

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)



1390 Market Street Suite 1200 San Francisco, CA 94102
P: 888.625.2251 415.431.5310 F: 415.431.2266
www.jonesclifford.com



To: Cheree Swedensky

From: Saba Rizvi for Christopher Dehner

Company: CalPERS Executive Office

Date: 2/3/2016

Fax No.: 916-795-3972

Total Pages: 8

Phone No.:

Re: Kristen Del Carlo

Case No. 2015-0201

Attached please find a copy of Respondent's Argument, dated 2/3/2016.

Original will follow via U.S. mail, along with a copy of the transcript of hearing, dated 10/26/2015.

1 CHRISTOPHER DEHNER, ESQ., SBN 197017
 2 JONES CLIFFORD, LLP
 3 1390 Market Street, Suite 1200
 4 San Francisco, CA 94102
 5 T: (415) 431-5310
 6 F: (415) 431-2266
 7 E: cdehner@jonesclifford.com

8 Attorneys for Respondent
 9 KRISTEN DEL CARLO

10 BEFORE THE
 11 BOARD OF ADMINISTRATION
 12 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
 13 STATE OF CALIFORNIA

14 In the matter of the Application for Industrial
 15 Disability Retirement of:

16 KRISTEN DEL CARLO,
 17 Respondent,

18 and.

19 DEPARTMENT OF CALIFORNIA
 20 HIGHWAY PATROL;
 21 Respondent.

Case No: 2015-0201

OAH No. 20150703-40

RESPONDENT'S ARGUMENT

22 Comes Now, Respondent, Kristin Del Carlo, with her response to the Proposed Decision of
 23 Administrative Law Judge (hereinafter "ALJ"), Coren D. Wong, dated December 3, 2015,
 24 recommending that Respondent's Application of Industrial Disability Retirement be Denied.

25 Respondent asserts that ALJ Wong 1) Had an incorrect understanding of Respondent's Job
 26 Duties, in particular ignoring the credible and un rebutted testimony of Respondent's Sergeant
 27 ("Sgt.") Linda Powell, 2) Erroneously held that the opinion of the IME David D'Amico, M.D.,
 28 supports a finding that Respondent is able to work full duty, ignoring Dr. D'Amico's testimony at
 hearing and 3) Erroneously held that Respondent did not meet her burden to demonstrate substantial
 incapacity.

JONES CLIFFORD, LLP

1 The medical report of Respondent's surgeon, Dr. Lali Sekhon, the orthopedic Agreed
2 Medical Evaluator ("AME") in the workers' compensation case, Dr. Steven Isono, and even the
3 contradictory and confusing opinion of the IME, Dr. D'Amico, when read as a whole support
4 Respondent's contention that she is substantially incapacitated from performing her duties as a
5 Traffic Officer with CHP.

6
7 **1) ALJ Wong Ignored The Unrebutted Testimony Of Sgt. Linda Powell Regarding**
8 **Respondent's Job Duties.**

9 Respondent asserts that ALJ Wong did not have a correct understanding of Respondent's job
10 duties as a CHP officer and that he ignored the credible and unrebutted testimony of Respondent's
11 superior, Sgt. Linda Powell, with regard to the duties of a CHP officer in Susanville. Specifically,
12 ALJ Wong narrowly interpreted the lifting and pulling requirements in the 14 Critical Tasks to
13 assume that those duties were done rarely, one to three times per month, when to the contrary, Sgt.
14 Powell testified that such tasks happen almost daily.

15 Vehicle Code Section 2268(a) requires in pertinent part:

16 Any member of the Department of the California Highway Patrol shall be capable of
17 fulfilling the complete range of official duties administered by the commissioner pursuant to
18 section 2400 10 other critical duties that may be necessary for the preservation of life and
19 property.

20 In evaluating Respondent's job duties for purposes of determining whether or not she is
21 incapacitated from performance of those duties we look to her job classification as a "Traffic
22 Officer" as opposed to any particular assignment she held (such as public affairs officer). *Beckley v.*
23 *Board of Administration of California Public Employee's Retirement System* (2013) 222 Cal. App.
24 4th 691. The usual duties of a Traffic Officer have been identified in a document entitled California
25 Highway Patrol Officer 14 Critical Physical Activities.

26 There were three documents submitted into evidence at the hearing by PERS regarding the
27 job duties of a CHP officer: 1) A Job Description (PERS Exhibit 12), 2) The Physical Requirements
28 of Position (PERS Exhibit 13), and 3) the CHP 14 Critical Tasks (Exhibit 14). Sgt. Powell testified
that she reviewed all three documents and that they were correct. She was then asked about how

1 frequently a CHP officer in the Susanville area may be asked to remove a deer or other debris from
2 the road and she testified that it happens on an almost **daily** basis. (Administrative Record pages 43
3 and 44) (Emphasis added). Upon further questioning Sgt. Powell testified about the fact that officers
4 in the area do pull people out of vehicles and that they help motorists in the winter with snow chains,
5 which requires bending and stooping. She also testified that because of the size and remoteness of
6 the Susanville location that officers frequently had to perform these task without assistance. Finally,
7 Sgt. Powell testified that officers did not have discretion regarding working overtime or over
8 whether or not they chose to remove road debris.

9 Sgt. Powell provided 17 pages worth of testimony regarding CHP duties in the Susanville
10 area. Her testimony is not mentioned or referenced in ALJ Wong's proposed decision. Her testimony
11 is corroborated by the testimony of Respondent as to the frequency and duration of job duties.
12 Respondent's testimony is likewise not mentioned and apparently ignored. Their testimony about the
13 job duties and conditions in Susanville is un rebutted and is the best evidence of the requirements of
14 the job. A correct understanding of the job duties is important because it is clear that the Dr.
15 D'Amico did not consider these requirements in rendering his assessment. He did not ask
16 Respondent about her job. He simply looked at the 14 Critical Tasks and as he stated in his reports,
17 made his own interpretation as to the nature and frequency of duties performed.

18 The *Beckley* case requires that we look at the full range of duties of a Traffic Officer. In this
19 case, it requires incorporating the testimony of Sgt. Powell, who was offered as a witness by PERS,
20 as to the actual duties required in the Susanville area. That was not done in this matter. Given Sgt.
21 Powell's testimony as to the job requirements, the testimony of Dr. D'Amico given at hearing would
22 support a finding of substantial incapacity.

23 **2) The Medical Evidence Supports a Finding That Respondent is Substantially**
24 **Incapacitated from the Performance of her Job Duties as a CHP Officer.**

25 **A) The Opinion of the IME Dr. D'Amico Supports a Finding of Incapacity.**

26 Despite his tortured and convoluted opinions and his penchant for making his own
27 unsupported interpretations of the 14 Critical Tasks, Dr. D'Amico's opinion supports a finding of
28 substantial incapacity when considering the testimony of Sgt. Powell.

1 In his July 30, 2014 report it is apparent that Dr. D'Amico has substituted his own
2 interpretations of the job restrictions given by Dr. Sekhon, the surgeon, and also of the 14 critical
3 tasks. On page 10 of his report, Dr. D'Amico states:

4
5 As a result of the improvement of the condition and my interpretation of occasionally
6 up to 3 hours, she is capable of performing all of the 14 critical physical activities as
7 presented in the records.

8 If you look at those some of those are done one to 3 times per month or one to 2 times
9 per year. Pushing and pulling may occur one to 2 times per year for one minute and standing
10 and sitting are done up to 8 hours but not on a continual basis. There are opportunities to
11 stand up and get up and move out of the car. Also there are limitations that can be imposed at
12 her work duties for instance not working overtime of the vehicle and not continuously lifting
13 up to 50 or 100 pounds. My interpretation of the 2 issues with the 14 activities is that they are
14 done infrequently and there is no reason that she cannot do them for any short period of time.

15 This is contradictory to the direct and un rebutted testimony of Sgt. Powell. Sgt. Powell
16 testified that CHP officers do not have discretion to avoid overtime or not to lift or move road debris.
17 They can be required to sit in a car on a continual basis or stand on a continual basis depending on
18 the situation. These pushing and pulling activities are performed daily and not one to 3 times per
19 month. Dr. D'Amico does not have an understanding of the job requirements. ALJ Wong has also
20 chosen to ignore the job requirements as stated by Sgt. Powell.

21 At hearing, Dr. D'Amico was combative and had difficulty answering the questions posed by
22 both sides. His testimony is convoluted and difficult to follow at best. However, when asked about
23 lifting situations as described by Sgt. Powell, Dr. D'Amico essentially indicated that Respondent
24 could not perform such duties. (Please Read the Administrative Record-Dr. D'Amico's testimony,
25 pages 65-108). Significantly, ALJ Wong also questioned Dr. D'Amico's credibility stating "Dr.
26 D'Amico, are you here to argue with everybody or to testify? Because I must say your performance
27 is making your credibility about zero." (Administrative Record page 107). Yet in his proposed
28 decision, ALJ Wong does not mention anything regarding Dr. D'Amico's testimony.

If we take the un rebutted testimony of Sgt. Powell and Respondent as to the frequency of
certain tasks performed by a CHP officer, even the opinion of Dr. D'Amico warrants a finding that
Respondent is substantially incapacitated from being a Traffic Officer.

JONES CLIFFORD, LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B) Respondent has Met Her Burden of Proving Substantial Incapacity

Respondent has met her burden to prove substantial incapacity for the performance of her duties as a CHP officer. First, the February 3, 2014 report from her surgeon, Lali Sekhon, provides that Respondent is to avoid any activities that involve bending, lifting or twisting in a repetitive fashion or lifting more than 50 pounds. Second, the report of the AME, Dr. Stephen Isono, also provides that Respondent is unable to return to her usual and customary duties. Finally, as noted above, the opinion of Dr. D'Amico, when read in its entirety and considering respondent's actual job duties, would also provide a basis for incapacity.

ALJ Wong erroneously interprets Dr. Sekhon's restrictions as prophylactic in nature and not permanent. It seems that he has bought into the "interpretation" of Dr. Sekhon's report proffered by Dr. D'Amico. This interpretation is just not supported by the evidence. First, Dr. Sekhon never indicates that the restrictions given are prophylactic in nature. In fact, Dr. Sekhon states that respondent was permanent and stationary as of February 3, 2014. These then are not temporary restrictions but in fact permanent. Dr. Sekhon indicates that respondent should avoid various activities listed in 14 Critical Tasks. The basic definition of the word "avoid" as stated by Merriam-Webster's dictionary is "to keep away from or to refrain from". Using this definition, according to Dr. Sekhon, respondent should not perform or refrain from performing the various activities noted in his February 3, 2014 report. Reading this logically, Respondent should not lift more than 50 pounds. As noted in the testimony of Sgt. Powell, a CHP officer does not have the discretion to decide on how much he or she should lift or what activities he or she should not perform. ALJ Wong has essentially made an assumption about Dr. Sekhon's opinions that is not supported by the evidence.

Respondent's substantial incapacity is also supported by the opinion of Dr. Isono who saw her on two occasions, pre and post-surgery. Dr. Isono was retained as an impartial evaluator by Respondent and State Fund. He reviewed the entirety of the medical file, performed a clinical examination and reviewed a job description. Dr. Isono felt that Respondent was unable to return to her usual and customary duties. His opinion concurs with that of Dr. Sekhon and is the most logical given Respondent's ongoing back symptoms post-surgery.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

Respondent has been a long-time member of the CHP. She has worked with low back problems since 2006. Finally, in order to try to get relief for her symptoms and to try to continue with road patrol she underwent lumbar surgery in December 2013. Unfortunately, her symptoms did not resolve sufficient to allow her to return. She has never been released back to work since her surgery. Her treating physicians feel she cannot do the job. The AME finds she cannot do the job. Only the IME, who ignores and minimizes Respondent's complaints and makes his own interpretations of her job duties finds that she is capable of the 14 Critical Tasks. The same IME whose credibility was rated near zero at the hearing by the ALJ. This decision by ALJ Wong just does not make sense. It is not supported by the evidence, especially the testimony given at hearing. It appears the ALJ did not even consider the hearing testimony.

The medical record, when read as a whole, along with the testimony provided, supports that Respondent has met her burden to demonstrate substantial incapacity. Respondent respectfully requests that the Board reject ALJ Wong's proposed decision and instead make a finding granting Respondent's application for industrial disability retirement.

Dated: February 3, 2016

JONES CLIFFORD, LLP

By: 
Christopher C. Dehner
Attorneys for Respondent,
KRISTEN DEL CARLO

JONES CLIFFORD, LLP

1
2 **PROOF OF SERVICE BY MAIL (CCP § 1013a(3))**

3 I, the undersigned, declare under penalty of perjury under the laws of the State of
4 California that the following is true and correct:

5 My business address is 1390 Market Street, Suite 1200, San Francisco, CA 94102. I am
6 employed in the county where the mailing occurred. I am over 18 years of age and not a party to
the within cause.

7 I am readily familiar with the business practice for collection and processing of
8 correspondence for mailing with the United States Postal Service and, in the ordinary course of
9 business, said correspondence is deposited with the United States Postal Service at San
Francisco, California, on the same day.

10 I placed a true copy of **RESPONDENT'S ARGUMENT, DATED 2/3/2016 AND**
11 **TRANSCRIPT OF HEARING, DATED 10/26/2015** in an envelope addressed to the persons
12 listed below, and each envelope was then sealed and placed for collection and mailing on
February 3, 2016 according to ordinary business practices.

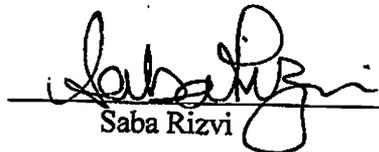
13 Cheree Swedensky, Assistant to the Board
14 CalPERS Executive Office
15 P.O. Box 942701
Sacramento, CA 94229-2701

16 Ms. Kristen Del Carlo

17
18 Elizabeth Yelland, Esq.

19 CalPERS
20 P.O. Box 942707
Sacramento, CA 94229 2707

21
22 Executed on **February 3, 2016**, at San Francisco, California.

23
24 
25 Saba Rizvi

PROOF OF SERVICE