**ATTACHMENT C**

**RESPONDENTS ARGUMENT**

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Re: Application for Service-Connected Disability Retirement of
JERRI L. CLAY
**RESPONDENT'S ARGUMENT**

Gentlepersons:

Respondent Jerri L. Clay, presents the following Argument in opposition to the Proposed Decision in the above captioned matter.

**Opinions Expressed by Roy Kroeker, DPM Should be Relied Upon in Granting the Disability Retirement** Dr. Kroeker is a podiatrist who rendered treatment to respondent over a period of years and had the best opportunity to assess and evaluate respondent, as compared to Dr. Shah, who saw the respondent on only one occasion.

The ALJ correctly summarized the opinion of Dr. Kroeker, ". . . that respondent cannot walk or stand for more than six hours, work overtime or perform the duties of a CO. . . ." The ALJ then concluded that this testimony does not establish respondent was "substantially incapacitated from the performance of her usual and customary duties as a CO for the Department." We respectfully submit that if a CO cannot walk or stand more than six hours and work the mandatory overtime, then the essential duties of a CO are beyond her capability. It does not matter whether Dr. Kroeker had ever testified in a retirement matter in this case. His experience in testifying at retirement matters is not the question. It is his opinion as to the capability of the respondent which is the most important issue.

**The ALJ Misapplies *Hosford v. Board of Administration* (1978) 77 Cal.App 3d 855** The ALJ argues that the *Hosford* holding is that prophylactic work restrictions cannot serve as the basis for granting a disability retirement. However, that interpretation of the *Hosford* holding is simplistic, and does not truly reflect the intent of the decision.

The *Hosford* decision was based on the testimony of an expert witness who testified as follows:

> ...Hosford could sit for long periods of time but it would "probably bother his back;" that he could run but not very adequately and he would probably limp if he had to run because he had a bad ankle; and he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and might hurt his back; and that he might make physical effort from the sedentary state but he would have to limber up a bit.

First, it should be recognized that Dr. Kroeker was not describing the respondent's inability to work in terms of prophylactic work restrictions. He was stating that she actually cannot perform those duties.

Second, the real holding in *Hosford* is that the physician is not allowed to speculate. The *Hosford* holding was referenced in the case of *Wolfman v. Board of Trustees* (1983) 148 CA.3d 787, where the Court cited *Hosford* and stated, ". . . nor do we find her disability speculative within the context of *Hosford*." In the *Wolfman* case, disability was founded on the severe asthma and chronic bronchitis suffered by the employee. The medical evidence was that it was dangerous for her to return to teaching because of the risk worsening her condition due to her exposure to infectious agents which small children harbor. The reviewing court determined that this work restriction was supportive of a disability retirement. Therefore, the real holding of *Hosford* is that if we are simply speculating that a person may become re-injured, that is not sufficient to support a holding that the person is entitled to a disability retirement. However, if a prophylactic work restriction is founded on non-speculative evidence, such as in *Wolfman*, then it can serve as the basis for such a disability retirement. Therefore, the question is whether the evidence is speculative in the case. In that regard, we do not believe that Dr. Kroeker was speculating. He was testifying on the basis of a significant period of observation and treatment of the respondent.

**The ALJ Confuses Determinations in the Workers' Compensation Case with *Evidence* in Workers' Compensation Cases** The cases cited by the ALJ are supportive of the conclusion that decisions by the Workers' Compensation Appeals Board are not binding, nor do they serve as collateral estoppel, on decisions of a Retirement Board. However, these

cases do not hold that evidence developed in the context of a workers' compensation claim are automatically suspect or inapplicable to a retirement case. When a physician states in the context of a workers' compensation case that a person cannot perform their job, the plain meaning of that statement is just as applicable in the retirement case as it is in the workers' compensation case.

Respectfully submitted,

THOMAS J. TUSAN

TJT:tjp
cc: Jerri L. Clay
Kevin Kreutz, Senior Staff Attorney