

**ATTACHMENT C**  
**RESPONDENT'S ARGUMENT**

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9 **BOARD OF ADMINISTRATION**  
10 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**  
11

12  
13 In the Matter of  
14 ANGIE WESCO-ALEXANDER,  
15 Respondent,  
16 and  
17 STATE COMPENSATION INSURANCE  
18 FUND,  
19 Respondent.

Case No. 2014-0561  
OAH No. 2014101006

**RESPONDENT'S ARGUMENT IN  
OPPOSITION TO PROPOSED  
DECISION**

20 **I. INTRODUCTION**

21 This matter was heard by Julie Cabos-Owen, Administrative Law Judge ("ALJ"), on  
22 July 15, 2015, and the Proposed Decision was served on March 10, 2016. Respondent,  
23 Angie Wesco-Alexander, hereby submits her Argument in Opposition to the Proposed  
24 Decision. Ms. Wesco-Alexander contends the weight of evidence does not support the  
25 ALJ's conclusion that she was *not* permanently incapacitated for duty.

26 Ms. Wesco-Alexander began employment with the State Compensation Insurance  
27 Fund ("SCIF") in October 1990 as a seasonal clerk. She began working on a permanent  
28 basis in August 1992 and was promoted to Program Technician in March 1999. She

1 worked until March 3, 2010 in this position and was subject to an involuntary layoff on or  
2 about June 12, 2012 due to the closing of her assigned office.

3 Ms. Wesco-Alexander suffered from multiple orthopedic conditions that precluded  
4 her from engaging in the physical functions of a Program Technician. Her treating  
5 physician, Dr. Simon Lavi, and an Agreed Medical Examiner, Dr. Richard Siebold,  
6 prescribed permanent restrictions based upon conditions affecting her cervical spine,  
7 bilateral shoulders, upper extremities, thoracic spine, lumbar spine, and lower extremities.

8 The ALJ erred in dismissing the opinions of these physicians and adopting the  
9 conclusion of CalPERS' retained physician, Dr. Ramin Rabbani, who opined no  
10 restrictions were warranted. The ALJ reasoned that restrictions prescribed by Dr. Lavi and  
11 Dr. Siebold were merely "prophylactic" and for purposes of preventing further injury, and  
12 that Ms. Wesco-Alexander was never shown to be incapable of performing her duties.  
13 This conclusion is contrary to the weight of evidence, and Ms. Wesco-Alexander  
14 respectfully requests independent review by the CalPERS Board and a determination  
15 finding her to be permanently incapacitated.

## 16 II. ARGUMENT

### 17 A. Medical Evidence Supports a Finding of Permanent Incapacity

18 Ms. Wesco-Alexander was disabled from her usual duties as a Program Technician  
19 owing to cumulative industrial trauma and a series of specific injuries. She experienced  
20 industrial trauma as early as April 1994 when she developed pain in both wrists, was  
21 deemed a qualified injured worker and *precluded from prolonged typing*. In 2000 and  
22 2001, she underwent two surgeries on her left shoulder and one on her right shoulder. She  
23 was precluded from repetitive pushing, pulling, *forward reaching*, and *prolonged work at*  
24 *or above shoulder level*. Further surgery on her right shoulder was completed in  
25 September, 2002, and she was deemed to have lost 25% capacity for lifting, pushing,  
26 pulling, grasping, pinching, holding, torqueing, and comparable activities.

27 She developed increased pain in her shoulders and wrists in relation to scanning  
28 duties that required repetitive use of her arms and overhead reaching. She was diagnosed

1 with bilateral carpal tunnel syndrome and underwent carpal tunnel releases, bilaterally, in  
2 2006. In November, 2007, she had a cervical discectomy and fusion due to a herniated  
3 nucleus pulposus and spondylosis. In June, 2009, she was released to modified duty until  
4 she was placed on total temporary disability on March 3, 2010.

5 In June, 2010, she underwent a discectomy, insertion of a disc implant at C4/5, and  
6 removal of hardware at C5/6 and C6/7. In February, 2011, she had a further procedure to  
7 remove a cervical plate. Dr. Lavi deemed her permanent and stationary in May, 2011 and  
8 reported her to be permanently disabled from duty in April, 2013.

9 Dr. Lavi prescribed restrictions *precluding her from holding her head in a fixed*  
10 *position for any length of time, sitting for prolonged periods, performing repetitive*  
11 *motions, prolonged positioning of her neck, low back or upper extremities, and she was*  
12 *unable to perform scanning for hours at a time or typing on a keyboard.* (Factual  
13 Findings, Proposed Decision, ("FF") No. 33(a)).

14 Similarly, in September, 2009, Dr. Siebold had advised she was "to *avoid the*  
15 *scanner if at all possible*, since this repetitive motion of her neck with the scanner  
16 apparently aggravates her underlying cervical spine condition." (Exh. 79, p. 19; emphasis  
17 added). In March, 2013, Dr. Siebold reported Ms. Wesco-Alexander was permanent and  
18 stationary and prescribed permanent work restrictions, including: *no repetitive fine*  
19 *manipulation with her upper extremities, no work at or above shoulder level, repetitive*  
20 *motion, or prolonged positioning of the cervical spine.* (FF No. 30(d)).

21 **B. Work Restrictions Are Incompatible with Duties of Program Technician**

22 In her last permanent assignment as a Program Technician, Ms. Wesco-Alexander's  
23 duties were devoted to scanning and indexing documents. This required extensive,  
24 prolonged, and repetitive use of her upper extremities and fixed positioning of her neck,  
25 and these physical aspects were incompatible with her medical restrictions.

26 **C. Medical Restrictions Were Not Merely Prophylactic**

27 The ALJ dismissed opinions of Dr. Lavi and Dr. Siebold supporting a finding of  
28 incapacity by characterizing medical restrictions they prescribed as serving only to "avoid

1 aggravating her underlying conditions," and viewed them solely as "prophylactic to avoid  
2 future re-injury." (Proposed Decision, pp. 12, 17). The ALJ felt the evidence did not  
3 demonstrate an actual inability to perform work.

4 Ms. Wesco-Alexander experienced debilitating pain, muscle spasms, and radicular  
5 symptoms in her neck, back and upper extremities. Contrary to the ALJ's reasoning, the  
6 prescribing physicians did not envision the restrictions as applying solely to the future  
7 aggravation or re-injury of her condition.<sup>1</sup> Rather, the restrictions reflected  
8 contemporaneous and actual limitations that disabled her from her usual duties.

9 The ALJ relied on the following excerpt from Dr. Siebold's report as indicating the  
10 restrictions to be merely prophylactic:

11 "She is advised to avoid the scanner if at all possible, since this repetitive  
12 motion of the neck with the scanner apparently aggravates her underlying  
13 cervical spine condition." (Exh. 79, p. 19).

14 A full review of Dr. Siebold's report demonstrates that the "aggravation" referred to  
15 an actual and current disabled status. (Exh. 79, p. 3). Ms. Wesco-Alexander had persistent  
16 complaints of pain in her head, neck, bilateral shoulders radiating to the elbows, bilateral  
17 wrists, thoracic and lumbar spine. When performing scanning duties, these pain symptoms  
18 were aggravated throughout and she also experienced whole back spasms. Her disability  
19 was not based on a prospective injury, but actual, current conditions. Similarly, an  
20 extensive treatment history with Dr. Lavi persistently demonstrated these same complaints  
21 and conditions, which precluded her from her usual duties. (Exhs. 2-72).

22 The ALJ also incorrectly relies on Hosford v. Board of Administration (1978) 77  
23 Cal.App.3d 854 for the proposition that the medical restrictions at issue were merely  
24 prophylactic and did not support a finding of incapacity. In Hosford, applicant Hosford  
25 suffered from a variety of orthopedic complaints, which he claimed disabled him from  
26 duty. He relied on medical testimony that sitting for long periods would "probably bother

27 <sup>1</sup> Moreover, the mere "physical capability" of performing duties where reinstatement would  
28 initiate the same debilitating symptoms is "not merely a prospective probability, but a medical  
certainty." Wolfman v. Board of Trustees (1983) 148 Cal.App.3d 787, 791.

1 his back." Id., p. 862. The Court did not feel this opinion meant he was *actually unable to*  
2 *do so*. Id. Moreover, Hosford testified he was capable of engaging in extensive periods of  
3 sitting in his non-work activities; and Hosford's own expert, the family doctor, also  
4 conceded that he was "presently capable of performing" even the more strenuous activities  
5 of his job. Id.

6 Finally, Hosford relied on opinion from his family doctor that the *fear of further*  
7 *injury* was mentally disabling. Id., pp. 863-864. The Court rejected this notion as  
8 *inherently impossible to accept* and described the speculative nature of Hosford's  
9 argument:

10 "Throughout the hearing, and again in his briefs, Hosford relied and relies  
11 heavily on the fact that his condition increases his chances for further injury.  
12 As the Board correctly points out, however, this assertion does little more  
13 than demonstrate that his claimed disability is only prospective (and  
14 speculative), not presently in existence. Id.

15 The ALJ incorrectly equates Ms. Wesco-Alexander's basis for disability with the  
16 *fear of further injury* argument rejected by the Court in Hosford. The disabling features of  
17 Ms. Wesco-Alexander's conditions were not merely prospective or speculative. Medical  
18 evidence unequivocally demonstrated that she suffered from orthopedic conditions that  
19 caused her to experience severe pain, spasms, and radicular symptoms precluding her from  
20 her duties.<sup>2</sup>

21 **D. Undue Weight Given to Opinion by Dr. Rabbani**

22 Ms. Wesco-Alexander was examined by Dr. Rabbani, an orthopedic surgeon  
23 retained on behalf of CalPERS, who opined she could perform her duties with no  
24 restrictions. Dr. Rabbani conceded that she sustained injuries so as to necessitate all the  
25 treatment and surgical interventions leading up to his March 4, 2014 examination. (Exh.

26 \_\_\_\_\_  
27 <sup>2</sup> Also, unlike the applicant in Hosford, Ms. Wesco-Alexander's is not advocating that work may  
28 "probably bother" her neck, back and upper extremities; nor has her treating doctor or the AME  
physician conceded that she can perform the ordinary, let alone more strenuous features of her job.

1 C8). Yet, he is unreasonably dismissive of her persisting complaints of pain, spasm,  
2 numbness and radicular features, despite also describing her to be a credible examinee.

3 Dr. Rabbani's opinion that no restrictions were indicated is not credible. His own  
4 examination revealed restricted range of motion, mild spasm and tenderness in her cervical  
5 and lumbar spine, and restricted range of motion in both shoulders. (Exh. C8, pp. 2-5). In  
6 addition, he failed to administer a grip strength test, which would have demonstrated  
7 reduced grip strength. Dr. Rabbani's finding of only mild spasm and tenderness is also  
8 rebutted by Dr. Lavi's extensive observation of marked spasm and tenderness, including an  
9 examination just two months after Dr. Rabbani's. (Exh. 72).

10 **III. CONCLUSION**

11 Respondent, Ms. Wesco-Alexander, requests that the CalPERS Board review this  
12 Argument in Opposition to the Administrative Law Judge's Decision and order the  
13 Transcript of Testimony and documentary evidence, and review the matter independently.  
14 Upon independent review, the evidence strongly supports a finding of permanent  
15 incapacity.

16 DATED: May 6, 2016

Respectfully submitted,  
  
LEWIS, MARENSTEIN, WICKE,  
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At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 20750 Ventura Boulevard, Suite 400, Woodland Hills, CA 91364-2338.

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Executed on May 6, 2016, at Woodland Hills, California.

  
Terry Hernandez