

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**



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California Board of Legal  
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Workers' Compensation Law*

June 9, 2020

CalPERS Executive Office  
P.O. Box 942701  
Sacramento, CA 94229-2701

Re: Application for Service-Connected Disability Retirement of JACK HOWARD  
CalPERS Ref. No.: 2019-0399  
OAH No.: 2019070788  
RESPONDENT'S ARGUMENT

Gentlepersons:

We acknowledge receipt of the June 5, 2020 cover sheet issued by CalPERS Legal Office wherein it attaches the "agenda item to be presented to the Board . . . at its meeting scheduled for June 17, 2020." We are concerned that Attachment C states, "Respondent(s) Argument(s) (None Submitted)."

As you should be aware, our office had submitted argument on behalf of Respondent Jack F. Howard by the attached letter dated April 1, 2020. The March 27, 2020 instructions had explained, "Your argument will not be disclosed to the attorney assigned to this matter until then." Accordingly, we did not copy the CalPERS Legal Office with the April 1, 2020 argument. Now, we have received the above-referenced June 5, 2020 communication from the Legal Office which states *no argument* was submitted on behalf of the respondent. While we recognize the stated procedure that the Legal Office was not to be copied with our Argument, we are nevertheless concerned with the statement by the Legal Office that we have not submitted any argument on behalf of Respondent Jack Howard.

Therefore, out of an abundance of caution, we are willing to disclose our April 1, 2020 Argument to the Legal Office, if by doing so, we can assure that it will in fact be presented to the CalPERS Board for consideration.

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Sincerely,

A handwritten signature in black ink, appearing to read 'Tuslan', written over the word 'Sincerely,'.

THOMAS J. TUSAN

TJT:tjp

cc: Jack Howard

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Respondent, Jack F. Howard, through our office, presents the following written argument to be considered in the determination of his pending application for an industrial disability retirement.

### **I. STATEMENT OF RELEVANT FACTS**

Respondent commenced employment at the State Prison in 2007 as a licensed vocational nurse, and continued that employment until an on the job injury that occurred on September 28, 2016, when he exited an exterior door and stepped off into a recessed section of ground that had been created by a construction project. As a result of that mishap, he sustained an injury to his thoracic and lumbar spine, as well as to his right lower extremity and foot. He worked one more day after the industrial injury, but has not returned to work thereafter.

As a result of the industrial injury that occurred in September 2016, respondent underwent surgery on his right knee. As demonstrated by the extensive medical records that were reviewed by both Dr. Williams and Dr. Capell, respondent has received, and continues to receive, medical care for his injuries.

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Other than the opinions expressed by Dr. Williams, who was retained by CalPERS, this medical record does not contain any medical opinions which have released the petitioner to return to his job duties at the prison. William Foxley, M.D., has been the respondent's primary treating physician for this injury. Dr. Foxley has stated his opinion that the respondent's medical condition permanently incapacitates the respondent from returning to his job (Exhibit C). In the context of the workers' compensation claim, the respondent was examined by a neutral medical-legal examiner, Sanjay V. Deshmukh, M.D., who concluded that the respondent was permanently incapacitated from performing his job. Although, Dr. Deshmukh could have qualified his opinion with the use of a term such as "prophylactic restriction," it should be noted that he chose not to make such a qualification. (Exhibits D and E)

We recognize that the opinions of both Dr. Foxley and Dr. Deshmukh came into evidence as administrative hearsay, however, they are being offered in support of the opinions expressed by Joseph T. Capell, M.D., who did testify at the hearing in this matter. Dr. Capell testified that, in his opinion, petitioner is permanently incapacitated from performing the essential duties of his job.

## II. ARGUMENT AND AUTHORITY

**A. Opinion of Treating Physician Carries Weight.** Respondent's Exhibit C is the "Physician's Report on Disability" which was filled out by William Foxley, M.D. Respondent's testimony at the time of the hearing correctly identified Dr. Foxley as his primary treating physician for the industrial injury. The question posed to Dr. Foxley on page of two (2) of this CalPERS form, was, "Is the member currently substantially incapacitated from performance of the usual duties of the position for their current employer?" Dr. Foxley's unqualified answer was, "Yes." In that regard, we make the following assertions in support of a finding herein that respondent is substantially permanently incapacitated from performing his job as a licensed vocational nurse.

First, we acknowledge that since Dr. Foxley did not testify at the hearing, his opinion shall only be accorded the value of administrative hearsay (Government Code §11513(d)) in support of the opinion's expressed by Dr. Capell's testimony. In that regard, the opinion of Dr. Foxley is in direct support of Dr. Capell's opinion that respondent is permanently substantially incapacitated.

Second, it should be noted that Dr. Foxley is the *primary treating physician*. As such, he has had the opportunity to see and examine the respondent on multiple occasions, over a number of months, as compared to the single opportunity which was afforded to Dr. Williams who examined at the request of CalPERS. The benefit of such continued and multiple examinations was recognized in the case of *Brant v. Retirement Board of San Francisco*

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(1943) 57 Cal.App.2d 721, 1943 Cal.App. LEXIS 426, when it held, “The rule is well settled in this state that, as against positive, uncontradicted factual evidence applicable to the particular case, particularly when given by attending physicians, opinions of experts as to probabilities or possibilities (particularly when partially based on erroneous assumptions) created no conflict.” In that regard, we are not claiming that the evidence in this case is “uncontradicted.” Certainly, the opinions expressed by Dr. Williams, who testified on behalf of CalPERS, contradicted all of the remaining opinions stated in this record. What we are asserting, as recognized in the *Brant* case, is that the opinions expressed by a *treating* physician should be afforded significant weight in the determination of medical-legal issues such as permanent incapacity.

**B. Opinions of Dr. Deshmukh.** As with the opinions expressed by Dr. Foxley, discussed above, the opinions expressed by Dr. Deshmukh in his three reports (Exhibits D, E, and F) are offered as administrative hearsay in support of the opinions expressed by respondent’s expert witness, Dr. Capell.

As with Dr. Capell, Dr. Deshmukh had the opportunity to examine respondent on two occasions, separated by a number of months. The first examination was on March 27, 2018 (Exhibit D), and the second was on January 14, 2019 (Exhibit E). As stated above, CalPERS’ expert, Dr. Williams, had only one opportunity to examine the respondent. We respectfully assert that two examinations over a period of nine (9) months, allows the evaluating physician to have a better opportunity to assess not only the extent of the incapacity, but also the permanency of the incapacity.

We anticipate that CalPERS will assail the opinions expressed by Dr. Deshmukh as opinions expressed in the context of the workers’ compensation claim which may consider *prophylactic* work restrictions, as compared to actual work restrictions. However, a careful reading of the reports of Dr. Deshmukh will demonstrate that none of these reports (including the supplemental report which is Exhibit F), qualified his opinion as being only a prophylactic opinion. His first report (Exhibit D) states that respondent is “precluded for repetitive kneeling and squatting, precluded for repetitive bending, twisting, limited lifting, pushing and pulling and pulling to 25 pound.” (page 14) At the time that Dr. Deshmukh had stated these incapacities, he had not yet found the respondent to have reached a permanent status. However, nine (9) months later, when Dr. Deshmukh found there was no further improvement or deterioration was likely, he repeated all of these as permanent incapacities.

**C. Opinions expressed by Dr. Williams.** It is of note that during his testimony on direct and cross-examination, Dr. Williams chose to state his opinions in a manner by which they left room to find that the respondent is entitled to a finding of permanent incapacity to perform the essential duties of his job.

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First, the hearing record will reflect that instead of testifying that the respondent could perform all of the essential job duties (functions) of a licensed vocational nurse, Dr. Williams chose to testify that respondent was capable of performing a “substantial portion” of those job duties. At another point in his testimony, Dr. Williams chose to express this opinion in terms of the respondent being capable of performing a “majority” of those job duties.

Both parties offered into evidence the same two exhibits in relation to the essential job duties and requirements of respondent's job as a licensed vocational nurse. These were marked and received into evidence as CalPERS' Exhibits 12 and 13. Whereas Exhibit 12 includes both “Administrative Functions” and “Physical Functions,” Exhibit 13 only lists physical requirements. For the sake of discussing the opinions expressed by Dr. Williams, we are going to assume that when he referenced a “substantial portion” or the “majority” of the job functions, that he was only referring to the *physical* functions that are the subject of this matter, rather than the “Administrative Functions” which are mental or intellectual in nature.

Therefore, when we apply the opinions expressed by Dr. Williams to either Exhibit 12 or 13, we have the task of determining the meaning of his opinions in that context. In the context of Exhibit 12, there are twenty-one (21) bullet points of the essential physical requirements. Based on Dr. William's opinion, one can find that the respondent could perform eleven (11) of those essential duties [which would be a “majority” of those functions], and that the respondent is not capable of performing the balance of ten (10) of those functions. Of course, we do not know which of the *essential* functions are to be placed in the “majority” and which in the minority. But if we assume the minority are still *essential*, it would also be reasonable to assume that the respondent is substantially incapacitated from performing his job.

The same analysis can be applied to the Exhibit 13, which lists 31 physical “requirements.” Even if we were to assume that there were only ten (10) of those 31 physical **requirements**, which the respondent could not perform, would that not be an appropriate basis on which to find that the respondent is substantially incapacitated from his job?

**D. Comparison of roles of each of the medical-legal evaluators.** There are four medical-legal evaluators in this case. Each of the respective sides in this litigation has retained its own expert – respondent has Dr. Capell, and CalPERS has Dr. Williams. Each of these parties has paid their respective expert to formulate and express an opinion in support of its position. By saying this, we are not implying that either of these doctors is dishonest. However, it would be naive to believe that neither of them did not understand they were hired to advocate on behalf of the party who retained them.

On the other hand, we have Dr. Deshmukh who is serving as a panel qualified medical examiner (PQME) in the context of the workers' compensation case. Even Dr. Williams acknowledge that when a physician serves in that capacity, they understand that they are to

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be neutral and not serve as an advocate for either *side*. They are supposed to “call it the way they see it.”

Even if one were to argue, as CalPERS argues, that Dr. Deshmukh’s opinion is a workers’ compensation opinion, which is not rendered in the context of the disability retirement case, one would have to acknowledge that his opinion is far more supportive of the opinions expressed by Dr. Capell, than those opinions expressed by Dr. Williams. Therefore, we have an opinion from a doctor who even Dr. Williams acknowledges is a neutral examiner, that sides with the opinion expressed by Dr. Capell rather than the opinion of Dr. Williams.

**E. Credibility of the respondent.** Other than the two medical-legal experts, the only other witness to testify in this matter was the respondent. The respondent’s testimony was straightforward. For instance, he did not testify that he absolutely needs to use a cane to walk. Rather, he testified that using the cane was for stability. That lack of stability was verified by the testimony of Dr. Capell who explained that during his examination of the respondent, he observed the respondent’s walking, and that Dr. Capell provided some assistance in steadying the respondent as the respondent walked.

In fact, there was *objective* evidence presented that verified the ongoing disabling condition suffered by the respondent. Exhibit M is an MRI of the right ankle performed on January 2, 2019. This is an objective test which is not reliant on what the patient says. This MRI, as read by the radiologist, shows “. . . edema . . in the surrounding soft tissues around the lateral malleolus of the fibula with ligament sprain seen in the calcaneal fibular ligament.” And the radiologist reported, “There is also ligament sprain seen in the medial deltoid ligament.” In addition this MRI showed three additional abnormalities. Note that the injury was in September 2016, and that an MRI done over *two years* later, is still showing abnormalities. This is further support of the credibility of the respondent’s testimony that he continues to suffer the debilitating effects of the industrial injury. In this regard, we would caution any conclusion being reached by looking at the subsequent radiology study that was done on January 16, 2020. That study was a CT of the right foot. At “first blush” this report appears to show no gross abnormalities, however, note that the radiologist who read the CT points out that it was not expected to show what an MRI would show. The radiologist states, “The ligament injuries cannot be commented on CT scan because they are better visualized on the MRI study.” (Exhibit N)

#### IV. CONCLUSION

By means of credible testimony from the respondent, together with well reasoned opinions expressed by Dr. Capell, we have presented proof of the respondent’s permanent incapacity. That incapacity is further supported by unbiased hearsay evidence from both the treating physician who had multiple opportunities to observe and treat the respondent, as well as the

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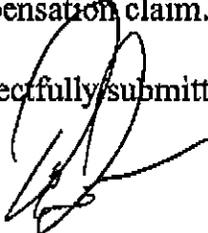
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unbiased hearsay evidence of Dr. Deshmukh who examined in the context of the workers' compensation claim. Together, this evidence compels a finding of permanent incapacity.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Tusan', is written over the text 'Respectfully submitted,'.

THOMAS J. TUSAN

TJT:tjp

cc: Jack Howard