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)

REPLY TO PETITIONERS' ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS

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

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INTRODUCTION

In their Answer to Respondents' Opening Brief on the Merits (hereinafter "Answer"), Petitioners raise four arguments.[1] First, they maintain that the Court of Appeal did not create a new causation standard for death claims. However, in doing so, Petitioners ignore the fact that the use of the "material factors" test was the lynchpin of the Court of Appeal's argument as it related to the role that Amitriptyline played in the death of Mr. Clark.

Next, Petitioners assert that a "contributory cause theory" is an invalid standard of industrial causation. This assertion appears to fly in the face of long-standing precedent established by this Honorable Court.

Petitioners then argue that any evidence of whether Amitriptyline was a contributing cause in the death of Mr. Clark did not rise to the level of substantial evidence. However, existing precedent from this Court supports the principle that the substantial evidence test can be met even when the evidence does not rise to the level of scientific certainty, and even when the exact causal mechanism regarding an injury is unknown.

Finally, Petitioners argue that the Court of Appeal was correct in finding Mr. Clark was not using Ambien as a result of his industrial injury. This argument again fails to appreciate the multitude of references in the record to sleep issues and chronic pain, and ignores the fact that the record is sufficient for the WCJ to have drawn the reasonable inference that Mr. Clark suffered from industrially-caused sleep problems.

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[1]Petitioners also claim that Respondents' Statement of Facts is either "overly glossy" or "deliberately misleading". There is no substance to this unfounded contention.

ARGUMENT

I.

REPLY TO PETITIONERS' CONTENTION THAT THE COURT OF APPEAL DID NOT CREATE A NEW CAUSATION STANDARD FOR DEATH CLAIMS.

In addressing whether the Court of Appeal had used a new causation standard and burden of proof for death claims, Petitioners first cite to the portion of the Court of Appeal's opinion where that Court discussed the legal principles they used to review this claim. Petitioners maintain, at page 10 of their Answer, that the only issues they had raised were whether Respondents had met their burden of proof, and whether the WCAB's Decision was supported by substantial evidence. Petitioners state:

> The very first sentence of the Appellate Court's analysis demonstrates the fact that it was these two issues it addressed. Citing to the standard of proof embodied in section 3600(a)(2) and (3), the Court of Appeal noted, "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).)

However, that is not the whole of the Court's discussion on this issue. In fact, Petitioners omitted the crucial language which is at issue in the case at bar. The full paragraph from the Court of Appeal's opinion reads as follows:

> 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 . . .". *(Citation omitted.)* "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.) *[Emphasis added.]*

When that entire paragraph is read in context, it is clear this Court of Appeal believes that, for a death claim, the proximate causation test of Labor Code §3600 is met only if the industrial injury and employment are material factors contributing to the employee's death.

Again, the use of the "material factors" standard by the Court of Appeal is crucial to their ultimate conclusion that Respondents did not establish a causal connection between Mr. Clark's death and his industrial injury, 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.

Thus, again, it is clear that the Court of Appeal utilized the "material factors" test in arriving at its conclusion that Petitioners had not established a causal connection between Brandon's death and his industrial injury.

II.

REPLY TO PETITIONERS' ARGUMENT
REGARDING THE ISSUE OF A "CONTRIBUTORY CAUSE THEORY".

In their second argument, Petitioners set out to show that, in their words, a "contributory cause theory" is invalid within the Workers' Compensation arena. Their analysis mainly focuses on a case, *Madin v. Industrial Acc. Com.* (1956) 46 Cal. 2d 90, relied on by the Respondents in prior pleadings. Petitioners attempt to deconstruct the *Madin* opinion by isolating two prior cases from one branch of its "lineage". Petitioners' analysis on this issue then ends with the following statement at page 16 of their Answer:

> Thus, there is no support for the theory that a contributory cause is a valid theory of causation in Workers' Compensation matter(s), especially not a contribution as little as one percent or less (as noted by Dr. Bruff), or that such a theory can constitute sufficient cause to support a finding of industrial causation.

While the argumentative middle clause of that sentence is at the heart of the dispute presented to this Court, Petitioners' assertion that a "contributory cause" theory of causation is invalid in Workers' Compensation seems fantastic. On this issue, one only need look at the Court of Appeal's opinion in the instant matter. As noted previously, the Court of Appeal

cited *Guerra* for the proposition that:

> Instead, the causal connection between employment and the injury is sufficient if the employment is a ***contributing cause*** of the injury. *[Emphasis added.]*[2]

Or, as stated by this Court in *McAllister v. Workers' Compensation Appeals Board* (1968) 69 Cal. 2d 408:

> As we noted, however, in *Employers etc. Ins. Co. v. Industrial Acc. Com.* (1953) 41 Cal. 2d 676, 680 [263 P. 2d 4], the decedent's employment need only be a "contributing cause" of his injury.[3]

Therefore, it is patently obvious that this Court has long held that a contributory cause theory of causation is a valid, well-established and fundamental tenet of Workers' Compensation law.

III.

REPLY TO PETITIONERS' ARGUMENT THAT EVIDENCE OF AMITRIPTYLINE'S CONTRIBUTION TO MR. CLARK'S DEATH WAS NOT SUBSTANTIAL EVIDENCE.

Petitioners' third argument centers on the issue of substantial evidence, specifically whether Dr. Bruff's opinions on Amitriptyline constitute substantial evidence. Among other cases, Petitioners cite *McAllister*, which is a particularly instructive case regarding the instant matter.

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[2]It is also worth noting that the *Guerra* court cited to *Madin* as one of its authorities for the above proposition.

[3]See also, *Colonial Ins. Co. v. IAC* (1946) 29 Cal. 2d 79.

As a threshold issue, it is of course axiomatic that an applicant bears the burden of establishing injury by a "reasonable probability of industrial causation". *(Citations omitted.) (McAllister at p. 413.)*

In *McAllister*, a widow filed a claim for death benefits after her husband's death from lung cancer. Her husband had been a fireman for 32 years. The widow produced evidence from one of her husband's co-workers, who testified as to the types and nature of the fires they had fought. She also put on evidence from a medical expert who indicated it was reasonable to assume that smoke from fires had caused the decedent's death. The defendants put on no evidence.

The widow prevailed at the trial level, but the Workers' Compensation Appeals Board overturned that Decision based on the following reasoning, as described by this Court:

> The Board concluded that the record did not disclose sufficient evidence as to the toxicity of the smoke inhaled or as to the amount of decedent's exposure to smoke, that a letter written by Dr. Benioff failed to support petitioner's contentions, and that petitioner had not adduced a satisfactory and detailed showing of the manner in which smoke inhalation may cause lung cancer. *(McAllister at pp. 411-412.)*

In reversing the WCAB and reinstating the Award of death benefits to the widow, this Supreme Court went on to state:

> We hold that the uncontradicted evidence in this case compelled the Board to rule in petitioner's favor as to both toxicity and exposure, that Dr. Benioff's letter did possess evidentiary value, and that ***the exact mechanism of industrial causation need not be shown.*** *[Emphasis added.] (McAllister at p. 412.)*

Much of this Court's opinion discusses the fact that while it is certainly desirable for more detail in these types of cases, such detail is not "a prerequisite to recovery" as "[s]uch a burden on applicants would often be unbearable". *(McAllister at p. 417.)*

The instant matter has much in common with *McAllister*. As Dr. Bruff noted multiple times in his deposition, it is impossible to tell what the exact causal mechanism was regarding the death of Brandon Clark. As has been noted in prior pleadings, Dr. Bruff, for example, stated:

> Toxicology tries to do single doses whenever possible. Mixtures are very difficult to quantify. *(WCAB Record, p. 145; 18:5-7.)*

Along those same lines, it is important to note the larger context of Dr. Bruff's opinion by reviewing in detail this exchange between counsel for the Petitioners and Dr. Bruff during his deposition:

> Q. Ultimately, it's my understanding from your discussion that you believed the combination of, and I'm just using the name brands, Xanax and Ambien was the ultimate cause of his death, correct?
>
> A. You know, in reviewing this, I think those were contributory. But it's difficult to know precisely what the cause of death was because the levels, while elevated, were not super elevated. This wasn't a diminutive female with alcohol on board, where some Xanax might really — just a few extra pills would really do it. And in cases of overdose, as I note, there's additive action of various medications. I had to take into consideration the Gabapentin and Amitriptyline were present, but not in particularly high doses.

> Gabapentin, we can just take off the table right now because I don't think there's been any cases, or certainly not very many of acute overdoses as a result of singular ingestion of Gabapentin. There have been several cases where people have taken fifty grams, a hundred grams, which are several bottles of Gabapentin, while they had symptoms and signs, they didn't die. So you can take quite a lot of Gabapentin. While you might not die, you'll certainly have a few — you know, dizziness, whatever, blurred vision. There's a whole list of symptoms.
>
> But the Amitriptyline, that can be additive. But I had to look at two drugs in the same class or similar class of medicines that are directly additive, and that seemed to be what I think was largely contributory. But it's a little unusual for that to be the sole cause. I think there's probably something else that happened. Because medicine is an imperfect science, we'll never know what that is. *(WCAB Record, pp. 137-138; 10:6-25 & 11:1-13.)*

This passage, which was Dr. Bruff's first statement during his deposition on the issue of causation, shows that, much like *McAllister*, the exact causal mechanism cannot be known here.

Further references to Dr. Bruff's deposition are also instructive. As part of another answer regarding a question attempting to quantify the different effects of the various drugs in Mr. Clark's system, Dr. Bruff, after noting the amount of Amitriptyline in Mr. Clark's body was not independently toxic, and after noting that it could be neuropsychiatrically active at the amount found, stated:

> Can I absolutely slam the door and say [Amitriptyline] had no effect? I cannot. *(WCAB Record, p. 144; 17:6-15.)*

Also worth noting is the fact that while Dr. Bruff confirmed that the Amitriptyline was not independently toxic in this case, he offered the following commentary on the nature of the drug itself:

> Usually, though, the Amitriptyline is really nasty. We don't use it as much, partly because its overdose toxicity is so high. *(WCAB Record, p. 145; 18:9-11.)*

Dr. Bruff was also questioned about the fact that the Medical Examiner's records showed that an error had been made in calculating the amount of Xanax and Ambien in Mr. Clark's system. While the extent of the error was unknown, Dr. Bruff agreed that this error by the coroner had the effect of overstating the amounts of Xanax and Ambien in Mr. Clark's system at the time of his death, thereby increasing the effect of the Amitriptyline, and other substances, although to an unknowable amount. *(WCAB Record, p. 327 and pp. 149-152.)*

Further on the issue of a lack of an exact causal mechanism regarding Mr. Clark's death, Dr. Bruff offered the following:

> Again, in toxicology, we have difficulty with mixtures. Some toxicologists are able to divine precise contributions from mixtures. But, really, if someone goes through courses in toxicology and training in toxicology, the reality is we have difficulty with mixtures. So that's why I kind of hedged a little bit here. I don't know the exact contribution. *(WCAB Record, p. 159; 33:7-14.)*

Shortly after that, Dr. Bruff went on to say again that the Amitriptyline had "some role" in Mr. Clark's death, and that there was "some contribution" from the Amitriptyline to Mr. Clark's death. While the doctor reiterated that the contribution was small, he noted that it would be difficult to arrive at a specific percentage in any circumstance. *(WCAB Record, pp. 160-161; 34:17-25 & 35:1-4.)*

Based on all of the foregoing, it is clear that the instant matter is well within the parameters of the *McAllister* decision, given Dr. Bruff's opinion that it is extremely difficult to quantify mixtures, and given that the exact causal mechanism of Mr. Clark's death is likely unknowable, and, bearing in mind that "the established legislative policy is that the Workers' Compensation Act must be liberally construed in the employee's favor (Lab. Code §3202), and that all reasonable doubts whether an injury is industrially related be resolved in favor of the employee". *(Citation omitted.)* (*Guerra at p. 200*; see also, *Employers Mutual Liability Insurance Co. of Wisconsin at p. 680.*)[4]

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[4]One final point needs to be raised — the WCJ in her Opinion on Decision specifically noted that in addition to the deposition of Dr. Bruff, she also was relying on the independent consultation reports obtained by Petitioners from Daniel Bressler, M.D., which support industrial causation, and the records from the San Diego County Medical Examiner, which also support industrial causation. This evidence must be considered in the context of whether there is substantial evidence in the record to support the WCJ's Decision.

Thus, this Court must find that Dr. Bruff's opinion on the contribution of Amitriptyline to Mr. Clark's death constitutes substantial evidence of injury AOE/COE.

IV.

REPLY TO PETITIONER'S ARGUMENT THAT THERE WAS INSUFFICIENT EVIDENCE OF MR. CLARK'S INDUSTRIALLY-CAUSED SLEEPING PROBLEMS.

Petitioners' final argument is that the Court of Appeal was correct to overturn the factual findings of the WCJ and WCAB regarding the inference that Mr. Clark was having difficulty sleeping because of his pain. Petitioners continue to maintain that "there is no support for this anywhere in the record". In fact, there is ample evidence in the record from which the WCJ could have drawn the inference that Mr. Clark was having sleeping difficulties which were caused by his industrial injury.

As has been well detailed previously, there can be no dispute from the voluminous medical records that Mr. Clark was in chronic pain related to his industrial injury from the time of that injury until the time of his death. There is clear and uncontradicted evidence in the record from both the widow, Jovelyn Clark, and the Decedent's brother, Jeff Clark, that Mr. Clark had been having problems sleeping. Jovelyn Clark noted that Mr. Clark apparently had sought the Ambien prescription because of his sleeping problems, and that he had never requested Ambien before that. There is a clear medical record in evidence, which was cited by the Court

of Appeal in the instant matter, wherein just a few days before Mr. Clark obtained his prescription for Ambien from his private doctors, he told his Workers' Compensation doctors that he used "pain medication mostly at night to help him get comfortable for sleep". As noted in prior pleadings, the obvious inference from that piece of evidence is that without pain medication (for his industrial injuries), Mr. Clark was uncomfortable for sleeping, *i.e.*, he had difficulty sleeping due to his industrial injuries. A later notation in the records indicates Mr. Clark stated his symptoms were "worse at night".

Further, Jovelyn Clark provided testimony that at the time of her husband's death, he had no physical ailments other than the industrial injuries to his neck and back. Also, while he was unable to speak to Mr. Clark's state of mind, Dr. Bruff noted that for many chronic pain patients, sleep problems are common.

Additional evidence regarding Mr. Clark's sleep issues includes Ms. Clark's testimony that she was aware her husband had used Tylenol PM "off and on" at some point before his industrial injury, although she did not provide any specificity as to when, how often, etc. Also, at the time Mr. Clark's private doctor gave him the prescription for Ambien, the doctor noted that Mr. Clark did not report any pain issues. Regardless, given the totality of evidence, the WCJ's inference that Mr. Clark was having sleep problems that were related to his work injury is most reasonable.

It must be noted that at page 8 of their Answer, Petitioners criticize the WCJ for failing to note that Mr. Clark's Ambien was first prescribed by his personal doctor at the time he was scheduled for a vasectomy. While that may be true, it is misleading, as there is no indication in the record that the Ambien was prescribed as a result of, or was in any way related to, the vasectomy which Mr. Clark ultimately did not undergo on that date.

As has been previously noted, the Court of Appeal summarily overturned the factual findings of the WCJ and WCAB with only a minimal and conclusory discussion. However, as is nearly axiomatic regarding appellate review of WCAB decisions, when the WCAB'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". (*Riskin v. IAC* (1943) 23 Cal. 2d 248, 254.)

Given the totality of the evidence and the circumstances regarding the period between Mr. Clark's industrial accident and his death, it was certainly fair for the WCJ to draw the inference that Mr. Clark was having sleep difficulties which were caused by his Workers' Compensation injury. This inference further supports the "reasonable probability of industrial causation" regarding Brandon's untimely death.

CONCLUSION

Again, it is clear that the Court of Appeal in the instant matter relied on the "material factors" test in its opinion. It is also clear that Respondents' attempt to invalidate the longstanding concept of a "contributory cause" theory of causation is not valid.

Finally, as detailed, there is substantial evidence in the record to support both the finding that Amitriptyline was a contributing cause to Mr. Clark's death, and to support the finding that the Ambien he was taking was related to his industrial injury.

Based upon the foregoing, Respondents request that this Honorable Court reverse the Decision of the Court of Appeal and remand the matter back to that Court with an order to reinstate the Findings and Award of the WCAB.

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 06/04/2014

Signed: _____

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

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 **REPLY TO PETITIONERS' ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS**, including footnotes, is 3,209 according to the computer calculation utilizing WordPerfect "File/ Properties/Information".

Respectfully submitted,

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Dated: 06/04/2014 Signed: _____

DANIEL J. PALASCIANO
ATTORNEY FOR PETITIONERS,
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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 PETITIONERS' ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS**, 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 06/04/2014 at San Diego, California.

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 06/04/2014 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 6/4/14, I, JIM BEGGS, served the within **REPLY TO PETITIONERS' ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS** in the matter of:

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

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