WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANTONIO FRANCO (Deceased);
VERONICA SOTO VILLEGAS (Guardian ad Litem and Trustee), ***Applicant***

vs.

ORANGE COUNTY PLASTERING COMPANY, INC.;
CYPRESS INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ17148489
Marina del Rey District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and for the additional reasons given below, we will deny reconsideration.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is

reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on May 14, 2025, and 60 days from the date of transmission is Sunday, July 13, 2025. The next business day that is 60 days from the date of transmission is Monday, July 14, 2025 (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, July 14, 2025, so that we have timely acted on the Petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, the WCJ's Report indicates that it was served on parties in the Official Address Record on May 14, 2025, the same day that the case was transmitted to the Appeals Board. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on May 14, 2025.

We agree with the WCJ's conclusions regarding causation and dependency and note that his decision to rely upon trial witnesses as a credible source of evidence is entitled to great weight because he had the opportunity to observe the demeanor of the witnesses at trial. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's determinations. (*Id*.)

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[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

As pointed out by the WCJ, the Petition misstates the holding of *Tuttle v. Industrial Accident Commission* (1939) 31 Cal. App. 2d 279 [4 Cal.Comp.Cases 62]. Specifically, the Petition misrepresents that in *Tuttle*, "the commission determined that the presumption of total dependency by a child required the claimant be either a biological or adopted child of the decedent." (Petition for Reconsideration, May 1, 2025, at p. 8, lines 24-26.) In *Tuttle*, the commission made no such determination. The beneficiary respondents in that case did not even raise the issue of whether a presumption of total dependency applied to stepchildren under Labor Code section 3501, electing instead to waive that point and focus on a dispute regarding the extent of dependency.[2] Without even addressing the applicability of the presumption, the court in *Tuttle* examined the evidence of dependency and found that based on the evidence, the dependent stepchildren in that case were partial dependents of both the mother and the decedent stepfather. (*Tuttle, supra,* 31 Cal. App. 2d 279, 21-282 [4 Cal.Comp.Cases 62, 64].) The *Tuttle* case appears to have been cited by only one other case in the 86 years since it was decided, a case involving the extent of dependency of nonresident aliens, in which the court found total dependency and noted that where extent of dependency is at issue, "each case must be decided upon its own facts." (*Munoz v. Workmen's Comp. Appeals Bd*., (1971) 19 Cal. App. 3d 144, 149 [36 Cal. Comp. Cases 488, 491].) In the present case, because defendants are not disputing Tessie Serrano's status as a total dependent,[3] the Petition's reliance upon *Tuttle is* misplaced.

In addition to *Tuttle*, the Petition cites *Costantino v. Santa Barbara Sch. Dist.,* 2011 Cal. Wrk. Comp. P.D. LEXIS 423 in support of its contention that Tessie Serrano should not receive benefits to the age of 18 under Labor Code section 4703.5(a) solely because she is a stepchild. As noted by the WCJ, the *Costantino* case is a panel decision, and unlike en banc decisions, it is not binding precedent but may be considered for any persuasive reasoning. [*See* Cal. Code Regs., tit. 8, section 10325; *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc).) We conclude that the reasoning in *Costantino* is not persuasive. In *Costantino*,

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[2] "It is conceded by respondents that the Tuttle children were entitled to the benefit of the conclusive presumption that they were wholly dependent (Labor Code, sec. 3501), and that the Trautman [step]children were not entitled to the benefit of said presumption" (*Tuttle, supra,* 31 Cal. App. 2d 279, 280 [4 Cal.Comp.Cases 62, 63]).

[3] "In the instant case, defendant does not contest Tessie Serrano is a total dependent, but only that Tessie should not receive benefits to the age of 18 as set forth in Labor Code section 4703.5(a)." (Petition for Reconsideration, May 1, 2025, at p. 9, lines 22-24.)

the panel justified its counterintuitive suggestion[4] that a stepchild is not a child by relying upon definitions taken from entirely different legal contexts, specifically the definition of a "relationship of parent and child" for purposes of intestate succession under California Probate Code section 6450, and the definition of a "parent and child relationship" under California Family Code section 7601 for purposes of custody and visitation rights.

There is no need to resort to these different contexts and codes to find statutory guidance on the issue of whether stepchildren can be "totally dependent children, as defined in Section 3501" who are entitled to additional death benefits until age 18 under Labor Code section 4703.5. (Lab. Code., § 4703.5.) Although Labor Code section 3501 does not include the word "stepchild" it is subject to the provisions of section 3503, which dictates in relevant part that "[n]o person is a dependent of any deceased employee unless in good faith a member of the family or household of the employee, or unless the person bears to the employee the relation of spouse, child, posthumous child, adopted child or stepchild…" (Lab. Code., § 3503.) The close proximity of this provision equating children with adopted children and stepchildren for purposes of death benefits suggests that the word "child" in section 3501, which includes no definition of its own, should include different kinds of children. "Statutory language should not be interpreted in isolation, but must be construed in the context of the entire statute of which it is a part, in order to achieve harmony among the parts." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903.) The fundamental purpose of statutory interpretation is to ascertain the legislature's intent in order to effectuate the law's purpose. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Statutory language should be interpreted "consistently with its intended purpose and harmonized within the statutory framework as a whole." (*Alvarez v. Workers' Comp. Appeals Bd*. (2010) 187 Cal.App.4th 575, 585 [75 Cal. Comp. Cases 817].) Thus, in the case of *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Asher)* (1993) 19 Cal.App.4th 1645 [58 Cal.Comp.Cases 760], the court followed this same line of reasoning to conclude that minor grandchildren are entitled to extended death benefits until age 18 because of the related statute identifying grandchildren (and stepchildren) as potential

[4] The *Costantino* panel decision explicitly did not reach a decision on the applicability of the presumption of total dependency under Labor Code section 3501: "Though we agree with the WCJ's finding that Miss Millender is not entitled to the statutory presumption of total dependency under Labor Code section 3501, to avoid bifurcation, we reach no decision regarding the conclusive presumption at this time." (*Costantino v. Santa Barbara Sch. Dist.,* 2011 Cal. Wrk. Comp. P.D. LEXIS 423, at pp. 6-7.)

dependents. The reasoning in *Asher* has been followed in several more recent panel decisions. (*Wirt v. California*, 2005 Cal. Wrk. Comp. P.D. LEXIS 5; *Jefferson v. Performance Excavators*, 2009 Cal. Wrk. Comp. P.D. LEXIS 526; *O'Quinn v. City of San Diego*, 2013 Cal. Wrk. Comp. P.D. LEXIS 118; *Skubitz v. Hanford Community Hosp.,* 2016 Cal. Wrk. Comp. P.D. LEXIS 168.) One writ denied case distinguished *Asher* because the deceased grandparent in that case was not acting as a parent of the grandchild, finding that section 3501 applies to any minor for whom a deceased worker was acting as a parent. (*Riley v. Workers' Compensation Appeals Bd.,* SOS Steel Fabrications, 71 Cal. Comp. Cases 1340, 1342 ("For other minors to be found to be 'children' within the meaning of the statute, a finding must be made essentially that the deceased is the acting parent.").) In the present case, the decedent was indisputably acting as a parent, even though he was not the biological parent.[5]

Further, it is established to the point of being axiomatic that statutory interpretation begins "with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*People v. Watson (*2007) 42 Cal.4th 822, 828.) The operative word chosen by the legislature in section 3501 is "child." While it is true that the legislature could have included the additional word "stepchildren" in section 3501 as it did in section 3503, it could also have clearly restricted the definition of "child" by expressly excluding stepchildren, or by using more precise legal terms such as "offspring," "issue," or "progeny." The plain and ordinary meaning of "child" includes stepchildren. The first definition for the word "child" in the American Heritage Dictionary is "[a] person between birth and puberty" or "[a] person who has not attained maturity or the age of legal majority."[6] Tessie Serrano, who was three years old and living with decedent Antonio Franco at the time he worked for Orange County Plastering Company, Inc., clearly was, and still is, a child within the ordinary and usual meaning of that word.

An inclusive, plain-meaning construction of the word "child" to include stepchildren is furthermore consistent with section 3202, which mandates that Division 4 of the Labor Code "shall

[5] "Mr. Franco fully supported Tessie, and Tessie does not know anyone else to be her father." (Minutes of Hearing and Summary of Evidence, February 10, 2025, at p. 3, lines 17-18.)

[6] American Heritage Dict. (https://www.ahdictionary.com/word/search.html?q=child)

be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code § 3202.) Speculatively assuming that the word "child" must be read restrictively to exclude stepchildren living with an employee acting as their parent at the time of a fatal work injury would be contrary to the mandate of section 3202, and contrary to the apparent purpose of section 4703.5 and California State Constitution, Article XIV, section 4 to protect such children who live with and depend on such an employee. Accordingly, we decline to read sections 4703.5 and 3501 in such a restrictive manner.

If a statute is amenable to more than one interpretation, the interpretation that leads to a more reasonable result should be followed. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) In the present case, our interpretation of sections 4703.5 and 3501 prevents the unreasonable result of providing different treatment to three minor dependent household members, all of whom knew Antonio Franco as their father, solely on the basis of their genetic origin.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 14, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

VERONICA SOTO VILLEGAS
RAHNAMA LAW
LAW OFFICES OF ALLWEISS, McMURTRY & MITCHELL

CWF/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

NOTICE OF TRANSMITTAL TO THE WCAB

I

INTRODUCTION

1. Applicant's Occupation:	Foreman (decedent)
2. Applicant's Age:	[] (decedent)
3. Date of injury:	01/05/2022 (01/13/2022 death)
4. Parts of Body Alleged:	Death
5. Manner in which injuries alleged to have occurred:	COVID-19
6. Identity of Petitioners:	Defendant
7. Timeliness:	The petition was timely filed.
8. Verification:	A verification is attached.
9. Date of Findings and Order:	04/11/2025
10. Petitioner's contentions:	That decedent's COVID death was not industrial; That dependent minor is not entitled to death benefits as she is not the biological child of decedent.

II

FACTS

Applicant, Veronica Soto Villegas, and the decedent employee, Antonio Soto Franco, were married on 04/10/2010 and were raising three children; Areli Soto (DOB 11/12/2010), Jozelyn Soto (DOB 08/20/2012), and Tessie Serrano (DOB 10/29/2018) (MOH/SOE, p.3, lines 14-16). Mr. Franco died 01/13/2022 from the effects of COVID-19 (Id. at p.4, lines 2-3). Prior to that date Mr. Franco worked for the employer herein, Orange County Plastering Company, for approximately 16 years as a lead foreman (Id. at p.3, lines 21-22). Mr. Franco's last day of work was 01/05/2022 as he was sent home by the employer due to showing signs of illness (Id. at p.3, lines 23-24). Applicant vacated the family home that same day, along with the three minor children, to stay with a friend (Id. at p.4, line 1). Neither Veronica Villegas nor the children showed any signs of illness before Mr. Franco became ill (Id. at p.4, lines 1-2).

In the one-month period preceding the death of Mr. Franco no one in the family socialized with anyone and no one lived with the family nor did any guests stay with them (Id. at p. 4, lines 4-6). Additionally, during this same one-month period, Mr. Franco worked with his brothers but did not socialize with them or other family members and the children did not attend school nor have any play dates (Id. at p. 4, lines 8-12). During the holidays in December 2021 neither Mr. Franco, Veronica Villegas nor the three children saw any family members because there were problems between the families (Id. at p.5, lines 8-10).

Mr. Franco was concerned about getting sick because there were many people at work who were getting sick in the two-week period leading up to 01/05/2022, the date on which Mr. Franco was sent home from work. (Id. at p. 4, lines 12-13). In checking Mr. Franco's phone after his passing, Veronica Villegas learned that Mr. Franco's boss had been sick and Veronica Villegas testified that she had no reason to think that Mr. Franco was exposed to COVID-19 anywhere else besides the workplace (Id. at p.4, lines 15-17).

The brother and co-worker of Mr. Franco was Jose Soto and they worked together for the employer at the same job site in December 2021 along with two other brothers (Id. at p.6, lines 10-12). There were up to 50 people working at the site in December 2021 and a few co-workers looked sick as well as the boss, Jerry Smith (Id. at p.6, lines 13-15). The brothers worked together putting metal ceilings together (Id. at p.6, line 15). Jose Soto noted Mr. Franco was sick toward the end of the year as Mr. Franco had fevers. (Id. at p.6, line 18). Jose Soto was already sick and staying at his own home when, two days later, Mr. Franco was sent home (Id. at p.6, lines 18-20). In December 2021 the brothers did not socialize outside of work because of the sicknesses (Id.). Jose Soto had a positive test for COVID-19 approximately a week before Mr. Franco died and another co-worker brother, Miguel, also tested positive for COVID-19 at around the same time as Jose Soto (Id. at p.7, lines 3-5). Jose Soto also testified that he and Mr. Franco got sick at the same time (Id. at p.7, line 10). Per a document reviewed by the QME, Dr. Tirmizi, Jose Soto tested positive for COVID-19 on 01/05/2022 (Exhibit D, p.2, top paragraph). The construction site where all the brothers worked was a building and they worked on stairways and bathrooms (MOH/SOE dated 02/10/2025 at p. 7, lines 16-17).

The panel QME, Dr. Tirmizi, issued two reports, the first dated 11/29/2023 (Exhibit D) and the second dated 09/29/2024 (Exhibit E). Dr. Tirmizi's deposition was taken on 05/07/2024 (Joint Exhibit XX). In his 11/29/2023 initial report Dr. Tirmizi found at p.3 that if it could be

shown that Mr. Franco worked in the vicinity of co-workers infected with COVID-19 then based on reasonable medical probability Mr. Franco contracted COVID-19 at the workplace (Joint Exhibit XX, p.3). The doctor also noted in this report that no family members tested positive for COVID-19 in the days and weeks leading up to Mr. Franco's death (Id. at p.3).

Dr. Tirmizi's deposition was conducted on 05/07/2024. Early in the deposition transcript the doctor was asked whether the duties of a construction foreman "would essentially be performed away from the general public?" (Exhibit XX, p. 6, lines 21-23). Dr. Tirmizi responds by stating that "Construction foreman is expected to be at the worksite as - - when needed, and oversee what's going on. Typically, where - - where there is construction there's not a whole lot of people around there." (Id. at p.6, lines 24-25 and p.7, lines 1-2).

Later in the deposition, after informing Dr. Tirmizi correctly that the general standard for nonoccupational diseases is that they are generally non-industrial unless an exception applies, such as where the employment subjects the applicant to a higher risk compared to that of the general public, defendant asks the doctor whether construction work involved working with the public and the doctor agreed that it would not (Exhibit XX p.23, lines 5-9). Then the doctor is asked if Mr. Franco, "as a construction foreman was not subject to an increased risk of contracting COVID compared with that of the general public" to which the doctor responds that Mr. Franco "was not at an increased risk." (Exhibit XX, p.23, lines 12-16).

In the second report dated 09/29/2024 (Exhibit E), Dr. Tirmizi reviewed the deposition transcript of the widow, Veronica Villegas, and continued to hew to his previous opinion that Mr. Franco was in contact with individuals at his workplace who may have had COVID-19 (Id. at p.4). The doctor's opinion that it was reasonably medically probable that Mr. Franco contracted COVID-19 at work was unchanged (Id.).

Regarding the dependency issue, since Defendant is not contesting the full dependency status of Veronica Villegas nor the two older children, Areli Soto and Jozelyn Soto, only evidentiary facts relevant to the dependency claim of Tessie Serrano will be discussed below.

Applicant, Veronica Villegas, testified that Pedro Serrano is the biological father of Tessie Serrano (MOH/SOE 2-10-2025, p.4, line 20). Veronica Villegas never applied for child support from Pedro Serrano (Id. at line 25). Pedro Serrano has never financially supported Tessie Serrano (Id. at line 24). Veronica Villegas has never asked Pedro Serrano for financial support for Tessie

(MOH/SOE at p.6, line 2). Veronica Villegas also testified that Mr. Franco was the only father Tessie Serrano had ever known (MOH/SOE, p.4, line 19).

The record in this matter was opened on 01/08/2025. Testimony by the Applicant, Veronica Villegas, and the decedent's co-worker and brother, Jose Soto, was taken on 02/10/2025 and the matter submitted for decision. No other witnesses were called. The decision and Finding of Fact, finding that Mr. Franco sustained an industrial exposure to COVID resulting in death and that Veronica Villegas, Areli Soto, Joselyn Soto and Tessie Serrano were total dependents, issued on 04/11/2025. Thereafter, Defendant filed a Petition for Reconsideration on 05/01/2025 seeking recission of the finding of industrial injury/death and recission of the finding that Tessie Serrano was a dependent entitled to benefits. Applicant filed a timely Answer to the reconsideration petition on 05/13/2025 arguing that Defendant's petition be denied.

III

DISCUSSION

AOE/COE:

Although there were a few minor discrepancies between them, this court found that Veronica Villegas and Jose Soto were very credible witnesses. Both witnesses testified only from their own personal knowledge in an honest and trustworthy manner and there was no attempt to exaggerate or slant testimony one way or another. The small discrepancies, in the judgment of this court, were centered on the interaction between Mr. Franco's work and home lives with Jose Soto being a percipient witness as to what happened at work and Veronica Villegas a percipient witness regarding the decedent's home life.

The initial factual question raised by Defendant appears to be focused on who may have had COVID-19 first as between Jose Soto and the decedent, Mr. Franco. Although Ms. Villegas testified that Mr. Franco and his brothers were sent home the same day (02/10/2025 MOH/SOE, p.5, lines 2- 3), she is not the best witness for this information as she did not work at the worksite and moved into the home of a friend the very day that Mr. Franco called to tell her he was coming home sick. Jose Soto, on the other hand, is the best percipient witness to the facts regarding who was sent home and when. Jose Soto testified that he was home sick two days before Mr. Franco was sent home. Additionally, pursuant to a document provided to Dr. Tirmizi (but not submitted into evidence), Jose Soto tested positive for COVID-19 on 01/05/2022. Mr. Franco, on the other hand, was not tested for COVID-19 until 01/10/2022. Although the timing of being sent home and

tested for illness are inexact metrics for measuring who got sick with COVID-19 first as between Jose Soto and Mr. Franco, based on the above, since Jose Soto was tested first and sent home first, the most reasonable inference and probable scenario is that Jose Soto acquired the COVID-19 infection prior to the decedent, Mr. Franco.

However, the main gist of Defendant's reconsideration petition on causation is that Applicant fails to show that Mr. Franco's job caused him to contract COVID-19 and, even if the job did cause Mr. Franco's COVID-19, the job itself did not subject him to a higher or increased risk of exposure than the general public and, thus, it is non-compensable. This court respectfully disagrees.

First, based on the unrebutted evidence, this is a case of a direct chain of causation. In other words, unlike most cases involving alleged industrial injury due to a potential passing exposure to a nonoccupational disease, this is not a case of uncertain etiology usually found in cases involving invisible and widespread pathological organisms. Rather, this is a case of certain, or sufficiently certain, causation. Although we do not know when exactly Mr. Franco contracted COVID-19, we do know that the exposure could only have happened at work. We know that COVID-19 caused Mr. Franco's demise on 01/13/2022 because that is the only cause of death listed on the Death Certificate (Exhibit 110). We also know from the credible testimony of Mr. Franco's brother and co-worker, Jose Soto, that Mr. Franco appear to be sick toward the end of the year. We know that Jose Soto was sent home on approximately 01/03/2022 as he testified that that he was sent home two days before Mr. Franco was sent home on 01/05/2022. We know that Jose Soto tested positive for COVID-19 on approximately 01/05/2022. Based on this information the reasonable inference is that Jose Soto and Mr. Franco had COVID-19 together at least as of the first days of January 2022. Jose Soto tested positive for COVID-19 around 01/05/2022 and brother Miguel tested positive for COVID-19 at about the same time. Since both worked closely with Mr. Franco, either one of them could have transmitted the COVID-19 virus to him although this court is of the opinion that it was Jose Soto who most probably transmitted the virus.

Next, we look at the work proximity dynamic as Dr. Tirmizi found that if Mr. Franco worked either in close proximity to or in the vicinity of people with COVID-19, then that was the most likely avenue of exposure. Jose Soto testified that he and the decedent, Mr. Franco, worked together at the job site with two additional brothers, Miguel and Jose Maria. The brothers did not socialize outside of work in December 2021. Jose Soto testified that the brothers worked together

putting metal ceilings together and that the brothers were working on stairways and bathrooms. Therefore, we have at least one co-worker (Jose Soto) and perhaps two (Miguel) working for long hours with Mr. Franco in close quarters such as bathrooms and stairways. These individuals satisfy Dr. Tirmizi's causation theory and support the doctor's opinion finding industrial exposure.

Additionally, we can look at whether there were any potential nonoccupational sources of COVID-19 transmission. And here there are none. The widow, Veronica Villegas, testified that the family did not socialize with anyone during the last 30 days of Mr. Franco's life, nor did anyone come and visit or stay with them. The three children were doing school from home because they were being home-schooled or doing online school from home. Veronica Villegas testified that neither she nor any of her three daughters contracted COVID-19 during this time frame. Thus, since Mr. Franco did not socialize outside of work or home in the 30 days prior to his death, there is no evidence of Mr. Franco being exposed to COVID-19 outside of work. Thus, the evidence points solely to work as the source of the Mr. Franco's exposure.

Based on all the above, this court concludes that the only place where Mr. Franco contracted COVID-19 was at the construction work site working in close quarters with infected co-workers inside relatively small places. The evidence supports no other alternative mechanism. Quite the contrary, Mr. Franco was only exposed to COVID-19 at work and although the most likely source of transmission was Jose Soto, the virus could have come from Miguel or the supervisor, Jerry Smith, or multiple other unnamed individuals at the construction site.

Despite this court's opinion that Applicant has shown direct COVID-19 exposure by Mr. Franco at work in a way the significantly minimizes or eliminates concerns underlying the general rule against industrial claims for exposure to nonoccupational diseases, this court also concludes that Mr. Franco's case easily satisfies the higher or increased risk exception set forth in *LaTourette v. WCAB*, 63 CCC 253 (March 1998). This exception noted in *LaTourette* holds that where the employment subjects the employee to an increased risk compared to that of the general public the injury is compensable.

Unlike a hospital or government building or library or fast-food establishment and many other locations open to the general public, the decedent's place of work was a construction site which was closed to the public. The construction site is, therefore, akin to a prison or military base in which entry of the public is significantly restricted. This is a significant distinction between publicly open workplaces and closed ones as the flow of people is unrestricted in the former and

heavily restricted for the latter. Also, the decedent here was required to report for work at a particular location during particular times, again unlike the general public. As well, Mr. Franco had to perform work duties in enclosed spaces such as bathrooms and stairwells for extended periods of time that the general public is not required or normally allowed to do. These factors of Mr. Franco's work quite simply put him at greater risk than the general public, particularly here, where work in enclosed spaces such as bathrooms and stairways was required.

Defendant's citation of the statement by Dr. Tirmizi at his deposition that Mr. Franco was "not at an increased risk" of contracting COVID-19 is misplaced for multiple reasons. First, this testimony is apparently premised on the premise that Mr. Franco did not work with the general public. This court is at a loss to understand the point here. The exception to the general rule has nothing to do with whether or not the employee works with the general public. The exception is only concerned with whether the employment places the employee at a higher risk. Thus, as Dr. Tirmizi appears to base his conclusion on nothing more than the idea that Mr. Franco did not engage in employment directly with the general public this court must disregard the doctor's ill-informed conclusion on this point.

Also, this court finds great persuasive value and guidance in the recent case of *Thomas Butts v. Butts & Johnson*, 89 CCC 127 (February 2024), another COVID-19 case involving the higher/increased risk exception. In this case the employee was an applicant attorney who contracted COVID-19 while meeting with a sick client at the board in an enclosed conference room, and in so doing was found to be exposed to a higher risk of contracting COVID-19 compared to the general public. Although Defendant herein asserts that the facts of this case are distinguishable from the instant matter, Defendant makes no effort to explain this assertion. Rather, Defendant mentions only the main conclusion of the *Butts* case and the unsupported conclusionary statement by Dr. Tirmizi in deposition that Mr. Franco was not subject to an increased risk. In these assertions, Defendant misses the significant similarities between these two cases.

Like the employee in *Butts*, Mr. Franco had to go to work at a specific location. Like Mr. Butts meeting with a sick client in an enclosed small conference room that was generally off-limits to the general public, Mr. Franco had to perform work duties in enclosed and relatively small non-public areas such as bathrooms and stairways at a construction site alongside individuals sick with COVID-19. In fact, on this point the claim of Mr. Franco is stronger because, unlike the client in *Butts*, Mr. Franco's co-worker, Juan Soto, was confirmed to have COVID-19 per company

documents. Also, unlike the attorney applicant in *Butts*, who likely did not have to be at court every day, here Mr. Franco could only work at a single location. Like Mr. Butts, Mr. Franco had to work alongside others in close quarters as a routine and necessary part of his job duties. However, only Mr. Franco had to do so every workday instead of some workdays. Thus, contrary to Defendant's conclusionary argument, the basic facts of this matter and the *Butts* case are virtually indistinguishable. Furthermore, as between Mr. Butts and Mr. Franco, it is the latter who has the stronger argument of meeting the higher/increased risk exception to the general rule enunciated in *LaTourette*.

DEPENDENCY:

The second main issue raised by Defendant's Petition for Reconsideration is that Tessie Serrano is not entitled to Labor Code section 4703.5(a) benefits because she is not presumed to be a "child" of Mr. Franco under Labor Code section 3501 because she is a stepchild. This argument is a bridge too far and unsupported by the vast majority of case law.

Defendant cites *Tuttle v. IAC*, 4CCC 62 (1939) for the proposition that a "presumption of total dependency by a child requires the claimant to be either a biological or adopted child to the decedent." (Petition, p.8, line 25). This assertion is incorrect. In *Tuttle*, the Commission found that all four children were wholly dependent on the deceased father/stepfather (two children were the father's biological children whereas the decedent's other two children were the biological children of the mother – the decedent's wife). However, since the two stepchildren of the deceased received some financial support from their own mother's earnings, the court deemed them to be partial dependents of the decedent. It was these facts that rendered the stepchildren partial dependents, not some irrelevant finding based solely on their non-biological relationship to the decedent.

Defendant also cites the case of *Constantino v. Santa Barbara School District* (2011) Cal. Wrk. Comp. P.D. LEXIS 423, for the proposition that stepchildren do not qualify for the presumption in Labor Code section 3501. Defendant further argues that because the presumption does not apply, even though total dependency is conceded by Defendant (Petition, p. 9, line 22-23), Tessie Serrano is not entitled to Labor Code section 4703.5 benefits. Indeed, while this case does stand for the proposition that stepchildren do not come within the purview of Labor Code section 3501, it is a nonbinding panel decision in which the conclusion does not preclude recovery of compensation by Tessie Serrano herein.

This court does not find the reasoning of *Constantino* to be persuasive regarding the meaning of the term "child" in Labor Code section 3501. To read this statute as exclusionary rather than inclusionary given liberal construction is moving in a direction counter to statutory construction and WCAB caselaw for the last half-century or more on dependency issues dealing with minor children who are not the direct progeny of mother and father. As an example, as stated in *Skubitz* 2016 Cal. Wrk. Comp. P.D. LEXIS 168, the dependent child was a mere 12 hours old when her grandfather died in an industrial accident. However, because he had supported the child in-utero and housed the child's mother and promised future such care and support the court found that the child was a good faith member of the household pursuant to Labor Code section 3503 and thus dependent on the decedent, that the dependency was total, and that the child was therefore entitled to the benefit payable under Labor Code section 4703.5.

Similarly, in this case and based on the discussion above, the evidence overwhelmingly shows, and this court finds that Tessie Serrano was a good faith member of Mr. Franco's household and wholly dependent on him as he was the sole provider/breadwinner. In fact, Tessie Serrano's argument here is even stronger than the grandchild in *Skibutz* as she lived with and was fully supported by Mr. Franco for the first three years of her life. And just like the grandchild in *Skubitz* this stepchild of Mr. Franco is entitled to benefits including those outlined in Labor Code section 4703.5.

To interpret Labor Code section 3501 as excluding someone like Tessie Serrano from the class of children covered by the statute as well as excluding her from the benefits of Labor Code section 4703.5, in this court's opinion, completely contravenes the intent of the statute to provide benefits to totally dependent minors. And no splitting of hairs as to whether Tessie Serrano was a posthumous child, grandchild, adopted child or any other classification changes that assessment where the child lived with and completely depended on the decedent for her support on a good faith basis.

IV

RECOMMENDATION

As the Applicant has established by a preponderance of the evidence that Antonio Soto Franco contracted COVID-19 at his employment which exposed him to a higher or increased risk of contracting the disease that ended his life, and that Tessie Serrano is a totally dependent minor child on the date of Mr. Franco's death who was a good faith member of decedent's household and is thus entitled to death benefits and Labor Code section 4703.5 benefits, it is respectfully recommended that the Petition for Reconsideration be denied.

DATED: May 14, 2025

Daniel Ter Veer
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE