were work-related. As such, based on the record and especially in consideration of the rule of liberal construction of Labor Code §3202, it was error for the Court of Appeal to overturn a factual finding of the WCAB.

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[4]It is worth noting that Dr. Bruff, while unable to speak to the Decedent's state of mind, noted in his deposition that sleep problems are common in many chronic pain patients.

CONCLUSION

This matter is appropriate for review by this Honorable Court since whether the "material factor" test is legally appropriate is an important question of law, and this Honorable Court needs to clearly establish for the Workers' Compensation community that there is no separate standard of causation and burden of proof for death claims.

Accordingly, Petitioner requests that this Honorable Court grant review of this matter and remand it back Court of Appeal to reinstate the WCAB's Findings, Opinion and Award.

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 01/21/2014 Signed: _____

DANIEL J. PALASCIANO
ATTORNEY FOR PETITIONERS,
JOVELYN CLARK (*Widow*), *et al.*

VERIFICATION

State of California, County of San Diego.

(1) I am the Attorney for Petitioners Jovelyn Clark (*Widow*) *et al.* in the above-entitled action or proceeding;

(2) I have read the foregoing **PETITION FOR REVIEW**, and know the contents thereof; and

(3) I certify the same is true of my own personal knowledge, except as to those matters therein stated upon my information or belief; and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed on 01/21/2014 at San Diego, California.

Dated: 01/21/2014 Signed: _____

DANIEL J. PALASCIANO
ATTORNEY FOR PETITIONERS,
JOVELYN CLARK (*Widow*), *et al.*

PROOF OF SERVICE (C.C.P. §§1013a & 2015.5)

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 2370 Fifth Avenue, San Diego, California 92101.

On 01/21/2014, I, Daniel J. Palasciano, served the within **PETITION FOR REVIEW** in the matter of:

SOUTH COAST FRAMING, INC. *et al.*, Petitioners v.

WORKERS' COMPENSATION APPEALS BOARD *et al.*, Respondents.

JOVELYN CLARK (*Widow*) *et al.*, Real-Party-in-Interest.

4 Civil No.: D063945

Upon the following addressee(s): *[SEE ATTACHED SERVICE LIST]*

Service of the foregoing document was by regular mail *(except as noted)* deposited in the United States Mail at San Diego, California, with postage thereon fully prepaid in accordance with this firm's practice of collecting and processing correspondence for mailing, according to which mail is deposited with the United States Postal Service each day. (C.C.P. §1013(a)(3))

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct. Executed on 01/21/2014 at San Diego, California.

Name: Daniel J. Palasciano Signed: _____

SERVICE LIST

CALIFORNIA SUPREME COURT
350 McAllister St.
San Francisco, CA 94102-4797

[SENT BY OVERNIGHT EXPRESS MAIL]
(One Original & 13 Copies)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT *(1 Copy)*
750 B St. #300
San Diego, CA 92101

WORKERS' COMPENSATION APPEALS BOARD *(2 Copies)*
Reconsideration Bureau
P.O. Box 429459
San Francisco, CA 94142-9459

Louis A. Larres, Esq.
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(Attorney for South Coast Framing, Inc. *et al.)*
(1 Copy)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SOUTH COAST FRAMING, INC. et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD et al., Respondents.	D063945 (WCAB No. ADJ7324566)

Petition for writ of review from an order of the Workers' Compensation Appeals Board. Order annulled and the matter remanded.

Bradford & Barthel and Louis A. Larres for Petitioners.

Law Offices of O'Mara & Hampton and Daniel J. Palasciano for Respondents.

A workers' compensation judge (WCJ) concluded that Brandon Clark, an employee of South Coast Framing, Inc. (South Coast), died as a result of medications he took after suffering an industrial injury. South Coast and its insurance carrier, Redwood Fire and Casualty Company administered by Berkshire Hathaway Homestate Companies

(together with South Coast, petitioners), petitioned for writ of review after the Workers' Compensation Appeals Board (the Board) denied reconsideration of the WCJ's decision in favor of Brandon's wife and children. We conclude the Board erred in denying reconsideration because the WCJ's decision was not supported by substantial evidence. Accordingly, the order denying reconsideration is annulled and the matter is remanded to the Board with directions to enter a new order denying the claim.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, Brandon suffered back, head, neck and chest injuries when he fell from a roof while working for South Coast. Brandon's workers' compensation physician prescribed amitriptyline, gabapentin (Neurontin) and hyrdrocodone (Vicodin) for his injuries. Brandon was also taking Xanax and Ambien, which were prescribed by his personal physician in January 2009. Xanax was prescribed for "ongoing anxiety," and Ambien was prescribed for sleeping difficulties. Brandon's personal physician noted that Brandon was "having problems sleeping. This [was] occurring at least 3 or 4 times a week . . . . During these times, [Brandon was] not aware of anxiety or . . . pain."

In July 2009, Brandon died from the combined effects of amitriptyline, gabapentin, Xanax and Ambien, and associated early pneumonia. Brandon's wife, Jovelyn Clark, and their three minor children filed a claim for death benefits alleging the death was the result of the injury and industrially prescribed medications.

Petitioners requested an opinion from Dr. Daniel Bressler regarding the cause of Brandon's death. After reviewing various medical records, Dr. Bressler concluded that "[Brandon's] death was secondary to an accidental overdose." In reaching this conclusion, Dr. Bressler stated, "[t]he specific combination of medicines [Brandon] was on, which included Xanax, Ambien, Flexeril, Neurontin, amitriptyline, and hydrocodone, all separately and in combination had the capacity to induce respiratory depression, and even respiratory arrest."

Dr. Thomas C. Bruff, an agreed medical examiner, reviewed Brandon's medical file, including autopsy and toxicology reports. Based on the records, Dr. Bruff issued his report, stating:

> "While there is some difference of opinion on therapeutic and toxic levels of the medications in this particular case, several conclusions can be made. While [Brandon] was prescribed a number of medications only amitriptyline, zolpidem, alprazolam, gabapentin, and acetaminophen were found in peripheral blood specimen. Gastric specimens showed both alprazolam and zolpidem. It is my opinion that gabapentin did not have a role in this particular case. Amitriptyline was prescribed in such low dose, and bloods levels show that the medication was likely taken as prescribed. However, zolpidem [(Ambien)] and alprazolam [(Xanax)] was found in excess of what would be normally considered peripheral blood concentrations. Both these medications work in a similar fashion and would be considered at least additive in their effects. It is my opinion in the case of [Brandon] that it is just this additive effect of zolpidem and alprazolam that caused sedation significant enough to result in the events leading to his death.
>
> "For clarity, it is my opinion that [Brandon] passed away as a result of the additive drug interaction between zolpidem and alprazolam. The two additional medications present in the bloodstream, gabapentin and amitriptyline, were not high enough to result in any coincident drug interaction."

During his deposition, Dr. Bruff clearly stated that gabapentin did not play a role in Brandon's death. In regard to amitriptyline, Dr. Bruff stated that while this drug was found in Brandon's bloodstream, it was not enough by itself to be toxic. However, Dr. Bruff noted that mixtures of drugs are difficult to quantify.

When questioned regarding whether amitriptyline *could* have contributed to Brandon's death, Dr. Bruff stated that "it's possible." He testified that amitriptyline "is additive" and "could be an incremental contributor," but alprazolam and zolpidem "carried the day." Dr. Bruff stressed that he could not precisely calculate the percentage of amitriptyline's contribution because "honestly, no medical person—it would be closing your eyes and throwing a dart at a dartboard kind of stuff. Maybe you get a bull's eye. You are just pulling numbers out of the sky." When further pressed for a percentage, Dr. Bruff stated that amitriptyline was part of the causation "pie," but he could not " 'tell . . . whether it's 1.5 percent or .5 percent.' . . . [W]e're way down at that end." Additionally, Dr. Bruff testified that hydrocodone, which was detected in Brandon's urine, could be "a couple crumbs" of the causation "pie." He clarified that while amitriptyline had a small role in Brandon's death, he stood by his initial report.

Dr. Bruff also commented on records relating to Brandon's sleeping problems. Dr. Bruff noted that the records did not reveal why Brandon was having trouble sleeping but stated that "[i]t could be because of back pain, could be, you know, stress at home. [The records] didn't seem to be detailed for me, so I don't know. I deal with a lot of cases of chronic back pain and what not and sleeping can be an issue." Jovelyn also testified

regarding Brandon's sleeping difficulties. She stated that before Brandon's injury in 2008, he took Tylenol PM "off and on" to help him sleep.

The WCJ found that Brandon's death resulted from medications he was taking as a result of his industrial injury. Specifically, she found that amitriptyline and hydrocodone contributed to Brandon's death. In reaching this conclusion, the WCJ relied heavily on Dr. Bruff's testimony that amitriptyline was part of the causation "pie" and hydrocodone represented additional "crumbs" of that pie. The WCJ also noted that Brandon was having difficulty sleeping as a result of pain from his industrial injury and was prescribed Ambien and amitriptyline to help him sleep. She concluded that "[Brandon] took both the amitriptyline as well as the zolpidem (Ambien) as prescribed, in addition to the Xanax, Gabapentin and Vicodin. These drugs were all interactive and contributed to his death."

Petitioners sought reconsideration, contending that the WCJ's opinion was not supported by substantial evidence because Brandon's industrially prescribed medications did not materially contribute to his death. The WCJ issued a report and recommendation to the Board, explaining that the causal connection between employment and the injury is sufficient if the employment is a contributing cause of the injury; it need not be the sole cause. The WCJ confirmed her finding that Brandon's death was related to his industrial injury. The WCJ also stated that she recommended denying petitioners' request for reconsideration because they attempted to parse the evidence and only cited to evidence that was favorable to their position.

The Board adopted the WCJ's report and denied reconsideration.

DISCUSSION

Legal Principles

To be compensable under the workers' compensation system, a worker must show that his injury arose out of and in the course of employment and "[was] proximately caused by the employment . . . ." (Lab. Code, § 3600, subd. (a)(2) & (3), all undesignated statutory references are to this code.) "The tort concept of proximate causation requiring a sole cause is not followed in workers' compensation. [Citation.] Instead, the causal connection between employment and the injury is sufficient if the employment is a contributing cause of the injury." (*Guerra v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 195, 199 (*Guerra*).) In a death case, "[s]o long as the industrial injury and employment generally constituted material factors in contributing to the employee's death, the proximate cause test of . . . § 3600 is met." (1 St. Clair, Cal. Workers' Compensation Law and Practice (5th Ed. 1996) § 11.1.4, p. 755.)

Although workers' compensation law must be "liberally construed" in favor of the injured worker (§ 3202), an applicant has the burden of establishing a "reasonable probability of industrial causation" (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 (*McAllister*)) by a preponderance of the evidence. (§ 3202.5.) "Whether an employee's injury is proximately caused by his employment is a question of fact. [Citation.] Judicial review of the Board's decision on factual matters is limited to determining whether the decision, based on the entire record, is supported by substantial evidence. [Citations.] This standard of review is not met by simply isolating evidence

which supports the Board and ignoring other relevant facts of record which rebut or explain that evidence. [Citation.]" (*Guerra, supra*, 168 Cal.App.3d at p. 199.)

"[I]n relying on the opinion of a particular physician in making its determination, the Board may not isolate a fragmentary portion of the physician's report or testimony and disregard other portions that contradict or nullify the portion relied on; the Board must give fair consideration to all of that physician's findings. [Citation.] . . . [I]n evaluating the evidentiary value of medical evidence, a physician's report and testimony must be considered as a whole rather than in segregated parts; and, when so considered, the entire report and testimony must demonstrate the physician's opinion is based upon reasonable medical probability. [Citations.] Hence, the Board may not blindly accept a medical opinion that lacks a solid underlying basis and must carefully judge its weight and credibility. [Citation.]" (*Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 255 (*Bracken*).)

With these principles in mind, we examine the record to determine whether the Board correctly decided that Brandon's death resulted from medications he was taking as a result of an admitted industrial injury.

Analysis

Petitioners argue: (1) Brandon's wife and their minor children did not meet their burden to establish a causal connection between Brandon's death and the medication he was taking as a result of his industrial injury; and (2) the WCJ's decision was not supported by substantial evidence. We agree.

The WCJ's report, which was adopted by the Board, started with the premise that Dr. Bruff changed his opinion from the time of his report to the time of his deposition. This finding is not supported when viewed in light of the entire record. Dr. Bruff testified that "it's possible" that amitriptyline contributed to Brandon's death and it "could be an incremental contributor." Although Dr. Bruff went on to state that amitriptyline had a "small role" in Brandon's death, he confirmed that he stood by his initial report, which concluded that Brandon's death was the result of an additive drug interaction between zolpidem and alprazolam. This evidence does not establish a change of opinion.

However, even if Dr. Bruff's deposition testimony was a change of opinion, the new opinion was largely based on surmise, speculation, conjecture and guess. Dr. Bruff recognized the limitations of toxicology by noting that mixtures of drugs are difficult to quantify. After repeatedly being pushed to calculate the percentage of amitriptyline's contribution to Brandon's death, Dr. Bruff stressed that no medical person could offer a precise percentage because "it would be closing your eyes and throwing a dart at a dartboard." Although a precise percentage is not required, a workers' compensation applicant must show a "reasonable probability of industrial causation." (*McAllister*, *supra*, 69 Cal.2d at pp. 413, 417–418.) Thus, a physician's report and testimony must demonstrate his opinion is based on "reasonable medical probability." (*Bracken*, *supra*, 214 Cal.App.3d at p. 255.)

Here, Dr. Bruff admitted that it is difficult to make a "reasonable medical analysis" regarding amitriptyline's precise contribution to Brandon's death. He also stated that making that kind of determination "really gets to be speculative." Liberally construing Dr. Bruff's testimony and report in its totality, we conclude the evidence did not establish industrial causation. Rather, the evidence demonstrates that if amitriptyline played a role at all, it was not significant such that it constituted a material factor contributing to Brandon's death.

Lastly, we note that there is some dispute regarding whether Brandon was taking Ambien due to his industrial injury. Jovelyn testified that Brandon had trouble sleeping before his industrial injury and used Tylenol PM to help him sleep. However, the Tylenol PM was not working. In January 2009, Brandon's personal physician prescribed him Ambien for his sleeping difficulties. The physician noted that Brandon was not experiencing pain during the times he had trouble sleeping. Brandon's medical record indicates that around the same time, he used "*pain medication* mostly at night to help him get comfortable for sleep." Based on our review of the record, the evidence is insufficient to establish that Brandon used Ambien as a result of pain from his industrial injury.

DISPOSITION

The order denying reconsideration is annulled. The matter is remanded to the Board with directions to enter a new order denying the claim.

McINTYRE, J.

WE CONCUR:

HUFFMAN, J.

BENKE, Acting P. J.