

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Appeal of Reinstatement from Industrial  
Disability Retirement of:**

**SETH D. HORST, Respondent**

**and**

**CALIFORNIA HIGHWAY PATROL, Respondent**

**Agency Case No. 2022-1039**

**OAH No. 2023030596**

**PROPOSED DECISION**

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephone on December 14, 2023, and January 25, 2024.

Mehron Assadi, Staff Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Steven W. Welty, Attorney at Law, represented respondent, Seth D. Horst, who was present throughout the hearing.

There was no appearance on behalf of respondent California Highway Patrol.

Oral and documentary evidence was received. The record remained open to allow the parties to submit written closing arguments including complainant's closing brief, respondent's closing brief, and complainant's rebuttal brief. The record was closed, and the matter was submitted for decision on February 15, 2024.

## **ISSUE**

Is respondent<sup>1</sup> still substantially incapacitated from performing the usual and customary duties of a California Highway Patrol officer due to a repaired left inguinal hernia and related ilioinguinal nerve condition such that he cannot be reinstated to his former position?

## **PROTECTIVE ORDER SEALING CONFIDENTIAL RECORDS**

Multiple exhibits, specifically Exhibits E, F, G, H, J, K, L, M, O, P, Q, and R, were received into evidence and contained confidential medical information. It is impractical to redact the information from those exhibits. To protect respondent's privacy and the confidential personal information in those exhibits from inappropriate disclosure, the

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<sup>1</sup> Respondent refers solely to Seth D. Horst throughout this decision, and respondent California Highway Patrol will be referred to as CHP.

exhibits are ordered sealed. This sealing order governs the release of those documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this order, provided that the documents are protected from release to the public.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Respondent was employed by the California Highway Patrol (CHP) as an Officer. By virtue of his employment, respondent was a state patrol member of CalPERS.

2. On December 10, 2020, respondent signed an application for industrial disability retirement, which was received by CalPERS on December 15, 2020. Respondent's application stated that he incurred a "left inguinal hernia (repaired) and ilioinguinal nerve pain" on May 12, 2017, as a result of "lifting and moving a pallet of boxes of paper." On February 10, 2021, CalPERS approved respondent's industrial disability application on the basis of internal (abdomen/groin strain) condition, and respondent retired for industrial disability effective April 2, 2021.

3. On May 26, 2022, CalPERS sent a letter to respondent advising him of its intent, in accordance with applicable law, to conduct a review and re-evaluation to ensure that he was still eligible for an industrial disability retirement. CalPERS also requested documentation from respondent, including completion of a Retiree Questionnaire for CalPERS Disability Re-evaluation, and documents from each of respondent's treating physicians. On June 5, 2022, respondent signed the completed

Retiree Questionnaire for CalPERS Disability Re-evaluation, which CalPERS received on June 13, 2022. Respondent submitted additional documents, and CalPERS reviewed respondent's submissions. Thereafter, CalPERS required respondent to undergo a re-evaluation examination from an Independent Medical Examiner.

4. On September 23, 2022, respondent underwent a re-evaluation examination by Amardip Bhuller, M.D., an independent medical examiner retained by CalPERS. Dr. Bhuller submitted a report of his re-evaluation examination of respondent to CalPERS, as well as three supplemental reports thereafter.

5. On December 5, 2022, CalPERS notified respondent that it had reviewed all medical reports, including the re-evaluation examination report, and the first supplemental report, completed by Dr. Bhuller, as well as reports from David McKinney, M.D., and determined as follows:

Based on the evidence in those reports, it is our determination that you are no longer substantially incapacitated from the performance of your job duties as an Officer with Department of California Highway Patrol due to your general surgery (abdomen/groin strain) condition(s).

6. By letter dated December 13, 2022, respondent appealed the discontinuance of his industrial disability retirement, and this hearing followed. CHP did not appeal CalPERS's determination that respondent should be reinstated to his former position. In his appeal letter, respondent wrote that he was unable to perform required job functions of a CHP officer because, "I am unable to wear a duty belt or Kevlar vest while sitting."

7. On March 6, 2023, complainant filed the Accusation in his official capacity, seeking to reinstate respondent to his former position with CHP based on the determination that he is no longer substantially incapacitated from performing the usual and customary duties of an officer due to his internal (abdomen/groin strain) condition.

### **Job Duties of a California Highway Patrol Officer**

8. A document entitled, "Physical Requirements of Position/Occupational Title" was submitted as evidence. The document identifies those job duties for an Officer that are considered infrequent (up to 30 minutes), occasional (up to 2.5 hours), frequent (2.5 to 5 hours), constant (over 5 hours), and never or rarely (under 5 minutes). Both respondent and a representative for his employer signed the document agreeing with its contents on October 9, 2020. The document identifies activities that are frequently required to be performed as interacting with the public face to face and by phone, lifting up to ten pounds, sitting, computer use on a keyboard, and driving. The document identifies activities that are occasionally required to be performed as interacting with coworkers, lifting or carrying 11 to 25 pounds, standing, walking, bending at the neck and waist, twisting at the neck and waist, and light grasping. The document identifies activities that are infrequently required to be performed as lifting or carrying 25 to 50 pounds, kneeling, reaching above the shoulder, reaching below the shoulder, fine grasping, and walking on uneven ground. The document identifies the following activities as never or rarely required to be performed: interacting with inmates, supervising staff, lifting or carrying over 50 pounds, running, crawling, climbing, pushing and pulling, power grasping, operating hazardous machinery, exposure to excessive noise, exposure to extreme temperature, exposure to dust, gas fumes or chemicals, and working at heights.

9. A document entitled "California Highway Patrol Officer 14 Physical Activities" was also submitted as evidence. That document generally describes the duties of a CHP Officer and provides representative job tasks, the frequency of performance of those tasks, and the duration of activity when those tasks are performed. The document identified a number of activities, but the specific activities at issue in this matter include: lifting or carrying, sitting and driving. For those activities, the document provides that a CHP Officer is required to "sit in a patrol car for an extended period of time during patrol or surveillance" for a frequency of "1 to 3 times per day" and a duration of "1 to 2 hours" on each occasion. With regard to driving, the document provides that a CHP Officer is required to drive a vehicle under a variety of conditions for a frequency of up to "1 to 3 times per day" for a duration of up to "30 to 45 minutes." With regard to lifting or carrying, the document provides that a CHP Officer is required to "lift or carry objects weighing 10 to 25 pounds (e.g. gear bag)" for a frequency of "1 to 3 times per day" for a duration of "2 to 5 minutes." The document also provides that a CHP Officer is required to "without assistance lift and carry objects weighing 30 to 50 pounds (e.g. car tire road debris)" for a frequency of "1 to 3 times per month" for a duration of "1 minute." The document also provides that a CHP Officer is required to "with assistance lift and carry an individual resisting arrest (20-35 feet)" for a frequency of "1 to 2 times per year" for a duration of "1 minute."

### **Investigation Conducted by CalPERS**

10. Benjamin Barba is employed by CalPERS as an investigator, a position he has held for over five years. His duties include conducting investigations regarding disability retirement applications and re-evaluation of disability retirement and creating reports and documentation regarding his investigations. Mr. Barba conducted an investigation of respondent for a re-evaluation of his disability retirement, and

drafted a report regarding his investigation. Typically, Mr. Barba will conduct undercover surveillance of individuals and film them performing daily activities as part of his investigations. However, because respondent lives in Idaho, Mr. Barba's investigation of respondent consisted only of reviewing information available on the internet, social media, and other open sources, where he collected multiple videos of respondent, and other information. Mr. Barba testified at the hearing and the following factual findings are based upon his testimony, his report, and video evidence received in the record.

11. Mr. Barba used internet search engines to find multiple videos of respondent on social media, such as Facebook, and YouTube. Respondent lives in Coeur d'Alene, Idaho with his family and owns and operates a real estate business with his wife. Respondent, his wife, and other realtors on respondent's team, sell real estate throughout Coeur d'Alene and Northern Idaho. Respondent has been licensed to sell real estate in the State of Idaho since February 4, 2021, and his license is currently active.

12. Additionally, respondent is very active in Brazilian Jiu-Jitsu (BJJ) and currently holds a "purple belt." Respondent also currently trains in BJJ at a facility called Sparta Training Academy (STA) located in Coeur d'Alene, Idaho, and he has competed in full contact amateur BJJ tournaments. Mr. Barba located respondent's "fight record" from a public source website, [www.smoothcomp.com](http://www.smoothcomp.com), showing that respondent's last BJJ competition fight at a tournament was on March 26, 2022, at the North Idaho College Christian Gym in Coeur d'Alene, Idaho, where he won one match and lost one match at that tournament. In addition to training at STA, respondent frequently appears as an instructor in multiple videos, posts, photos, and training videos posted on STA's website and social media accounts. The training videos, some



of which were received in evidence, show respondent demonstrating BJJ techniques with other instructors and students. The photographs and videos received in evidence dated from October 18, 2021, to April 11, 2022. All the video content Mr. Barba found on the STA website, respondent's social media accounts, and other public websites showing respondent, were uploaded after mid-2021 and after respondent moved to Idaho.

13. In another video received in evidence, respondent can be seen wearing a ballistic vest, carrying a firearm, and standing at the doorway of a home. The video appears to be a form of advertisement for his real estate business and is titled, "When your realtor is a former cop: Finding a Realtor in N. Idaho." Respondent was not shown in the video wearing the ballistic vest while sitting. In another video, respondent appears to be promoting an intravenous nutrient business and is seen doing push-ups on the floor while interviewing the owner of the business.

### **Independent Medical Re-Evaluation Examination**

14. Amardip Bhuller, M.D., is board-certified in general surgery and plastic surgery, and has worked as a surgeon since 2006. Dr. Bhuller has been licensed to practice medicine in California since 2012. He is also licensed to practice medicine in Nevada, Nebraska, Iowa, Indiana, and in the United Kingdom. He currently practices as a staff surgeon at Riverside Community Hospital in the level 2 trauma center, a position he has held since April 2018. He also currently practices as an Associate Professor of Plastic Surgery at Loma Linda University, a position he has held since February 2023. Dr. Bhuller obtained his medical degree in 1993 from the University of Sheffield in Sheffield, United Kingdom. He completed a residency in general surgery in 2003 from Indiana University School of Medicine. He also completed a fellowship in Plastic Surgery in 2006 at Cleveland Clinic Foundation in Cleveland, Ohio. From 2006

to 2018 he worked as a Staff Surgeon and the Division Chief in the Division of Plastic Surgery at Creighton University School of Medicine in Nebraska. In addition to his work as a surgeon, Dr. Bhuller has worked as an Independent Medical Examiner for CalPERS and has completed a total of three independent medical examinations (IMEs) for CalPERS including this matter.

15. In a letter dated August 25, 2022, Dr. Bhuller was appointed by CalPERS to provide an IME of respondent to evaluate respondent's disability status to perform his duties as a CHP officer. The letter further requested Dr. Bhuller to review the job descriptions for a CHP officer, as summarized above, medical records, CalPERS's investigative report of Mr. Barba with included videos discussed above, and to provide a written report regarding his IME, including answering six specific questions listed in the letter regarding respondent's disability status. Dr. Bhuller performed the IME on September 23, 2022, and drafted a report summarizing his findings based upon his interview and examination of respondent and review of records provided. Dr. Bhuller spent four hours reviewing medical records and documents, 45 minutes interviewing and examining respondent, and three hours preparing his report in this matter. With regard to his three subsequent supplemental reports in this matter, Dr. Bhuller spent an additional two hours reviewing medical reports and ten minutes preparing his second supplemental report. No information was provided on the amount of time he spent preparing his first and third supplemental reports. The following factual findings are based upon Dr. Bhuller's testimony and reports received in evidence.

Dr. Bhuller reviewed multiple videos of respondent performing various tasks as provided to him by the CalPERS investigator. Dr. Bhuller testified about those videos and wrote in his report regarding his observations from those videos. He wrote that one video of respondent performing Brazilian Jiu-Jitsu shows respondent lying on the

floor with leg abduction and pressure being exerted on the left ilioinguinal region with respondent showing no difficulty or pain in the movement. Dr. Bhuller noted one video showing respondent wearing "a flack jacket" promoting his business with no difficulty. Dr. Bhuller also noted one video showing respondent jumping into a lake and "jumping off a cliff into water" without any difficulty.<sup>2</sup> Dr. Bhuller additionally noted that "video investigation" showed respondent "backpacking around Idaho" that showed respondent had "no difficulty performing in an outdoor environment."<sup>3</sup>

16. Dr. Bhuller testified that on September 23, 2022, the day of the IME, Dr. Bhuller observed respondent in the parking lot of Dr. Bhuller's office complex prior to his appointment getting out of a low seated car and walking into the office complex with no discomfort or difficulty. Dr. Bhuller explained that typically people with ilioinguinal pain avoid low seating cars because getting in and out of them can exacerbate the pain. Dr. Bhuller testified that respondent's injury occurred on May 12, 2017, while lifting heavy objects at work. Specifically, respondent incurred a left inguinal hernia from this injury, that was repaired by surgery using a mesh on December 26, 2017. Dr. Bhuller stated that respondent last saw David W. McKinney, M.D., by telehealth appointment on August 19, 2020. On October 20, 2020, Dr. McKinney completed the Physician's Report on Disability for respondent with the last

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<sup>2</sup> Notably, no such video showing respondent jumping into a lake was received into evidence or offered by complainant. Accordingly, no conclusions were drawn regarding any such video.

<sup>3</sup> No such video depicting respondent backpacking anywhere was offered or received in evidence. Accordingly, no conclusions were drawn regarding any such video.

visit to Dr. McKinney being that telehealth visit. Dr. McKinney found that respondent had (1) hypersensitivity on left groin, and (2) ilioinguinal nerve pain and was substantially incapacitated from performance of the position of a CHP officer because he cannot lift more than 30 pounds, cannot sit for prolonged period of time wearing a ballistic vest, and cannot wear a duty belt, all of which causes pain. Dr. McKinney opined that respondent's incapacity was permanent.

On September 23, 2022, at the IME, respondent complained of pain and discomfort while in both the standing and sitting position, and he complained that he had pain from sitting for prolonged periods of time, which prevented him from wearing a gun belt. Respondent also complained of ilioinguinal nerve pain. In his physical examination of respondent during the IME, Dr. Bhuller found no evidence of any hernia recurrence, no evidence of any abdominal masses, and no evidence of any recurrent varicocele, which is a swelling of the testes and epididymis in the scrotal sac. Dr. Bhuller found no objective evidence of any condition that would cause respondent to have left ilioinguinal pain. Dr. Bhuller also found no objective evidence of any health condition that was caused by respondent's 2017 hernia or its surgical repair. Dr. Bhuller watched respondent walk and saw no gait disturbance or other indications of exertion causing pain.

17. Dr. Bhuller interviewed respondent during the September 23, 2022, IME and asked respondent if he had any follow-up with a pain specialist or any physicians in Idaho regarding the pain that he was complaining about since he had his hernia repair surgery in December 2018. Respondent informed Dr. Bhuller that he had not done so. During the years since the December 2018 surgery, respondent had sought no treatment from any physician regarding his asserted pain. Dr. Bhuller testified that there was a "substantial lack of medical records" from after the hernia repair surgery in

December 2018 until the September 23, 2022, IME. Only after Dr. Bhuller's IME was performed on September 23, 2022, did respondent have any medical appointments regarding his asserted pain.

18. Dr. Bhuller testified that ilioinguinal pain, which is pain in the groin region and above the genitals, can be exacerbated by putting pressure on the groin or hip area. Dr. Bhuller stated that respondent provided medical records from his physical therapy appointment on October 13, 2023, that noted that respondent "has pain with resisted hip flexion." Dr. Bhuller also noted that multiple video clips of respondent performing Brazilian Jiu-Jitsu movements, taken from mid-2021 up to prior to the September 23, 2022, IME, showed an opponent placing pressure on respondent's hip and groin area and did not appear to result in any pain to respondent. Dr. Bhuller noted that the video clips of respondent performing various Brazilian Jiu-Jitsu movements with a partner show respondent engaging in exertional activities that would normally exacerbate ilioinguinal pain, but respondent did not appear to be in pain. One video of respondent doing push-ups with no apparent pain is an example of respondent clenching his abdomen, which is necessary to do a push-up, with no pain.

19. Dr. Bhuller also reviewed recent medical records from respondent that were created after the September 23, 2022, IME and completed a supplemental report regarding that record review. Dr. Bhuller noted that he reviewed Dr. McKinney's report from the March 1, 2023, as well as reports from a pain specialist and urologist after office visits in April 2023. Dr. Bhuller noted that the urologist did not perform any abdominal examination of respondent to rule out abdominal hernia. Respondent complained of ilioinguinal pain and received a nerve block from the pain specialist in April 2023. Dr. Bhuller noted that respondent had not been seen by any physician in

the past three years and the timing of the nerve block and pain specialist visits was concerning. In his supplemental report Dr. Bhuller wrote:

After being symptom free for three years and requiring no follow up until IME where he was able to perform strenuous exercises, he has now developed pain. He could have easily developed a recurrent hernia or developed pain after being a jujutsu [sic] instructor. Further therapy and examination are required to rule out a hernia recurrence.

Dr. Bhuller also noted that respondent did not have a recurring hernia ruled out in any of those March or April 2023 visits with physicians. Dr. Bhuller stated further that his review of Dr. McKinney's report from the March 1, 2023, visit did not include any objective evidence of respondent's pain and no objective findings from Dr. McKinney. Dr. Bhuller also noted that Dr. McKinney did not review the video evidence of respondent's Brazilian Jiu-Jitsu activities and made no effort to examine the list of tasks necessary for a CHP officer. Dr. McKinney made no effort to assess respondent's physical capacity for lifting, either. Dr. Bhuller also testified that the video evidence shows respondent dragging an adult male across the floor with no issues.

20. Dr. Bhuller's final supplemental report is dated August 1, 2023. In that report, Dr. Bhuller directly answered three specific questions posed by CalPERS based upon Dr. Bhuller's September 23, 2022, IME of respondent. The following are the three questions and Dr. Bhuller's answers to those questions he provided in his report.

1. Does the retiree have an actual and present abdomen and groin strain impairment that arises to the level of substantial incapacity to perform their usual job duties?

No. Based on the review of the examinee's job activities, referring to the job description by California Highway Patrol 14 critical physical activities, observations of direct video evidence of him performing Jujutsu [*sic*] and physical activities including jumping off a cliff, he is able to sit, stand, walk, run, climb, and jump, clearly demonstrated in the video, push and pull, and driving was observed coming into the examination. Visual acuity, hearing, and vision were not assessed during his examination.

2. Considering the retiree's subjective complaints and the objective findings (or lack thereof) on the examination and medical records, what findings lead you to the conclusion the retiree is or is not substantially incapacitated? Please explain fully.

The examinee was able to drive in without any difficulty **with a low seat in a car**. He has been leading a healthy active life in Idaho for the last three years. He has not seen any physicians in the last three years since leaving California with regard to the chronic pain issues or abdominal and groin pain. He has been seen performing physical exercises such as Jujutsu, [*sic*] jumping off cliffs into water, running up the stairs, wearing a flak jacket and guns without any incapacity.

3. If you find the retiree to be substantially incapacitated, is the incapacity permanent or temporary? If temporary, how long will the incapacity last? Please explain in detail.

I do not feel that the subject is permanently incapacitated as can be seen by the video at the time of my examination.

21. Dr. Bhuller testified at hearing that he has reviewed all medical records and other evidence provided by respondent since the September 23, 2022, IME and after consideration of all that evidence, Dr. Bhuller's opinions and conclusions as set forth above have not changed.

### **Testimony of Respondent's Medical Expert**

22. David McKinney, M.D., is currently retired from his position as an occupational medicine physician. He obtained his medical degree in 1982 from University of Southern California School of Medicine and completed his residency in family medicine in 1985 at the University of Wyoming. He also obtained a master's degree in public health in 2005 from the Medical College of Wisconsin. Dr. McKinney is board certified in occupational medicine. He has been licensed to practice medicine in California since 1985. Dr. McKinney treated respondent beginning on June 13, 2017, for his occupational injury that occurred on May 12, 2017. The following factual findings are made from Dr. McKinney's testimony and related documents received in evidence.

23. Respondent first came to see Dr. McKinney on June 13, 2017, for "a hernia." In the medical records for that visit Dr. McKinney wrote, in part, as follows:



Mr. Seth Horst is a right-handed 36 year old male who worked at CHP at the time of his injury. His industrial injury occurred on 05/12/17. His groin/genitalia was injured due to repetitive use 6/3/17. The patient works as a police officer. He reports that his wide and heavy (20-25 lbs) belt buckle has been pressing into his groin area over the last year leading to increasing pain. He finally reported his L Inguinal and L testicular pain a month ago after his pain increased when he lifted a 40 lb. box. . . .

Dr. McKinney stated that he ordered an ultrasound, which was completed on July 19, 2017, and ultimately diagnosed respondent with a hernia. Dr. McKinney became respondent's treating physician. Dr. McKinney referred respondent to have surgery from Dr. Randell Skau to repair the hernia, which he did on December 26, 2017. Dr. McKinney remained respondent's treating physician even after the hernia repair surgery. Dr. McKinney stated that it appeared from the surgical report that respondent's hernia repair surgery was successful. Dr. McKinney noted, and medical records reflect, that Dr. Skau released respondent back to modified duty as a CHP officer on January 17, 2018. Dr. Skau had scheduled that respondent be released to full duty as an officer with CHP on February 2, 2018. Dr. McKinney testified that he can't remember whether Dr. Skau released respondent back to work or if Dr. McKinney did. Dr. McKinney also stated that he did not recall respondent's feelings regarding his return to work. However, medical records for respondent from Dr. McKinney show that as of February 14, 2018, respondent was back to full-duty work and had some residual left inguinal pain at a level of 2 out of 10. Dr. McKinney stated that it is not unusual to have such residual pain, and that "there is some sensitivity in that area for some time."

24. Dr. McKinney also testified that prior to respondent returning to work full-time, Dr. McKinney performed a functional capacity evaluation, which is required by the State of California, to determine if respondent had any restrictions to his work duties. In respondent's case, Dr. McKinney cleared him to go back to work full-time with no restrictions.

25. Dr. McKinney testified that, with regard to the hernia repair surgery respondent had, the majority of patients receiving that surgery have a complete resolution of symptoms from the surgery while others still have some symptoms that may bother them. Still other individuals may have remaining symptoms that impair them in some way on a long-term basis. In those individuals who have persistent pain, Dr. McKinney stated, "we may not figure out where the pain is coming from." After respondent went back to work on full duty, respondent came back to see Dr. McKinney by telehealth appointment on August 19, 2020, because he continued to have groin pain, which was incapacitating him "if he has to drive a patrol car for any prolonged period of time or if he even has to sit at a desk, but especially if he has to wear his duty belt or duty vest." Notably, Dr. McKinney did not examine respondent on August 19, 2020, because the appointment was through telehealth and not in person. Dr. McKinney made his conclusion that respondent was permanently unable to return to his duties as an officer with CHP based exclusively on respondent's reports of pain. Prior to the August 19, 2020, telehealth appointment, respondent underwent another ultrasound to determine if he had a recurrence of the hernia. The ultrasound results showed no such recurrence. Based on the August 19, 2020, telehealth appointment, Dr. McKinney signed the CalPERS Physician's Report on Disability on October 20, 2020, that provided that respondent is permanently disabled from returning to work as a CHP officer because of hypersensitivity in the left groin area and ilioinguinal nerve

pain, and that as a result respondent is unable to lift more than 30 pounds, unable to sit for prolonged period of time wearing a vest, and unable to wear a duty belt.

26. Dr. McKinney acknowledged during his testimony that a nerve block is sometimes utilized to alleviate the type of pain respondent complained about. However, in respondent's case, Dr. McKinney never ordered such a nerve block for respondent. Dr. McKinney also noted that his statement in the CalPERS Physician's Report on Disability for respondent that he cannot lift over 30 pounds was "prophylactic" in nature and that respondent can in fact lift over 30 pounds. However, Dr. McKinney stated that he would not want respondent lifting more than 30 pounds "on a regular basis" and that at his job respondent could not choose how or "under what circumstances" he would have to lift 30 pounds. Dr. McKinney stated that there are additional treatments respondent could use for his pain that could improve his pain, but Dr. McKinney does not believe those treatments would allow respondent to return to work.

27. Dr. McKinney wrote a report dated February 2, 2023, wherein he provided "a rebuttal of [Dr. Bhuller's] evaluation" of respondent that he was fit to return to duty as a CHP officer. Dr. McKinney testified and wrote in his report that Dr. Bhuller's evaluation was "inaccurate" because he "made no effort to make the assessment on Mr. Horst's ability to do his work as a law enforcement officer versus doing these activities in a noncombat duty setting (recreational)." Dr. McKinney testified that the nature of respondent's job is that he "was likely to have to do something in an extreme manner like run after a suspect, fight, physically restrain someone, etc.," and that officers do "extraordinary duty" that he equates to "combat duty." Dr. McKinney wrote in his February 2, 2023, report that "[c]hronic pain would preclude him from combat duty. With respect to treating chronic pain,

recommendations have been made in my original report about him seeing a physician, pain management doctor and he is trying to pursue those as discussed above.”

Notably, respondent did not seek to have any treatment from a pain management doctor or other physician until after Dr. Bhuller rendered his opinion that respondent was fit to return to his duties as an officer with CHP. Dr. McKinney also stated that he had seen some parts of the videos reviewed by Dr. Bhuller, but he noted that those videos depict respondent “doing something recreational,” and nothing in the videos changed his opinions in this matter. He stated that most of the videos show respondent “being placed into a position,” and he “did not see anything that was highly active.” Dr. McKinney admitted that he had not seen all of the videos referenced by Dr. Bhuller.

28. Dr. McKinney testified that he agrees that respondent is physically fit, but that he can be physically fit and still be disabled from working as a CHP officer. He stated that respondent “can be fit on his own time” and that “you can be healthy, but not be able to do extraordinary duty like police officers must do, like combat duty.” Dr. McKinney stated that “being disabled from combat duty does not mean you are disabled from life.”

29. On cross-examination Dr. McKinney admitted that he has not physically examined respondent since he left California in December 2020, and does not recall when he last conducted a physical examination of respondent in person. His last appointment with respondent was by telemedicine in August 2020, but that was not an in-person examination. Dr. McKinney does not recall if he ever referred respondent to a pain medicine specialist, but he understands that respondent is now seeing a pain specialist in Idaho after Dr. Bhuller gave his evaluation. Dr. McKinney also admitted

that his understanding of respondent's condition is based exclusively on respondent's reports of the pain he is experiencing.

30. On cross-examination Dr. McKinney also admitted that he is not familiar with the CalPERS disability standards and stated that "it would have to be explained to me." Dr. McKinney first examined respondent in the worker's compensation context.

## **Respondent's Testimony**

31. Respondent is 43 years old and currently lives in Idaho where he works as a real estate agent. Respondent works from a standing desk to avoid sitting and limits his driving time. Respondent moved to Idaho because he knew he was retiring and wanted a cheaper cost of living.

32. Respondent worked as a CHP officer from 2007 to 2020 when he retired. He worked 10-hour shifts as a CHP officer, and he would spend up to six hours per day sitting in a patrol car. Respondent wore the tan CHP officer uniform with a Kevlar ballistic vest under his uniform, and a duty belt. The vest is worn over the shoulder and around the abdomen tight on the body from below the throat to below the belly button. He stated that when you sit, the top of the vest rests "along the top of the thighs." The vest weighs about five to ten pounds. The duty belt is made of a "plastic material" that is about 2.5 inches wide and is very rigid. The duty belt weighs about 20 pounds, and the weight is spread around the perimeter of the belt. When sitting, the belt rests just below the belly button and at the top of the thighs.

33. Respondent first encountered hernia problems in May 2017 when he was moving a pallet of copy paper into a shed during work as an officer. During that May 2017 incident, respondent experienced pain in his left testicle that was about a four to six on a scale going up to ten. Respondent filed a worker's compensation claim for

that injury and Dr. McKinney was his treating physician for that workers' compensation claim. Respondent had the hernia repair surgery to treat the hernia and was off work for about one month. The scar for that surgery is about three inches long and located on respondent's lower left abdomen below his belly button and where you would wear a duty belt. After a month of recovery from the surgery, respondent was cleared to return to full duty work as a CHP officer. Even after returning to work, respondent continued to have "low grade pain" in his left testicle. In order to treat the continuing pain, respondent underwent physical therapy and ultrasound was used to "break up the scar tissue." According to respondent, the surgeon told him that he could not "go on nerve blocking medications" because he would not be able to drive. As a result, respondent "mostly treated with ibuprofen." The surgeon told respondent that the pain was caused by potential nerve damage.

34. Respondent testified that he was "taken off work multiple times" from 2017 to 2020 until he officially retired in April 2021 because he was experiencing groin pain from sitting in a patrol vehicle while wearing a duty belt and ballistic vest. Respondent stated that he would get a burning sensation in his inner left thigh and left testicle. He stated that if he "worked multiple days in a row, [his] left testicle would swell, and it would be hard to wear underwear." Respondent stated that in 2020 Dr. McKinney did not clear him to go back to normal patrol duty because of his pain, and he filed for disability retirement based on Dr. McKinney's Physician's Report on Disability dated October 20, 2020. Respondent testified that as of October 20, 2020, he did not receive any further treatment options. According to respondent, his surgeon, Dr. Skau, told him that he would have these symptoms for the rest of his life. As a result, respondent modified his lifestyle to "keep the pain at a low grade." Respondent stated that if he had been provided with treatment options, he would have done them. He stated that he always has "low grade" pain in his left testicle, which he stated, "feels

like it is being squeezed at a level of one or two out of ten." If he sits, then the pain increases to a four to six out of ten depending on how long he sits. After his surgery, and while working as a CHP officer, respondent would reach his "maximum level of symptoms" after working continuously for two to three days and his pain would be at a level of six to seven out of ten.

35. Respondent has participated in Brazilian Jiu-Jitsu since 2001 and is in good physical condition because he exercises regularly. Respondent's children are involved in Brazilian Jiu-Jitsu at Sparta Training Academy (Sparta) in Idaho, and respondent was offered the opportunity to coach Brazilian Jiu-Jitsu classes for both children and adults at Sparta. Respondent stated, "I have been doing [BJJ] for a long time and can do it in a manner that is safe, there are some positions that are very uncomfortable for me, but I do it in a controlled environment." He has the ability to stop at any time while engaging in BJJ. Respondent stated that if anyone were to kneel on his lower left abdomen, he could not tolerate that. However, video taken of respondent engaging in BJJ teaching at Sparta shows an opponent placing his knee into respondent's lower left abdomen on numerous occasions, and respondent does not appear to be in pain. Respondent currently attends Sparta three days per week for about an hour at a time.

36. Respondent admitted that after he moved to Idaho, he did not seek any treatment for his groin pain. He stated that he understood his condition was permanent and simply changed his lifestyle to adapt. He saw his primary care provider in Idaho for the first time on July 12, 2021. The medical records for that date show that respondent has a "past history" of "left inguinal nerve entrapment syndrome." However, the medical records for that visit show that respondent only mentioned his current symptoms as "heart burn" and "anxiety." The records show that respondent

denied having any abdominal pain, denied having nerve pain, nerve weakness, or numbness. Respondent stated that at the time he "did not feel I was in need of treatment for my nerve pain issue." Until he saw Dr. Bhuller, respondent did not "have any flair ups" in his medical condition for which he felt he needed to get treatment. After Dr. Bhuller's evaluation of respondent, respondent admitted to seeing the pain specialist for a nerve block and seeing a physical therapist. Respondent stated he did so because "honestly it is scary to have a pension that you thought you had taken away so I decided I needed to do everything I could to prove this is a real issue for me."

37. In April 2023, after Dr. Bhuller's evaluation, respondent began seeing another primary care provider in Idaho, Rebekah Syverson, who is a physician's assistant. On April 12, 2023, respondent had his first appointment with Ms. Syverson, and the medical records for that visit show that respondent "presents for evaluation, cc: left groin pain, patient describes persistent left groin, testicle and leg pain since hernia repair in 2017." Respondent testified that this "is one of the attempts I made to prove to CalPERS that I am disabled." As a result of this appointment, respondent was referred to pain management, urology, and physical therapy. Respondent thereafter saw a pain specialist physician, who prescribed medications for his nerve pain. Respondent took those medications for only one week and stopped taking them because they made him "feel loopy" and be "unsafe to drive." He stated that the medications did not help his symptoms. Respondent also underwent a nerve block procedure into the ilioinguinal nerve from the pain specialist. Respondent stated he was supposed to get immediate relief from the nerve block, but he received no relief. Respondent also underwent physical therapy and has completed about six to eight physical therapy sessions over two months. He discontinued the physical therapy



because it did not help his pain and instead it "irritated the nerve." He ended the physical therapy about two weeks before this hearing.

38. Respondent wrote a letter of appeal to CalPERS, which mirrored his testimony and was received in evidence. Respondent testified that he does not believe he currently has the ability to work as a CHP officer because he "can barely tolerate sitting in a vehicle for more than a couple of hours."

39. On cross-examination, respondent reviewed the "California Highway Patrol Officer 14 Critical Physical Activities" document. He testified that he can perform all of the listed duties on that document other than "sitting for extended periods of time and wearing a duty belt." Notably, the document makes no mention of a "duty belt," and indicates that the frequency of the performance of the requirement that the officer "sit in patrol car for an extended period of time during patrol or surveillance" is "1 to 3 times per day" with a "Duration of Activity when performed" of "1 to 2 hours."

### **Testimony of Devin Daniel Rourke, D.D.S.**

40. Dr. Devin Rourke is a dentist, board certified in dental surgery and works in Northern Idaho. In addition to working as a dentist, Dr. Rourke also is a co-owner of Sparta Training Academy, which he described as "a collective where we train people in jiu-jitsu, first aid, and some firearms training – we are a general resource to increase health and wellness." Dr. Rourke started training in jiu-jitsu in 2005 and holds the rank of a first-degree black belt. He has been training others in jiu-jitsu since 2008. Dr. Rourke knows respondent through the jiu-jitsu community and first met him at another gym. Respondent thereafter began training at Sparta, and respondent trains students in jiu-jitsu at Sparta on Mondays and Fridays for one hour on each of those days. Respondent is not paid to teach students at Sparta and is instead teaching as a

volunteer, but the students do pay Sparta a monthly membership fee. Dr. Rourke described jiu-jitsu as a martial art that uses your partner's momentum and techniques to apply leverage to weak points like joints or the neck. Unlike other martial arts, jiu-jitsu does not utilize blunt force or striking with hands or fists.

41. Dr. Rourke testified that he is familiar with respondent's medical condition related to his previous injury because respondent has told him to avoid force in respondent's left groin area. Dr. Rourke trains with respondent in jiu-jitsu and also performs examples of jiu-jitsu techniques for students using respondent as a partner. According to Dr. Rourke, respondent has requested that Dr. Rourke put all force on respondent's right side rather than his left side at the ilioinguinal area. Dr. Rourke stated that instead of putting force on respondent's left ilioinguinal area, he puts the force on respondent's anterior superior iliac spine (ASIS), which is the anterior extremity of the iliac crest of the pelvis.

42. Dr. Rourke stated that during the training sessions and teaching sessions with respondent, he always has the option to "tap out" to stop all force. Dr. Rourke watched all the videos of respondent training in jiu-jitsu in this matter and stated that when they are demonstrating techniques they are only moving at about ten percent of full speed. Dr. Rourke is aware that respondent competed in jiu-jitsu tournaments in 2022 and acted as respondent's coach for those events. He has not seen respondent compete in any jiu-jitsu tournament since 2022 and is unsure of why that is the case. When respondent first started jiu-jitsu training at Sparta, respondent was a blue belt in jiu-jitsu. Now respondent is a purple belt in jiu-jitsu. Each belt requires a certain amount of time. Dr. Rourke was the individual who promoted respondent to purple belt because respondent demonstrated the necessary skills to do so. Dr. Rourke stated

that he did not give respondent any accommodation for his pain issue or other disability qualifier for that promotion.

43. On cross-examination Dr. Rourke admitted that prior to reviewing documents in this matter, he did not have an understanding of respondent's medical condition. Also, Dr. Rourke has watched two of respondent's jiu-jitsu competitions and has never seen respondent "tap out" of a match. Respondent also engages in sparring in the Sparta gym. Dr. Rourke also stated that he has never seen respondent's surgical scar and does not know where it is located.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated from performing the usual and customary duties of a California Highway Patrol officer based on a repaired left inguinal hernia repair and related ilioinguinal nerve condition. (Evid. Code, §§ 115, 500.)

### **Applicable Statutes**

2. A Government Code section 20026 provides in part:
- "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as

determined by the board . . . on the basis of competent medical opinion.

3. Government Code section 20390 provides in part:

(a) "Patrol member" includes all members employed in the Department of the California Highway Patrol or by a county in connection with its highway patrol function, respectively, whose principal duties consist of active law enforcement service, except those whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise clearly do not fall within the scope of active law enforcement service, even though the person is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement service.

(b) "Patrol member" does not include employees of the Department of the California Highway Patrol who are designated as peace officers by the Commissioner of the California Highway Patrol under subdivision (a) of Section 2250.1 of the Vehicle Code.

4. Government Code section 21060, subdivision (a) provides:

A member shall be retired for service upon his or her written application to the board if he or she has attained 50 years of age and is credited with five years of state service,

except as provided in Sections 7522.20, 21061, 21062, and 21074.

5. Government Code section 21151, subdivision (a) provides:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

6. Government Code section 21156, subdivision (a)(1) provides:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

7. Government Code section 21192 provides in part:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same

classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

8. Government Code section 21193 provides in part:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a

position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position. . . .

9. Vehicle Code section 2268 provides:

(a) Any member of the Department of the California Highway Patrol, as specified in Sections 2250 and 2250.1, shall be capable of fulfilling the complete range of official duties administered by the commissioner pursuant to Section 2400 and other critical duties that may be necessary for the preservation of life and property. Members of the California Highway Patrol shall not be assigned to permanent limited duty positions which do not require the ability to perform these duties.

(b) Subdivision (a) does not apply to any member of the California Highway Patrol who, after sustaining serious job-related physical injuries, returned to duty with the California Highway Patrol and who received a written commitment from the appointing power allowing his or her continued employment as a member of the California Highway Patrol. This subdivision applies only to commitments made prior to January 1, 1984.

(c) Nothing in subdivision (a) entitles a member of the California Highway Patrol to, or precludes a member from receiving, an industrial disability retirement.



## Appellate Authority

10. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.) Disability is not an inability to perform fully every function of a given position. For nearly 40 years, the courts have consistently and uniformly held that Government Code section 20026, formerly Government Code section 21022, requires "substantial inability" to perform the applicant's "usual duties," as opposed to mere discomfort or difficulty performing those duties. (*Mansperger, supra*, at p. 877.) As such, when an employee can perform his or her usual and customary job duties, even though doing so may be difficult or painful, the employee is not substantially incapacitated and does not qualify for an industrial disability retirement. (*Id.* at pp. 886-887; *Hosford, supra*, at p. 854.)

In *Mansperger, supra*, there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to "incapacity for the performance of duty." (*Mansperger, supra*, at p. 876.) After concluding that "incapacity for the performance of duty" meant the substantial

inability to perform an applicant's usual duties, the appellate court assessed the facts in that case as follows (*Id.* at pp. 876-877):

While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp.

11. A similar result was reached in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854. In that case, a California Highway Patrol (CHP) officer applied for industrial disability retirement, claiming he feared his back injuries placed him in danger of further injury if he was required to overpower someone resisting arrest. CalPERS's determination that he was not substantially incapacitated from performing the usual duties of his job was upheld on appeal. The appellate court determined that the fact that an injury increases an individual's chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. (*Id.* at p. 862-863.) Accordingly, fear of further injury or fear of aggravation of an existing injury is insufficient to support a finding of disability. (*Ibid.*) Furthermore, the appellate court noted that even if a certain activity could cause a CHP

officer some discomfort, it did not amount to inability to do that activity. (*Id.* at 862.) The above-referenced appellate authority is also discussed thoroughly in several precedential decisions.<sup>4</sup>

12. Retirement benefits and reinstatement rights are fundamental vested rights. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System and Angelita Resendez*, 242 Cal.App.4<sup>th</sup> 133, 138.) A disability retirement is considered a temporary separation from state service. (Gov. Code § 19143; Cal. Code Regs., tit. 2, section 446.) As a temporary separation from state service, disability retirement does not result in the loss of permanent civil service status. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes*, December 15, 1999, CalPERS Precedential Decision 99-03, at p. 10.) A state civil service member is therefore entitled to reinstatement once the

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<sup>4</sup> An agency may designate a decision as precedential authority that may be relied upon in future decisions if it contains a significant legal or policy determination of general application that is likely to recur. The following precedential decisions apply to and were received as evidence in this case: *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes and Department of California Highway Patrol*, Case No. 2530, OAH No. L-1999060537, effective January 22, 2000; *In the Matter of the Application for Disability Retirement of Theresa V. Hasan and Department of Corrections [Parole and Community Services Division, Region II]*, Case No. 2704, OAH No. N-1999100099, effective April 21, 2000; *In the Matter of the Application for Disability Retirement of Ruth A. Keck and Los Angeles County Schools [Glendora Unified School District]*, Case No. 3138, OAH No. L-19991200097, effective September 29, 2000.

disability ends. (Gov. Code § 21193; *Resendez, supra*, 242 Cal.App.4<sup>th</sup>, at p. 142.) An employer is also prohibited from placing any conditions upon the employee's return to work. (*Resendez, supra*, 242 Cal.App.4<sup>th</sup>, at p. 142.)

## **Evaluation**

13. A public employee has a fundamental vested right to a disability pension if he or she is, in fact, disabled. (*Beckley v. Bd. of Administration* (2013) 222 Cal.App.4<sup>th</sup> 691, 697, citing *Quintana v. Bd. of Administration* (1976) 54 Cal.App.3d 1018, 1023.) Government Code section 20026 defines disability as "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." The courts have typically relied on medical expert opinion in determining whether a respondent should be granted disability retirement. (See, e.g., *Hosford, supra*, 77Cal.App.3d at p. 864; *Haywood v. American River Fire Protection District* (1998) 61 Cal.App.4<sup>th</sup>, 1292,1299.) A respondent's opinion of his or her physical condition does not constitute competent medical evidence within the meaning of Government Code section 20026.

In this case, CalPERS had the burden of proving by a preponderance of the evidence that the respondent was no longer substantially incapacitated from performing the usual and customary duties of a California Highway Patrol officer. Dr. Bhuller testified as CalPERS medical expert, and his credentials are impressive. He has many years of experience with hernia repair surgery like that received by respondent. Dr. Bhuller persuasively testified that his physical examination and review of medical records show that respondent's hernia repair surgery in December 2017 was successful. During his physical examination of respondent, Dr. Bhuller found no signs of any hernia, observed respondent's walking and movement that appeared normal, observed respondent getting out of a low-seated car easily, and observed

respondent's jiu-jitsu activities. These observations showed Dr. Bhuller that respondent does not have any abdominal wall discomfort during exertion. Dr. Bhuller credibly explained that a person with a chronic problem with ilioinguinal pain typically would complain of pain during exertion, during bending and flexion of the leg, and during exertional activities causing pressure on the abdomen. Respondent did not show pain during any of those activities as shown on the multiple videos of him performing jiu-jitsu moves or otherwise. Notably, respondent did not ever complain at all to any medical provider of any pain in his abdomen or ilioinguinal area after his retirement and prior to Dr. Bhuller's IME opinion. During his testimony, respondent admitted that he began pursuing medical treatment for his pain only after Dr. Bhuller's evaluation because he wanted to prove to CalPERS that he had such pain in order to keep his disability retirement benefits. Overall, there was no objective medical evidence to support respondent's claim of substantial incapacitation from performing his usual and customary job duties as a CHP officer.

14. Respondent provided competent medical testimony from Dr. McKinney. Dr. McKinney also has impressive credentials as an occupational medicine physician. Dr. McKinney served as respondent's treating physician for worker's compensation purposes. Notably, Dr. McKinney testified at the hearing that he simply did not understand the applicable standards for CalPERS disability retirement, which is at issue in this hearing. By comparison, Dr. Bhuller did express and understand the applicable standards for this matter. Dr. McKinney also relied exclusively on respondent's reports of pain with no objective evidence to substantiate those reports. Furthermore, Dr. McKinney last physically examined respondent over three years ago with the last appointment with respondent being by telehealth in August 2020. Additionally, Dr. McKinney opined that because respondent would have to engage in "combat duty," that his subjective reports of pain would preclude him from performing his usual and

customary duties of an officer with CHP. However, Dr. McKinney is simply applying the wrong standard for CalPERS disability. As noted by the *Hosford* court, although a CHP officer may have suffered some physical impairment, that alone does not establish that he could not still substantially perform his usual duties. Notably, Dr. McKinney failed to take into account the commonality of respondent performing the activities that Dr. McKinney describes as "combat duties," nor whether respondent could actually perform those duties even if he experienced some pain. Respondent admitted during his testimony that the only listed duty on his job description that he could not perform was sitting for long periods of time, which the job description stated would only have to be performed up to two hours at a time. Respondent also admitted he could sit for up to two hours, but after that may have some pain.

15. Accordingly, the persuasive competent medical evidence established that respondent is no longer substantially incapacitated from the performance of the usual and customary duties of a CHP officer, and respondent is not entitled to continue his industrial disability retirement.

## **ORDER**

Respondent Seth D. Horst's appeal of the determination by CalPERS that he is no longer substantially incapacitated from the performance of the usual and customary duties of an officer of the California Highway Patrol is denied.

DATE: March 11, 2024

*Debra D. Nye-Perkins*

DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings