

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

The hearing in this matter was completed on August 20, 2013. The sole issue for hearing was whether, on the basis of orthopedic conditions, John A. Macias (Respondent) is permanently disabled or incapacitated from performance of his duties as a Street Maintenance Worker for respondent City of Walnut Creek.

Respondent was employed by Respondent City of Walnut Creek as a Street Maintenance Worker. Respondent submitted an application for disability retirement to CalPERS, claiming disability on the basis of orthopedic (neck and shoulder) conditions.

CalPERS reviewed medical reports concerning Respondent's orthopedic (neck and shoulder) conditions from competent medical professionals. CalPERS also sent Respondent for an IME examination with Orthopedic Surgeon Dr. John Hearst Welborn. After review of the IME report and other medical reports, CalPERS determined that Respondent was not permanently disabled or incapacitated from performance of his duties as a Street Maintenance Worker at the time his application for disability retirement was filed.

At the hearing on this matter, CalPERS presented medical testimony of Dr. Welborn who interviewed and examined Respondent, reviewed Respondent's medical records and job descriptions, obtained Respondent's work history, and a summary of his present complaints. Respondent's job description included being able to lift up to 75 pounds, shoveling, using a pick and jackhammer and tying down equipment on trucks.

Dr. Welborn testified that he believes that Respondent would experience discomfort while working. Dr. Welborn believes Respondent can drive a truck, shovel and tie down heavy equipment. However, Dr. Welborn's testimony and IME report included prohibitions against lifting over 50 pounds. Dr. Welborn also believes that Respondent has cervical disc degeneration which may have been aggravated by his employment.

Nevertheless, Dr. Welborn testified that Respondent is not substantially incapacitated for the performance of his usual duties as a Street Maintenance Worker.

The Administrative Law Judge (ALJ) found that the preponderance of the evidence showed that Respondent was substantially unable to perform the usual and customary duties of a Street Maintenance Worker. Respondent's usual and customary duties were very physically demanding. He was constantly required to lift and carry up to 75 pounds. He was also required to regularly use a jackhammer, stand, bend, twist, drive and work with heavy equipment. The ALJ was struck by the fact that Respondent tried to persuade his employer to keep him on and suggested various accommodations. His supervisors did not believe that the accommodations would be feasible or that he was able to perform his usual duties with the work restrictions his physicians put in place. Respondent's MRI revealed objective support of Respondent's complaints. Although he obtained some help from epidural injections, he remained unable to perform his usual duties at the time he applied for disability retirement.

The ALJ reasoned that Dr. Welborn's finding that Respondent was unable to lift more than 50 pounds is consistent with the findings of Respondent's treating physicians. The ALJ held that the preponderance of the evidence established that Respondent was substantially unable to perform the usual and customary duties of his position at the time he applied for disability retirement.

The ALJ concluded that Respondent's appeal should be granted. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision grants the Respondent disability retirement, there is no risk that Respondent will file a Writ Petition in Superior Court seeking to overturn the Decision of the Board. Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal as to the City of Walnut Creek. Although named as a party, the City of Walnut Creek did not participate in any way in the litigation of this case. Nevertheless, the City may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

October 16, 2013.


ELIZABETH YELLAND
Senior Staff Attorney