
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.: S215637

) 4 Civil No.: D063945

) (WCAB Case No.: ADJ7324566)



SUPREME COURT
FILED

FEB 18 2014

Frank A. McGuire Clerk

Deputy

REPLY TO ANSWER TO 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 1,261 according to the computer calculation utilizing WordPerfect "File/Properties/Information".

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: _____

Signed: _____

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

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REPLY TO ANSWER TO 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.*
("Petitioners") respectfully submits this Reply to Answer to
Petition for Review. The instant Petitioner filed a Petition for

Review on 1/22/14, to which the instant Respondents filed an Answer to Petition for Review on 2/4/14.

To briefly summarize, after the death of the decedent, Brandon Clark, a claim was filed for workers' compensation death benefits. At the trial level, the Petitioners were awarded those benefits per the decision of the Workers' Compensation Judge (WCJ), which decision was upheld by the Workers' Compensation Appeals Board (WCAB). The Court of Appeal then reversed the WCAB, thus denying death benefits to the widow and her three minor children.

In overturning the decision below, the Court of Appeal appears to have created a new — and seemingly more stringent — 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 the decedent in a workers' compensation case. Further, the Court of Appeal appears to have impermissibly re-weighed the factual evidence in coming to its decision that Mr. Clark's employment was not a “material factor” in his death.

ARGUMENT

The instant Respondents maintain in their Answer to Petition for Review that the Court of Appeal did not impose a new standard of causation and burden of proof for death benefit claims, but merely relied on existing precedent regarding the concept of substantial evidence. As detailed in the Petition for Review, the report and deposition of Dr. Bruff, taken as a whole, are substantial evidence in showing that the industrially-prescribed medication amitriptyline was at least partially causative of Mr. Clark's death, even if Dr. Bruff could not with reasonable medical probability give an exact percentage of causation.¹

Regarding the standard of causation and burden of proof, in *LaTourette v. WCAB* (1998) 17 Cal. 4th 644, this Honorable Court, in the context of analyzing a claim for workers' compensation death benefits and the issue of the "commercial traveler" rule, discussed the standards for evaluating whether an injury arose out of and occurred in the course of employment, and noted that Labor Code §3600(a) states, in part: "Liability for

¹Also, as documented in the Court of Appeal opinion and record below, the expert retained by the Defendants, Dr. Daniel Bressler, arrived at an opinion which supported a finding of injury AOE/COE regarding Mr. Clark's death. The record below demonstrates that the County of San Diego Medical Examiner's findings also supported injury AOE/COE.

[workers' compensation benefits], in lieu of any other liability whatsoever to any person except as otherwise specifically provided shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death.”

The opinion goes on to state, per *McAllister v. WCAB* (1968) 69 Cal. 2d 408, that the applicant has the burden of establishing a “reasonable probability of industrial causation”, and that, per Labor Code §3202.5, the relevant standard of proof is “proof by a preponderance of the evidence”.

Then, after reiterating that an injury must arise out of and occur in the course of employment, the Court notes that “(t)his two-pronged requirement is the cornerstone of the workers' compensation system. [Citation omitted.] In applying it, this Court must be guided by the equally fundamental principle that the requirement is to be liberally construed in favor of awarding benefits.” (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal. 3d 729, 732–733.)

In the *LaTourette* opinion, this Honorable Court clearly stated the relevant standard of causation and burden of proof for a death claim. In the case at bar, however, the Petitioner again

reiterates that the Court of Appeal appears to have created a new causation standard and burden of proof by stating that the industrially-prescribed medication in the case at bar, amitriptyline, was not a “material factor” in causing the decedent’s death, to wit: “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.”

What is unclear is whether the “material factor” test imposes a higher burden of proof on a claimant than that imposed by the Legislature and existing case law. As noted in the Petition for Review, neither this Honorable Court nor any Court of Appeal has ever used the “material factor” test in any published precedential opinion on the issue of injury AOE/COE regarding a claim for death benefits.²

²The Respondents in their Answer note that there are two *writ-denied* cases — *West v. WCAB* (1998) 63 Cal. Comp. Cases 1203; and *Fickes v. WCAB* (1983) 48 Cal. Comp. Cases 484 — which utilize the “material factor” language. Based on a LexisNexis search for these cases, it does not appear either Court of Appeal actually discussed the “material factor” language or issued a written opinion. Rather, both cases appear to have been summarily denied. However, the headnotes for both cases in the California Compensation Cases LexisNexis database do utilize the “material factor” language.

The Respondents at page 12 of their Answer to Petition for Review state that the WCJ was mistaken in finding that the decedent “. . . was having difficulty sleeping because of [his] pain”. They go on to further claim that “there is absolutely no support for this anywhere in the medical record”. However, the Court of Appeal, in its opinion below, cited a medical record from the decedent’s workers’ compensation doctor which stated that he used “*pain medication* mostly at night to help him get comfortable for sleep” [*emphasis in original*].³ The obvious inference is that without his pain medication the Applicant’s chronic pain from his work injury made it uncomfortable for him to sleep. Moreover, as detailed in the Petition for Review, the record below contains numerous other references to sleep difficulties, from which the WCJ drew the very reasonable inference that the decedent, Mr. Clark, was having sleep difficulties as a result of his workers’ compensation injury.

Finally, at page 11 of their Answer to Petition for Review, the Respondents complain that the instant Petitioners “seek to have this Court re-weigh the evidence” and that the WCJ’s

³The Court of Appeal opinion does not make clear that the medical record they cited came from Mr. Clark’s *workers’ compensation physicians*, not his private personal physician.

factual findings were “properly disregarded by the Court of Appeal” because “there is absolutely no evidence that the sleeping problems were industrial”.

First, as previously stated, even the Court of Appeal noted there was evidence in the record of the Applicant’s sleep difficulties. Secondly, the instant Petitioner is not requesting that this Honorable Court re-weigh the evidence. Rather, the argument raised in the Petition for Review was that the Court of Appeal impermissibly re-weighed the evidence and summarily overturned a factual finding made by the WCAB.

CONCLUSION

This matter is appropriate for review by this Honorable Court because 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 higher standard of causation and burden of proof for death claims.

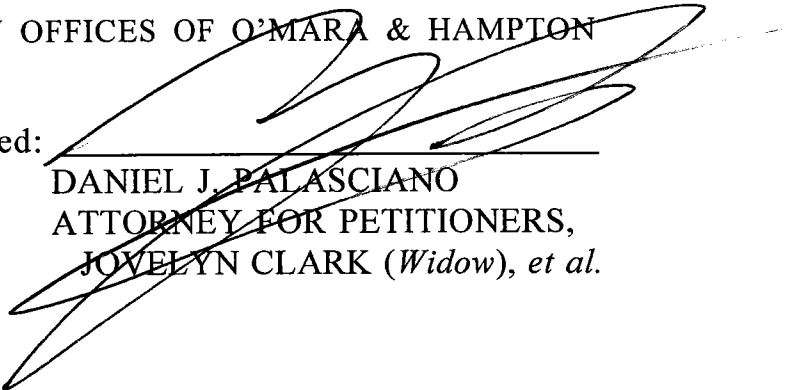
Accordingly, Petitioner requests that this Honorable Court grant review of this matter and remand it back to the Court of

Appeal to reinstate the WCAB's Findings, Opinion and Award,
or in the alternative to further develop the record.

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 02/14/2014

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 **REPLY TO ANSWER TO 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 02/14/2014 at San Diego, California.

Dated: 02/14/2014 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 02/14/2014, I, Daniel J. Palasciano, served the within **REPLY TO ANSWER TO 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.

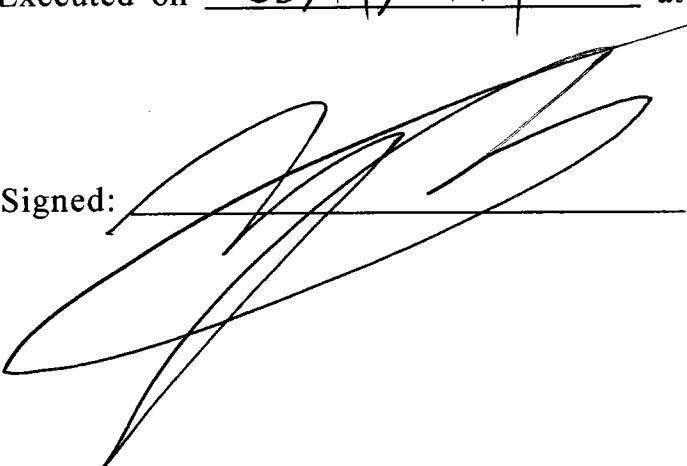
Supreme Court Case No.: S215637

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

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct. Executed on 02/14/2014 at San Diego, California.

Name: Daniel J. Palasciano

Signed: _____


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