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)

RESPONDENTS' OPENING BRIEF ON THE MERITS

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

DANIEL J. PALASCIANO, SBN: 212412
Law Offices of O'Mara & Hampton
2370 Fifth Ave.
San Diego, CA 92101-1611
Tel. No.: (619) 239-9885
Attorneys for Real-Party-in-Interest Jovelyn Clark (*Widow*) *et al.*

RESPONDENTS' STATEMENT
PER CALIFORNIA RULES OF COURT
RULE 8.520

While not squarely on all fours with Rule 8.520, it must be noted that the Respondents are relying on their original Petition for Review for the substance of this Opening Brief.

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 04/14/2014 Signed: _____

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

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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, OR DOES THE STANDARD REQUIRE ONLY THAT THE INDUSTRIAL INJURY BE A "CONTRIBUTING CAUSE"?

INTRODUCTION

After trial of this matter before the Workers' Compensation Appeals Board (hereinafter "WCAB"), the Workers' Compensation Judge (hereinafter "WCJ") found that the decedent's death due to the accidental toxicity of multiple medications was an industrial injury, and awarded death benefits to the widow and her three minor children. The WCJ found that medications the decedent had been taking that were prescribed by his workers' compensation doctors, and one of the medications the decedent was taking that was prescribed by his personal doctor, were at least partially causative of his death. Regarding the latter medication, which was Ambien, the WCJ made a factual finding that the applicant was having sleep problems that could reasonably be inferred to have been caused by the chronic pain of his industrial injury, thus, his use of Ambien was related to his industrial injury.

In its unpublished Opinion below, the Appellate Court reversed the WCAB, thus denying death benefits to the widow and her three minor children, finding that there was not a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. This new standard is without any significant precedential support, and impermissibly imposes a higher causation standard and burden of proof on death cases than the Legislature itself has imposed. As such, the decision of the Court of Appeal should be reversed by this Honorable Court.

STATEMENT OF THE CASE

Trial of this matter was held on 12/19/2012. On 01/14/2013, the WCJ issued her Findings and Award and Opinion on Decision. *(WCAB record at pp. 544-557.)*[1]

The Petitioners filed a Petition for Reconsideration with the WCAB *(WCAB, p. 558)*, which was denied without comment on 04/09/2013 *(WCAB, p. 612)*. Petitioners then submitted a Petition for Writ of Review to the Court of Appeal, Fourth Appellate District, District One, and that Court issued a Writ of Review on 08/14/2013. Thereafter, on 12/09/2013, the Court of Appeal issued an opinion reversing the lower Court's award

[1]All further references are to the WCAB record, which is numbered pp. 1-613.

of death benefits, and remanded the matter back to the WCAB so that a new order could issue denying the claim. The Respondents then filed a Petition for Review with this Honorable Court on 01/21/2014, and the Petition was granted on 03/19/2014.

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. *(WCAB, p. 299.)*

A claim for death benefits was filed on behalf of Mrs. Jovelyn Clark and her three minor children. After deposing Mrs. Clark, the Petitioners 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. *(WCAB, pp. 337-359.)*

The parties later obtained opinions from Thomas Bruff, M.D., in the capacity of Panel Qualified Medical Evaluator. 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 medications were not found in high enough concentrations to have caused "any coincident drug interaction". *(WCAB, pp. 177-190.)*

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. *(WCAB, pp. 71-121.)*

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. *(WCAB, p. 210.)* 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". *(WCAB, pp. 235-236.)* 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. *(WCAB, p. 327.)*

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. *(WCAB, pp. 243-244.)* 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. *(WCAB, pp. 266-267.)*

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. *(WCAB, pp. 411-412.)*

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". *(WCAB, p. 456.)* 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.)* *(WCAB, p. 439.)*

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. *(WCAB, p. 211.)* She thought he had been prescribed the Ambien because the Tylenol PM was not working. *(Id.)* When asked about her knowledge as to how long her husband had taken Tylenol PM, Mrs. Clark testified that she did not know. *(Id.)* 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. *(WCAB, p. 212.)*

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED WHEN IT REVERSED THE WORKERS' COMPENSATION APPEALS BOARD BY HOLDING THAT AN INDUSTRIAL INJURY MUST CONSTITUTE A "MATERIAL FACTOR" CONTRIBUTING TO AN 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 found 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 that he became a paraplegic, approximately six months after the industrial injury. He 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.

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" *(WCAB, p. 104)*, 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, 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". *(WCAB, p. 81.)* The doctor also stated he could not "slam the door and say [Amitriptyline] had no effect . . ." regarding causation of Mr. Clark's death. *(WCAB, p. 87.)* 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". *(WCAB, p. 89.)*

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." *(WCAB, p. 116.)* 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" *(e.g., WCAB, pp. 94-95.)*.

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."[2]

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 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.

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[2]*See also Labor Code §3208.3(h).*

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 caused, at least in part, 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.[3]

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.

CONCLUSION

The use of a "material factors" test by the Court of Appeal was incorrect, as the correct standard is whether an industrial injury is a contributing cause to an employee's death. In the instant matter, the medical opinions in the record, and the WCJ's reasonable factual findings that the decedent suffered from chronic pain which caused him sleep problems, establish that the industrial injury was at least partially causative of the decedent's death.

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[3]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.

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

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 04/14/2014

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 **RESPONDENTS' OPENING BRIEF ON THE MERITS**, including footnotes, is 4,235 according to the computer calculation utilizing WordPerfect "File/Properties/Information".

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 04/14/2014

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 **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 04/14/2014 at San Diego, California.

Respectfully submitted,

LAW OFFICES OF O'MARA & HAMPTON

Dated: 04/14/2014 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 4/15/14, I, JIM BEGGS, served the within **RESPONDENTS' OPENING BRIEF ON THE MERITS** 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

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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 4/15/14 at San Diego, California.

Name: JIM BEGGS Signed: Jim Beggs

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San Francisco, CA 94102-4797

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. *(Attorney for* South Coast Framing, Inc. *et al.)*
Bradford & Barthel, L.L.P. *(1 Copy)*
1300 E. Shaw Ave. #171
Fresno, CA 93710