In the Supreme Court of the State of California

REDWOOD FIRE and CASUALTY COMPANY administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES,	**Supreme Court Case No.: S215637**
Petitioner,	
vs.	
WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA and BRANDON CLARK DECEASED; JOVELYN CLARK (WIDOW); and GUARDIAN AD LITEM FOR JOANA CLARK (MINOR CHILD); BRITTANY CLARK (MINOR CHILD); and BENJAMIN CLARK (MINOR CHILD),	
Respondents,	

Fourth Appellate District Division One, Case No.: D063945

Workers Compensation Appeals Board, Case No.: ADJ7324566

ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS

BRADFORD & BARTHEL, LLP

Louis A. Larres
SBN: 213672
1300 East Shaw Avenue, Suite 171
Fresno, California 93710
(559) 221-6500

Attorney for Petitioner
Redwood Fire and Casualty Company administered by
Berkshire Hathaway Homestate Companies

In the Supreme Court of the State of California

REDWOOD FIRE and CASUALTY COMPANY administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES,	**Supreme Court Case No.: S215637**
Petitioner,	
vs.	
WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA and BRANDON CLARK DECEASED; JOVELYN CLARK (WIDOW); and GUARDIAN AD LITEM FOR JOANA CLARK (MINOR CHILD); BRITTANY CLARK (MINOR CHILD); and BENJAMIN CLARK (MINOR CHILD),	
Respondents,	

Fourth Appellate District Division One, Case No.: D063945

Workers Compensation Appeals Board, Case No.: ADJ7324566

ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS

BRADFORD & BARTHEL, LLP

Louis A. Larres
SBN: 213672
1300 East Shaw Avenue, Suite 171
Fresno, California 93710
(559) 221-6500

Attorney for Petitioner
Redwood Fire and Casualty Company administered by
Berkshire Hathaway Homestate Companies

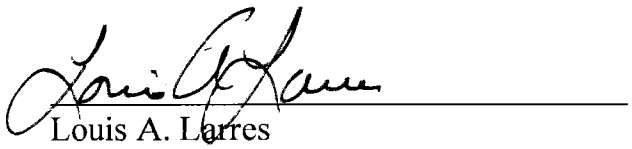
CERTIFICATE OF INTERESTED PARTIES
California Rule of Court 8.208

Pursuant to California Rule of Court 8.208, counsel for Petitioner files this Certificate of Interested Parties. Pursuant to rule 8.208(d)(3), counsel knows of no other parties with more than a ten percent interest in Petitioner, nor of any person or entity with an interest in the outcome with the exception of Redwood Fire and Casualty Company administered by Berkshire Hathaway, which the justices should consider as to whether to disqualify themselves.

DATED: May 14, 2014

Respectfully submitted,

BRADFORD & BARTHEL, LLP



Louis A. Larres
Attorney for Petitioner

TOPICAL INDEX

PAGE(s)

TABLE OF AUTHORITIES

CASE LAW **PAGE(s)**

STATUTES AND REGULATIONS **PAGE(s)**

INTRODUCTION

In their opening brief, Respondents raise a slightly different issue then it did in its Petition for Review. Respondents now contend the Court of Appeal not only set forth a new causation standard for work-related death claims, but also a new burden of proof. In reversing the Workers' Compensation Judge (WCJ) and Workers' Compensation Appeals Board (WCAB), the Court of Appeal did not set a new standard for causation nor a new burden of proof.

To support their position, Respondents offer a statement of facts that is overly glossy at best and deliberately misleading at worst. Respondents overlook the clear fact the Court of Appeal focused solely on the question before it – whether Respondents met their burden of proof by providing substantial evidence of a causal connection between Mr. Clark's death and the medication he was taking for his industrial injury. Respondents, like the WCJ improperly isolate evidence rather than reviewing the entire record. The Court of Appeal's decision to reverse the WCAB is merely a reflection of that fact. In doing so, the Court of Appeal did not stray beyond the bounds set forth in Labor Code section 5952[1]. Under section 5952, an Appellate Court has authority to reverse the WCAB if the decision is unreasonable or not supported by substantial evidence. As explained at length already and further herein, Respondents failed to meet their burden of proof on the threshold issue of causation. As a result, the WCAB's Order denying reconsideration and upholding the WCJ's decision was inherently unreasonable and not supported by substantial medical evidence. Thus, the Court of Appeal properly exercised its authority to reverse the WCAB.

///

///

---

[1] All further statutory references are to the Labor Code, except where otherwise noted.

STATEMENT OF FACTS

Mr. Brandon Clark, born August 26, 1972, worked as a carpenter for South Coast Framers insured by Berkshire Hathaway. On September 5, 2008 he fell approximately nine feet from the roof he was working on and sustained an admitted injury to his neck, head and chest. Mr. Clark's treating physician for his industrial injury toward the end of his life, was Dr. Robert Scott.

Before this injury occurred Mr. Clark was treating for non-industrial medical issues at Graybill Medical Group and paying through his private insurance. In late January 2009, Valium and Xanax (alprazolam), both in the benzodiazepine class of drug, were prescribed by his private doctor, Dr. Borecky, due to fears over a pending vasectomy. Dr. Borecky also prescribed Ambien (zolpidem) due to reported problems sleeping. Dr. Borecky's report of January 29, 2009, noted very specifically that "He is having problems sleeping." However, that same report also noted that during these times of sleeping difficulty, "he is not aware of anxiety or obsessive thoughts or pain or urinary urgency."

For the industrial injury of September 5, 2008, and toward the end of his life, Mr. Clark was taking Neurontin (gabapentin) and Amitriptyline. All four of these medications were found in Mr. Clark's blood system at the time of death. Mr. Clark's death occurred on July 20, 2009 and was ruled an accidental overdose of medication. At the time of death he was survived by his wife and three children ages 9, 11 and 13.

A death claim was filed on April 23, 2010. Defendants procured the services of Dr. Daniel Bressler, an internist, to assist in addressing the issue of causation. Dr. Bressler reviewed the reports of Mr. Clark's personal physician, Dr. Borecky as well as the reports of Dr. Scott. After reviewing these records, Dr. Bressler concluded, "The specific combination of medicines he was on, which included Xanax (alprazolam), Ambien

(zolpidem), Flexeril, Neurontin, Amitriptyline and Hydrocodone, all separately and in combination had the capacity to induce respiratory depression, and even respiratory arrest." He also noted that Mr. Clark's pulmonary findings were not premorbid.

Mr. Clark's wife, Respondent, Jovelyn Basila Clark (Respondent), was deposed on September 13, 2010. When asked about sleeping problems and medication Mr. Clark had taken for those problems, the Respondent testified that prior to being prescribed Ambien (zolpidem), Mr. Clark took over-the-counter Tylenol PM. He used Tylenol PM off and on for some time prior to his injury in September 2008.

To resolve the issue of causation, the parties requested a panel Qualified Medical Examiner (QME). Dr. Thomas Bruff, a toxicologist, was selected as the panel QME. Dr. Bruff reported on June 28, 2011. Dr. Bruff reviewed the October 12, 2009, autopsy report that noted elevated levels of Ambien (zolpidem) and Xanax (alprazolam) with the levels of Neurontin (gabapentin) and Amitriptyline within usual therapy range. Amitriptyline was reported at .12 mg/L, Xanax (alprazolam) at .15 mg/L, Ambien (zolpidem) at .48 mg/L, Neurontin (gabapentin) at 1.4 mcg/mL and Acetaminophen at 3.2 mg/L. The doctor also reviewed a June 29, 2009 treatment report from Dr. Scott noting that medications included Amitriptyline and that Mr. Clark was instructed to discontinue its use and replace it with Flexeril. After reviewing the entire medical file including the toxicology and autopsy report, Dr. Bruff concluded on page 13 of his deposition,

> It is my opinion that gabapentin did not have a role in this particular case. Amitriptyline was prescribed in such low dose, and blood levels show that the medication was likely taken as prescribed. However, zolpidem and alprazolam 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 Mr. Clark 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 Mr. Clark passed away as a result of additive drug interaction between zolpidem and alprazolam. The two additional medications present in the blood stream, gabapentin and amitriptyline, were not high enough to result in any coincident drug interaction. (WCAB record, p. 189).[2]

Dr. Bruff sat for his deposition on March 29, 2012. In his deposition Dr. Bruff testified that the reports of Dr. Bressler did not factor into his final conclusion. The treating reports and the autopsy were the most important evidence reviewed by the doctor. The doctor noted that per the records from Graybill in 2009, Mr. Clark had complaints of difficulty sleeping, but that the reports were silent as to why. The doctor theorized that "it could be because of back pain, could be, you know, stress at home." The reporting was not detailed enough for him.

On the cause of death, Dr. Bruff acknowledged that Xanax (alprazolam) and Ambien (zolpidem) were contributory but conceded that "it's difficult to know precisely what the cause of death was because the levels, while elevated, were not super elevated." As a result, the doctor had to take into consideration the Neurontin (gabapentin) and Amitriptyline, but also not in particularly high doses. Dr. Bruff then noted that Neurontin (gabapentin) could be removed from consideration because there are not many cases of overdosing on the drug even at significantly high levels.

---

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

As to Amitriptyline, "that can be additive." Ambien (zolpidem) and Xanax (alprazolam) were used by Mr. Clark on a daily basis for close to six months. This however, did not seem to be a heavy abuse situation. Mr. Clark's nascent pulmonary edema and bronchial pneumonia, non-industrial conditions, may also have been contributory.

The coroner's report noted pneumonia as a cause and listed Xanax (alprazolam), Ambien (zolpidem), Neurontin (gabapentin) and Amitriptyline, but these drugs were listed simply because they were found to be in Mr. Clark's system. Again, just because Neurontin (gabapentin) was listed did not mean it was causative. The Amitriptyline was not reported to be found in toxic levels. Dr. Bruff stated that "It is neuropsychiatrically active and may have had a small role at the levels found." This is why the doctor felt that two drugs in the same class should be given more weight than Amitriptyline. Yet, despite this, the doctor could not "absolutely slam the door and say it had no effect." The reported level of Amitriptyline found in Mr. Clark's body was significantly below those levels seen in fatal cases, but above those one would expect to see from taking a 10 milligram tablet.

Dr. Bruff acknowledged the limitations of his field. He stated, "toxicology tries to do single doses whenever possible. Mixtures are very difficult to quantify." When asked whether Amitriptyline could have contributed to death in combination with Xanax (alprazolam) and Ambien (zolpidem) already at significant levels, Dr. Bruff stated, "I mean, it's possible." He added, "Amitriptyline could be an incremental contributor. It's very difficult to know how." He further expressed the view that "alprazolam [Xanax] and zolpidem [Ambien] being in the same class and at a much higher dose were – kind of carried the day." The doctor felt that it would speculative to specify whether the contribution of Amitriptyline to the cause of death was half a percent, one percent or five percent, because

the Xanax (alprazolam) and Ambien (zolpidem) were largely contributory. In the doctor's opinion the Amitriptyline was "way down there." Dr. Bruff felt that it was additive. He admitted that Amitriptyline was at the minimum level of causation. It has a sedative effect. Although Hydrocodone, or Vicodin, a respiratory depressant, was also found in Mr. Clark's urine, but not his blood, it was not at any high level. Dr. Bruff admitted that Hydrocodone could be in the causative "pie."

Again, Dr. Bruff noted that the Amitriptyline was found to be at the low end of what would be considered therapeutic blood levels. The doctor was unaware of any cases where levels that low could have any real causative effect in causing death. The doctor was also unaware of any studies that demonstrated a contributory effect of small levels of Amitriptyline to death. However, Dr. Bruff stated in that same discussion that "I'm unable to ferret out the exact amount, but its way down there."

When asked specifically about the contribution of Ambien (zolpidem), Dr. Bruff stated that in light of the levels reported in the toxicology reports, Mr. Clark "was probably doubling up. It's speculative on my part because I don't really know what happened." Yet, when asked whether the fact that Ambien (zolpidem) and Xanax (alprazolam) were noted to be above therapeutic levels would indicate that Mr. Clark was taking extra of both medications, Dr. Bruff stated, "That was the conclusion I came to." Dr. Bruff was never asked to comment on the reasons Mr. Clark was taking Ambien (zolpidem) and Xanax (alprazolam). It was his understanding that both medications were prescribed for non-industrial issues. At .48 milligrams, the amount of Ambien (zolpidem) in Mr. Clark's system would have been more than double the normal dosage. Mr. Clark's blood levels were probably actually higher during the night of his death than found during the autopsy.

As for Xanax (alprazolam), Dr. Bruff acknowledged that the levels found (.015 milligrams) in Mr. Clark's system were in a range of one to two orders of magnitude higher than normal and thus at the low end of toxicity. On further examination by Applicant's counsel, Dr. Bruff added that Amitriptyline represented some small percentage of the causation "pie" noting that it was not zero, but certainly not 20 percent either.

Dr. Bruff also expressed disagreement with Dr. Bressler's opinion that the pulmonary findings were strictly postmortem findings. Dr. Bruff felt that there were both pre- and post-mortem changes.

PROCEDURAL HISTORY

The case proceeded to trial before WCJ Linda Atcherley on December 19, 2002. Stipulations and issues were read into the record with the primary issue, for purposes of this appeal, being injury AOE/COE resulting in the death of Mr. Clark. No testimony was taken although the transcript of Respondents' deposition testimony was submitted by stipulation of the parties.

On January 14, 2013, WCJ Atcherley issued her Findings and Award (and Orders). WCJ Atcherley found that Mr. Clark's death arose out of the admitted industrial injury of September 3, 2008, as a result of medications he was taking for his industrial injury. In her Opinion on Decision, the WCJ discussed the evidence on the issue of causation of death. She first noted that the death was classified as an accident. She acknowledged that the four drugs found in Mr. Clark's system were Ambien (zolpidem), Xanax (alprazolam), Neurontin (gabapentin), and Amitriptyline. She noted the effects of several of the medications and that Xanax (alprazolam) and Ambien (zolpidem) were prescribed by Mr. Clarks' non-industrial primary care physicians at Graybill Medical Clinic. She then went on to note that the Neurontin (gabapentin) and Amitriptyline were prescribed by doctors at Concentra for Mr. Clark's industrial injury.

After discussing the chronology of events leading up to Mr. Clark's death, the WCJ noted that the first mention of difficulty sleeping was in the Graybill records in January 2009. The WCJ failed to make any mention of the fact that Mr. Clark was treating there for a pending vasectomy and that Xanax (alprazolam) and Ambien (zolpidem) were first prescribed at that time by Dr. Borecky. The WCJ then referred to the report of the defense QME report of Dr. Bressler and noted that Dr. Bressler was of the opinion that each drug acted separately and "in combination [having] the capacity to induce respiratory depression and even respiratory distress." In discussing Dr. Bruff's reporting and deposition, the WCJ noted that the death was caused by the additive interaction of the non-industrial medications Xanax (alprazolam) and Ambien (zolpidem). The WCJ then isolated and emphasized Dr. Bruff's comment that Amitriptyline was "part of the causation pie." (WCAB record p. 551). She also noted Dr. Bruff's comment that hydrocodone (Vicodin) represented additional "crumbs" to the causation "pie."

After citing to case law on the preponderance of the evidence standard and citing to the doctrine of liberal construction, the WCJ focused on Dr. Bruff's statements concerning Amitriptyline. WCJ Atcherley stated, "[I]t is clear from the Concentra records and the Graybill records that the applicant was suffering from continued or chronic pain from his industrial neck, back and head injury and that he was having difficulty sleeping because of that pain. It is also clear that the doctors prescribed him both the Ambien and the amitriptyline for the inability to sleep." Noting that Mr. Clark took both the Amitriptyline and Ambien (zolpidem) as prescribed, in addition to the Xanax (alprazolam), Neurontin (gabapentin) and Vicodin, the WCJ found that these drugs were interactive and contributed to his death on an industrial basis.

Petitioners filed a Petition for Reconsideration on February 8, 2013. WCJ Atcherly issued her Report and Recommendation on Reconsideration recommending that reconsideration be denied. Respondents filed an Answer on February 25, 2013.

The WCAB issued its Order Denying Petition for Reconsideration on April 9, 2013. The WCAB did not issue its own substantive analysis of the issues raised and instead merely adopted and incorporated the WCJ's Report and Recommendation.

Petitioner filed a timely Petition for Writ of Review with the Court of Appeal, 4th District, Division One. After the case was fully briefed, the Court of Appeal granted Petitioner's writ and issued its decision on December 9, 2013. In its decision, the Court reversed the WCAB's Order Denying Petition for Reconsideration finding Respondents have failed to meet their burden of proof on the threshold issue of causation and as a result instructed the WCAB to enter a new order denying the claim.

ARGUMENT

I. THE COURT OF APPEAL DID NOT CREATE A NEW CAUSATION STANDARD FOR DEATH CLAIMS.

The thrust of Respondents' argument is and has been that the Court of Appeal created a new standard of causation for death claims. Although giving lip service to the main issue of whether they met their burden of proof, Respondents' argument conflates the standard of causation and the burden of proof, which was and remains the only issue raised by Petitioner. It also demonstrates the fact Respondents misconstrue the decision of the Court of Appeal, perhaps intentionally, in an effort to obtain a reversal. This should not be allowed. Respondents go to great lengths to prove their point by not only twisting the issue but citing to other Labor Code provisions in which the Legislature provided for differing standards of

causation of injury. However, all of that misses the mark and overlooks the much more narrow issue addressed by the Court of Appeal.

From the very outset of its decision, the Court of Appeal made it clear that its sole focus was the question of what the requisite burden of proof is for an industrial injury. The only issues for which Petitioner sought redress were whether Respondents had met their burden of proof and whether the WCAB's decision was supported by substantial evidence. 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 Appealsnoted, "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))."

In the second paragraph, the Court of Appeals stated, "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 [71 Cal. Rptr. 697, 445 P.2d 313] (McAllister)) by a preponderance of the evidence. (Lab. Code § 3202.5)."

Respondents contend the Court of Appeal overstepped its legal bounds reviewing the facts anew. However, the limitations on a reviewing court are not without exception. Respondents completely fail to acknowledge this fact, instead focusing solely on an Appellate Court's limitation.

In reviewing an order, decision, or award of the WCAB, an appellate court must determine whether, in view of the entire record, substantial evidence supports the WCAB's determination. (Lab. Code § 5952;

Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 159, 164 [666 P.2d 14, 193 Cal.Rptr. 157, 48 Cal.Comp.Cases 566]). As noted by Respondents, a court of appeal may not reweigh the evidence or decide disputed questions of fact. (Lab. Code § 5953; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 [20 Cal.Rptr. 2d 26, 58 Cal.Comp.Cases 323]).

The appropriate standard of review in resolving the employer's challenges to the WCAB action is described in section 5952, which states, insofar as relevant: "The review by the court shall not be extended further than to determine, based upon the entire record . . . whether: [para.] (a) The appeals board acted without or in excess of its powers . . . [para.] (c) The order, decision, or award was unreasonable. [para.] (d) The order, decision, or award was not supported by substantial evidence. [para.] (e) If findings of fact are made, such findings of fact support the order, decision, or award under review. [para.] Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

The definition of "substantial evidence is well-established. The term "substantial evidence" means evidence "which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . . It must be reasonable in nature, credible, and of solid value." (*Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 905, 910 [176 Cal.Rptr. 365, italics in original, quotation marks omitted; Estate of Teed (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]). The Board's findings on factual questions are conclusive if supported by substantial evidence. (*Martori Brothers, Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal. 3d 721, 727 [175 Cal.Rptr. 626, 631 P.2d 60]).

While Respondents would likely agree with all of the above, they fail to consider the fact that the limitations on a reviewing court are not absolute.

In resolving the Petition for Writ of Review, an Appellate Court must determine whether the evidence, when reviewed in the light of the entire record, supports the Board's decision (*Universal City Studios, Inc. v. Workers' Comp. Appeals Bd.* (1979) 99 Cal.App.3d 647, 656 [160 Cal.Rptr. 597]; see *National Convenience Stores v. Workers' Comp. Appeals Bd.* (1981) 121 Cal.App.3d 420, 424 [175 Cal.Rptr. 378]); and in doing so, the Court must consider the weight or persuasiveness of all the evidence, not just whether there is substantial evidence in favor of the respondent. (*Skip Fordyce, Inc. v. Workers' Comp. Appeals Bd.* (1983) 149 Cal.App.3d 915, 920 [197 Cal.Rptr. 626].)

An appellate court is not bound to accept the Board's factual findings where they are illogical, unreasonable, or improbable (*Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 905, 911 [176 Cal.Rptr. 365]), where they do not withstand scrutiny when considered in light of the entire record (Duke v. Workers' Comp. Appeals Bd. (1988) 204 Cal.App.3d 455, 460 [251 Cal.Rptr. 185]), or where on a case-by-case examination the Court discerns an inequitable result when the record is examined for fairness, reasonableness and proportionality in the overall scheme of the workers' compensation law and the purposes sought to be accomplished by that law. (*National Convenience Stores v. Workers' Comp. Appeals Bd., supra,* 121 Cal.App.3d at p. 424; *Universal City Studios, Inc. v. Workers' Comp. Appeals Bd., supra,* 99 Cal.App.3d at pp. 658-659).

Finally, where the Board's decision is not within the realm of what a reasonable trier of fact could find, the decision is not supported by substantial evidence and must be annulled. (*Skip Fordyce, Inc. v. Workers'*

Comp. Appeals Bd., supra, 149 Cal.App.3d at p. 921; *Insurance Co. of North America v. Workers' Comp. Appeals Bd., supra*, 122 Cal.App.3d at p. 911). This is precisely the case here and the Court of Appeal correctly recognized that fact.

As explained further below, the WCAB's decision to adopt and incorporate the opinion and findings of the trial judge was not based on evidence a reasonable trier of fact would rely on as credible. As the Court of Appeal noted, "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 [two non-industrial medications] zolpidem and alprazolam. This evidence does not establish a change of opinion." Thus, without definitive evidence that Dr. Bruff changed his opinion on causation there was no solid evidence that Amitriptyline caused or was even contributory in Mr. Clark's death.

Respondents spend a great deal of time discussing the Court of Appeal's use of the word "material" contending the Court of Appeal, by use of that term, has created a new standard for death claims. Respondents offer an analysis of this Court's decision in *Pacific Gas & Electric Co. v. Industrial Accident Commission (Drew)*, (1961) 56 Cal.2d 219, 363 P.2d 596, 14 Cal.Rptr. 548. Although the phrase "material factor" or "material contribution" does not appear in that case itself, the concept that undergirds the Court's analysis is that the industrial component of the applicant's death in *Drew* was significant enough a factor to be found causative. Here, the inverse of that reasoning is manifest. Any notion the industrial medication Mr. Clark was taking was even the slightest bit contributory is speculative and surmise. Thus, Respondents attempt to mischaracterize the import of the decision below and have this Court engage in an analysis that simply is not appropriate because the standard of causation of injury or death was not

the issue below. In light of the authority discussed above, it is nothing new to find a medical opinion, which does not rise to the level of substantial medical evidence, cannot form the basis for an award of death benefits.

Likewise, Respondent's claim that no other courts have used similar language in the context the burden of proof is incorrect. In two writ-denied cases, *West v. Workers' Compensation Appeals Board*, (1998) 63 Cal.Comp.Cases 1203, and in *Fickes v. Workers' Compensation Appeals Board*, (1983) 48 Cal.Comp.Cases 484, the WCAB was upheld in denying a claim for industrial death due to the fact that the industrial injury was not a material factor in contributing to the injured workers' deaths. Although the phrase is not defined by the Court, it is clear that by use of the term, the Court is saying the evidence of a causal connection between the industrial medication and Mr. Clark's death was not significant enough to be recognized even as a contributing factor.

The Appellate Courts' use of that word "material" speaks to the nature and quality of the evidence presented on the issue of causation of death and does not give rise to a new standard of causation. In other words, Dr. Bruff's testimony on the effect of the industrial medication was so weak as to be immaterial and insufficient to prove a causal link between that medication and Mr. Clark's death.

II. RESPONDENTS' CONTRIBUTORY CAUSE THEORY IS OF QUESTIONABLE PRECEDENT.

Respondents spend a great deal of time discussing the causation standard and focuses heavily on the word "contribution" noting from a prior Supreme Court decision that "such connection need not be the sole cause; it is sufficient if it is a contributing cause." (*Madin v. Industrial Acc. Com. (IAC)* (1956) 46 Cal.2d 90, 92 [292 P.2d 892]). First, it is important to note that the issue in *Madin* was the constitutionality of the award of benefits in addition to whether the *Madin's* injury arose out of the

employment. The Court in *Madin* acknowledged, "the injury arises out of the employment unless the connection is so remote from the employment that it is not an incident of it." (*Madin, supra,* 46 Cal.2d at 95 [292 P.2d 892]). Here, the evidence of a causal connection between the industrial medication and Mr. Clark's death is so tenuous as to be remote. As such, Respondents failed to prove by a preponderance of the evidence that the industrial medication contributed to Mr. Clark's death.

A review of the lineage of this dicta from *Madin* is instructive. Not surprisingly, Respondents fail to provide any discussion on the history of the *Madin* Court's statement on the concept of contributory cause. In making that statement in *Madin*, the Court relied on similar language from one of its earlier decisions, *Colonial Ins. Co. v. Industrial Accident Commission (Pedroza)*, (1946) 29 Cal.2d 79 [172 P.2d 884]. Yet, the Court in *Pedroza* did not make that statement in the context of causation of injury or death as is the issue here. In *Pedroza*, an insurer challenged the Commission's order awarding the employee disability compensation for silicosis. The insurer, one of several involved in the case, argued that it was not responsible for the full amount of the disability award since it had been the employer's insurance compensation carrier for only a portion of the employee's employment period. In connection with that argument, the insurer argued that the prior insurance compensation carriers were proportionally responsible for the employee's disability. The Court affirmed the Commission's award of disability compensation to the employee, but remanded in order to address the issue of apportionment. The insurer, prior insurance carriers, and the employer had the burden of adjusting the share of disability compensation that each was to bear because each of them may have contributed to the disability. Thus, the Court's ultimate decision was framed in the context of joint and several liability among multiple insurers or employers for an accepted injury. The Court's

analysis had nothing to do with the question of causation of death involving non-industrial and industrial factors.

The Court in *Pedroza* also cited to yet another earlier decision in *Tanenbaum v. Industrial Accident Commission*, (1935) 4 Cal. 2d 615 [52 P.2d 215], where this Court dealt solely with the question of causation of disability (i.e. apportionment), not causation of injury. In *Tanenbaum*, the Court upheld the WCAB's apportionment of disability due to other causes, noting, "nothing in the above authorities, or in others that have come to our attention, that in any way militates against the apportionment made in the present case." (*Tanenbaum v. Industrial Accident Commission* (1935) 4 Cal. 2d 615, 618 [52 P.2d 215]). Thus, there is no support whatsoever for the theory that a contributory cause is a valid theory of causation in workers' compensation matter, 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.

III. EVEN IF A VALID THEORY OF CAUSATION, THE EVIDENCE HERE DID NOT RISE TO THE REQUISITE LEVEL OF SUBSTANTIAL EVIDENCE THAT AMITRIPTYLINE WAS CONTRIBUTORY.

Alternatively, even if a contributing cause is a legally valid standard, it does not negate or relieve the injured worker from meeting the requisite burden of proof, which, as discussed above, is by a showing of a preponderance of the evidence. (Lab. Code § 3202.5). In other words, the evidence of how and why the industrial injury contributed to Mr. Clark's death still must be substantial evidence. The Court of Appeal below acknowledged that the evidence of any contributing cause by the industrial medication was not substantial evidence. In fact, it was anything but clear, contrary to what Respondents contend.

If Dr. Bruff's reporting is taken at face value it is clearly contradictory and internally inconsistent. In his initial report, after

reviewing all of the records, Dr. Bruff was of the opinion that Mr. Clark's death was not work-related. Without reviewing any new information, Dr. Bruff appeared to have changed his opinion on the effects of Amitriptyline. However, every time he was asked to provide a statement on the potentially contributory effect of the medication he never stated an opinion with any degree of medical probability. This is of course the one and only legal standard that matters for purposes of this discussion. A review of Dr. Bruff's testimony illustrates this lack of evidence sufficient to meet the proper standard.

In his deposition, Dr. Bruff acknowledged the limitations of his field. He stated, "toxicology tries to do single doses whenever possible. Mixtures are very difficult to quantify." (WCAB record, p. 145, 18:5-7). When asked whether Amitriptyline could have contributed to Mr. Clark's death in combination with Xanax (alprazolam) and Ambien (zolpidem), each of which was already at significant levels, Dr. Bruff stated, "I mean, it's possible." (WCAB record, p. 145, 18:22-19:6). He added, "Amitriptyline could be an incremental contributor. It's very difficult to know how." (WCAB record, p. 146, 19:20-21). He further expressed the view that "alprazolam [Xanax] and zolpidem [Ambien] being in the same class and at a much higher dose were – kind of carried the day." (WCAB record, p. 146, 19:21-23). The doctor felt that it would speculative to specify whether the contribution of Amitriptyline to the cause of death was half a percent, one percent or five percent, because the Xanax (alprazolam) and Ambien (zolpidem) were largely contributory. (WCAB record, p. 147, 20:15-19). In the doctor's opinion the Amitriptyline was "way down there." (WCAB record, p. 147, 20:15). Dr. Bruff felt that it was additive. (WCAB record, p. 147, 20:21). He admitted that Amitriptyline was at the minimum level of causation. (WCAB record, p. 148, 21:6). It has a sedative effect. (WCAB record, p. 150, 24:23-24). Although

Hydrocodone, or Vicodin, a respiratory depressant, was also found in Mr. Clark's urine, but not his blood, it was not at any high level. (WCAB record, p. 153, 27:24-28:8). Dr. Bruff admitted that Hydrocodone could be in the causative "pie." (WCAB record, p. 154, 28:24-29:1). Again, Dr. Bruff noted that the Amitriptyline was found to be at the low end of what would be considered therapeutic blood levels. (WCAB record, p. 158, 32:3-5). The doctor was unaware of any cases where levels that low could have any real causative effect in causing death. (WCAB record, p. 158, 32:6-10). The doctor was also unaware of any studies that demonstrated a contributory effect of small levels of Amitriptyline to death. (WCAB record, p. 159, 33:6-7).

An injured worker bears the burden to put forth sufficient evidence to show that a claimed injury was industrially related based on reasonable medical probability. (Lab. Code, § 3600(a)(3); *Rosas v. Workers' Comp. Appeal Bd.* (1993) 16 Cal.App.4th 1692 [20 Cal. Rptr. 2d 778; 58 Cal.Comp.Cases 313]). Again, to be substantial evidence, a medical opinion must be "reasonably probable" and not merely "possible." (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417–418 [33 Cal.Comp.Cases 660]; see Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]). No matter how one looks at this evidence, a trier of fact could not reasonably assert it constitutes substantial evidence that Mr. Clark's death was caused, even in part, by the industrial medication. As Respondents acknowledge, Dr. Bruff used words such as "could," "may," and "possible" all of which connote something less than the requisite standard of medical probability. Dr. Bruff could not establish a precise percentage of contribution which begs the question – how could any statement of causation be substantial evidence, if he could not provide a statement of the degree of contribution with any degree of medical probability? The fact of

the matter remains, Dr. Bruff did not because he could not. He admitted that to do so would be speculative. To claim that Dr. Bruff changed his opinion has no merit given the fact Dr. Bruff stated in his deposition that he stood by his original opinion. Thus, Respondents failed to meet her burden of proof and the Court of Appeal correctly reversed the WCAB.

IV. REGARDLESS OF THIS SUPPOSED NEW STANDARD, THE COURT OF APPEAL WAS CORRECT TO REVERSE THE WCAB REGARDING MR. CLARK'S USE OF AMBIEN.

Respondents attempt to link together this supposed new "material" standard to the decision to reverse the WCAB and comments finding a lack of supporting evidence Mr. Clarks' use of Ambien was tied to his death. Again, the Court of Appeal did not indicate that it was creating a new standard. It used the term in the context of whether there was substantial evidence to support a causal link.

It is crucial to note the WCJ failed to make any mention of the fact Mr. Clark was treating with his personal physician, Dr. Borecky, for a pending vasectomy and that Xanax (alprazolam) and Ambien (zolpidem) were first prescribed at that time by him. In failing to note the origins of Mr. Clark's use of Ambien, the WCJ likewise failed to make any mention of the fact Mr. Clark had a history of using medication to aid his falling asleep. He used Tylenol PM off and on even prior to the industrial injury. (WCAB record, p. 211, 20:3-21:8). The WCJ also referred to the report of the defense QME report of Dr. Bressler and noted that Dr. Bressler was of the opinion that each drug acted separately and "in combination [having] the capacity to induce respiratory depression and even respiratory distress." (WCAB record, p. 550). In discussing Dr. Bruff's reporting and deposition, the WCJ again evidence to support her finding, noting that the death was caused by the additive interaction of the non-industrial medications Xanax (alprazolam) and Ambien (zolpidem). (WCAB record p. 551). The WCJ

again isolated and emphasized Dr. Bruff's comment that Amitriptyline was "part of the causation pie" (WCAB record, p. 551) while ignoring the rest of Dr. Bruff's testimony.

Respondents can only point to speculation that Mr. Clark's sleeping problems were related to the industrial injury. There is no evidence that the sleeping problems were industrial. The WCJ's Opinion on this topic is a significant stretch of logic. The WCJ states that "he was having difficulty sleeping because of that pain." (WCAB record, p. 554). Yet, there is no support for this anywhere in the record. This is a clear example of the WCJ substituting her judgment for medical evidence that is clearly missing. It also ignores the fact that Mr. Clark had sleeping problems before his injury for which he was taking Tylenol PM. (WCAB record, p. 211, 20:3-21:8). When he was prescribed Ambien (zolpidem) by Dr. Borecky there was no mention of pain as the reason. Thus, the WCJ's opinion on this matter is clearly contradicted by the medical record. In fact the January 29, 2009 report from Dr. Borecky notes the Mr. Clark specifically denied pain as a cause of his sleeping difficulties. (WCAB record, p. 413).

When commenting on this history, Dr. Bruff stated that "And that he's having trouble sleeping. Didn't say why. It could be because of back pain, could be, you know, stress at home. It didn't seem to be detailed for, so I don't know." (WCAB record, p. 136, 9:22-25). Dr. Bruff did not know why Mr. Clark was having sleeping problems. There is absolutely no evidence tying any alleged sleeping problems to Mr. Clark's industrial injury. The WCJ's assertion that Mr. Clark was suffering from continued or chronic pain and that he was having difficulty sleeping because of that pain is completely without support. Similarly, there is no evidence that the amitriptyline was prescribed for sleep problems. Thus, the Court of Appeal properly concluded the WCJ's opinion was inherently unreasonable.

///

CONCLUSION

As stated herein and elsewhere in the pleadings, the issue before the Court of Appeal dealt solely with Respondents' burden of proof and whether that burden was met. In reversing the WCAB the Court of Appeal did not create a new standard of causation for death cases. Consistent with its statutory authority to review decisions of the WCAB, the Court of Appeal properly and correctly determined the WCAB's Order denying reconsideration was not supported by substantial evidence because Respondents fail to meet her burden of proof.

As a result, the Court of Appeal reversed the WCAB. That decision to do so should be left alone, to stand as a clear example of what is required of a party in meeting his or her burden of proof.

DATED: May 14, 2014

Respectfully submitted,

BRADFORD & BARTHEL, LLP

Louis A. Larres
Attorney for Petitioner

(VERIFICATION - 446.2015.5 C.C.P).

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am the attorney of record for Petitioner REDWOOD FIRE and CASUALTY COMPANY administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, in the above-entitled action or proceeding: I have read the foregoing ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS and know the contents thereof; and certify that the same is true to my knowledge, except as to those matters which are therein stated upon my information or belief. And as to those matters I believe it to be true.

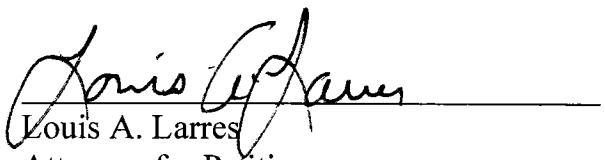
Executed on May 14, 2014, at Fresno, California

I declare under penalty of perjury that the foregoing is true and correct.

DATED: May 14, 2014

Respectfully submitted,

BRADFORD & BARTHEL, LLP



Louis A. Larres
Attorney for Petitioner

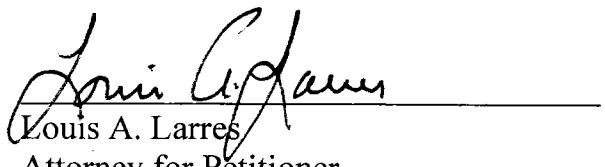
CERTIFICATE OF WORD COUNT
California Rule of Court 8.204(c)(1)

The text of this brief consists of 6378 words as counted by the Microsoft Word computer program used to prepare this brief.

DATED: May 14, 2014

Respectfully submitted,

BRADFORD & BARTHEL, LLP



Louis A. Larres
Attorney for Petitioner

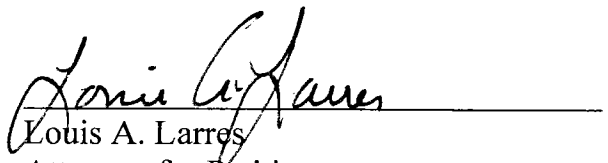
CERTIFICATE OF RECYCLED PAPER
California Rule of Court 1.22(b)

Pursuant to California Rule of Court 1.22(b), counsel for Petitioner files this Certificate of Recycled Paper. Pursuant to rule 1.22(b), counsel certifies that this original document and all copies filed and served were reproduced on recycled paper.

DATED: May 14, 2014

Respectfully submitted,

BRADFORD & BARTHEL, LLP



Louis A. Larres
Attorney for Petitioner

PROOF OF SERVICE
(C.C.P Section 1013a, 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

RE: Redwood Fire and Casualty Company administered by Berkshire Hathaway Homestate Companies vs. Workers' Compensation Appeals Board of California and Brandon Clark Deceased; Jovelyn Clark (Widow); and Guardian Ad Litem for Joana Clark (Minor Child); Brittany Clark (Minor Child); and Benjamin Clark (Minor Child)

I, David Tringali, am a citizen of the United States and am employed in the county of the aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 1300 E. Shaw Avenue, Suite 171, Fresno, California 93710.

On May 14, 2014 I served the within document(s) described as:

ANSWER TO RESPONDENTS' OPENING BRIEF ON THE MERITS

on the interested parties in this action as stated below:

Berkshire Hathaway Homestate Companies ~*Petitioner* 9095 Rio San Diego, Suite 400 San Diego, California 92111 Post Office Box 881716 San Francisco, California 94188	Workers Compensation Appeals Board Secretary (2 Copies) ~ *Respondent* 455 Golden Gate Ave, 9th Fl. San Francisco, CA 94102
Court of Appeals 4th District Division 1 750 B Street, Suite 300 San Diego, California 92101	Daniel J. Palasciano, Esq Law Offices of O'Mara & Hampton ~ *Respondent/Applicant Attorney* 2370 Fifth Avenue San Diego, California 92101

Jovelyn Clark ~ *Respondent/Applicant* 1230 Topaz Place San Marcos, California 92069	

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Fresno, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct.

Executed on May 14, 2014, at Fresno, California.

David Tringali
(Type or print name)

(Signature)