

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **POPE POWELL,**

5 *Applicant,*

6 **vs.**

7 **CITY AND COUNTY OF SAN FRANCISCO,**
8 **Permissibly Self-Insured,**

9 *Defendant.*

Case No. **ADJ8710988**
(Oakland District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

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12 Applicant seeks reconsideration of the December 2, 2013 Findings and Award (F&A), wherein
13 the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a
14 manager of fleet operations on September 26, 2011, sustained industrial injury to his bilateral upper
15 extremities, including shoulders and elbows. The WCJ found that applicant's injury caused permanent
16 disability of 62%.

17 Applicant contends that the WCJ erred in finding that applicant's injury caused permanent
18 disability of 62% because this finding was based on an incorrectly assessed occupational code.

19 We have received a request for an extension of time to file an Answer from defendant, which we
20 will grant, and we have reviewed defendant's Answer. The WCJ prepared a Report and
21 Recommendation on Petition for Reconsideration (Report), recommending that the Petition for
22 Reconsideration (Petition) be granted as to applicant's permanent disability rating and denied as to
23 applicant's occupation code.

24 We have considered the Petition for Reconsideration, the Answer, and the contents of the Report,
25 and we have reviewed the record in this matter. For the reasons discussed below, we will grant
26 reconsideration, amend the WCJ's F&A, and return this matter to the trial level for further proceedings
27 consistent with this opinion. We will otherwise affirm the WCJ.

1 **FACTS**

2 While employed by defendant as the director of fleet management and operations on
3 September 26, 2011, applicant sustained an admitted industrial injury to his right upper extremity and left
4 shoulder.

5 On October 29, 2012, applicant was evaluated by Panel Qualified Medical Evaluator (PQME)
6 Pramila R. Gupta, M.D., a neurologist. Dr. Gupta examined applicant and reviewed medical records
7 from applicant's treating physicians as well as utilization review records. She diagnosed applicant with a
8 right brachial plexus injury, left lateral epicondylitis, and left shoulder strain, which together resulted in a
9 Whole Person Impairment (WPI) of 49%. (October 29, 2012 PQME Report, App. Exh. 1, p. 8.)

10 On January 10, 2013, a Request for Summary Rating Determination was submitted to the
11 Disability Evaluation Unit (DEU), based on Dr. Gupta's PQME Report. The DEU issued a Consultative
12 Rating Determination on January 24, 2013, which was calculated using a 47% WPI based on Dr. Gupta's
13 report and the occupational group code 212, and concluded that applicant's permanent disability rating
14 was 62%.

15 The parties appeared for trial on October 29, 2013 on the issues of, as relevant to the Petition
16 before us, permanent disability and occupational group and group number. Applicant argued that his
17 permanent disability should be rated using the occupational variant for group 112 (mostly clerical
18 occupations), and defendant argued that applicant's permanent disability should be rated using the
19 occupational variant for group 212 (mostly professional and medical occupations).

20 As the WCJ noted in her Opinion on Decision, the record does not include a job duties statement
21 for applicant's position (Opinion on Decision, p. 5), but applicant testified on this issue as follows:
22 Applicant held a management position with the title of Director of Fleet Management and Operations.
23 (October 29, 2013 Minutes of Hearing and Summary of Evidence [MOH/SOE], 7:9-10, 9:7-8.) His
24 initial salary was \$85,000.00 per year, and his salary at the time of the October 29, 2013 hearing was
25 between \$108,000.00 and \$115,000.00. (*Id.* at 7:11-12.) He was hired to reorganize fleet management
26 for the Public Utilities Commission (PUC), including fuel and usage. (MOH/SOE, 7:13-14.) As the
27 Director of Fleet Management and Operations, applicant supervised five employees, and dealt with

1 budgets, specifications, requests for proposals relating to the purchase of vehicles such as trucks and
2 heavy equipment, and requests for quotes. (*Id.* at 7:14-18.) He wrote contracts, policies, and procedures;
3 he and his staff all used computers, and applicant did not have his staff perform computer tasks for him.
4 (*Id.* at 7:18-22.) Additionally, applicant coordinated efforts between his department and other city
5 agencies and the city attorney's office, and worked with directors and supervisors from other divisions
6 regarding PUC policies. (*Id.* at 7:26-29.) Applicant also advised human resource managers regarding
7 policy enforcement, and had authority to negotiate with vendors. (*Id.* at 7:31-34.)

8 Applicant spent 80-85% of his time working on his computer, and at least five hours a day.
9 (MOH/SOE, 7:24-25.) The other employees in his department used their computers at least 60% of the
10 time. (*Id.* at 8:2-3.) Applicant estimated that he dealt with more than 100 emails each day, and used his
11 telephone two to three hours each day, in conjunction with his computer use. (*Id.* at 7:25-31.) In
12 addition to his computer, he also used a mouse, a ten key (a tool for budgeting, reviewing requisitions for
13 approval, and keeping track of expenditures in his division), and a calculator. (*Id.* at 8:3-7.)

14 When applicant was hired, his initial assignment was to bring "all fleet management and
15 operations under one umbrella"; at the time, fleet management was separated into three departments,
16 with one in Millbrae and the remaining two in southeast San Francisco. (MOH/SOE, 9:23-31.) In 2012,
17 there were approximately 1,250 vehicles in the entire fleet, and applicant was responsible for their
18 maintenance and fueling. (*Id.* at 9:31-33.) The fueling budget was approximately \$10,000,000.00. (*Id.*
19 at 11:6-8.)

20 As the Director of Fleet Management and Operations, applicant administered a GPS maintenance
21 program, writing specifications for the contract signed by the city manager. (MOH/SOE, 9:34, 10:3-4.)
22 Applicant also helped develop an emergency response plan for natural disasters, for which he
23 collaborated with the San Francisco Fire and Police Departments as well as the United States Department
24 of Homeland Security. (*Id.* at 10:32-11:6.)

25 The WCJ issued her decision on December 2, 2013, finding that applicant's injury caused 62%
26 permanent disability. In the accompanying Opinion on Decision, the WCJ explained that this rating was
27 based on Dr. Gupta's PQME Report and the occupational group code 212.

1 Applicant timely sought reconsideration, contending that the WCJ erred regarding applicant's
2 permanent disability rating, and arguing that the rating should have been based on the occupational
3 variant for group 112, not 212. Applicant also contended that the WCJ erred in relying on the DEU's
4 Consultative Rating Determination, which was calculated using a 47% WPI based on Dr. Gupta's report,
5 because Dr. Gupta's report listed a 49% WPI, not 47%.

6 DISCUSSION

7 As an initial matter, we agree with applicant and the WCJ that the DEU's Consultative Rating
8 Determination includes an erroneous WPI rating from Dr. Gupta's PQME Report. As the WCJ stated in
9 her Report, "a permanent disability rating must be based on substantial evidence and petitioner is correct
10 that 47% WPI [as] utilized by the DEU rater is inconsistent with Dr. Gupta's reporting." (Report, pp. 7-
11 8.) Accordingly, we will amend the F&A to defer the Findings of Fact and Award with respect to
12 permanent disability (Finding No. 5; Award (b)) and attorney's fees (Finding No. 9; Award (b); Order).
13 We will also direct that Dr. Gupta's October 29, 2012 PQME Report be sent to the DEU for a formal
14 rating. After the DEU issues a formal rating, it should be served on the parties, who will then have the
15 opportunity to object to either the rating instructions and/or the formal rating, and to cross-examine the
16 DEU rater. If neither party chooses to cross-examine the rater or requests further proceedings, the rating
17 instructions and formal rating should be admitted into evidence without further order from the WCJ.
18 (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc).)

19 With respect to applicant's proper occupational code, we will affirm the WCJ. Labor Code
20 section 4660(a) lists the factors for determining the applicant's percentage of permanent disability,
21 including nature of the physical injury or disfigurement, occupation of the injured employee, and age at
22 the time of injury, with consideration of diminished future earning capacity. (Lab. Code, § 4660(a).)
23 The 2005 Schedule for Rating Permanent Disabilities (PDRS) sets forth the occupational groups. The
24 PDRS describes occupational group 112 as "mostly clerical occupations," involving the "highest demand
25 for use of keyboard [and] prolonged sitting," and lists "billing clerk, computer keyboard operator, [and]
26 secretary" as typical occupations. (See PDRS, p. 3-29.) The PDRS describes occupational group 212 as
27 "mostly professional and medical occupations," involving "work predominantly performed indoors, but

1 may require driving to locations of business; less use of hands than 211; slightly higher demands on spine
2 than 210 & 211.” (*Id.* at p. 3-30.)

3 The WCJ’s summary of applicant’s job duties is instructive here:

4 “Though [applicant] spent the majority of his work day using a key board, his
5 integral job duties and salary were managerial in nature. Applicant had control
6 of the entire fleet of 1000 vehicles and the fuel budget of over \$10 million for the
7 city’s PUC department. He had supervisory responsibility and authority to
8 negotiate contracts. He implemented new programs. He advised on policy. In
his capacity, preparation of contract terms, charts, and use of email undoubtedly
necessitates extensive keyboarding, however, the clerical function is not at the
core of his job.” (Opinion on Decision, p. 6.)

9 We further agree with the WCJ that there is a difference between applicant’s “managerial job and a
10 clerical or data entry occupation, with the latter requiring the ‘highest demand’ for keyboarding.”
11 (Report, p. 6.) As the WCJ correctly states, jobs in occupational group 112 usually have workflow
12 “controlled by a superior who typically assigns keyboarding tasks at a constant rate to ensure maximum
13 output by the clerical employee.” (*Id.* at 6-7.) By contrast, applicant’s testimony that he spent 80-85%
14 of his time reflects the transition in the modern office environment to “[c]onstant use of a personal
15 computer.” (*Id.* at p. 6; MOH/SOE, 7:24-25.) Applicant’s job required the use of a computer to fulfill
16 the managerial responsibilities inherent in the position of Director of Fleet Management and Operations,
17 not as his core task.

18 We note that both applicant and the dissent have raised the “dual occupation rule,” which states
19 that, “[a]s a general rule, a worker is entitled to be rated for the occupation which carries the highest
20 factor in the computation of permanent disability. When the worker’s duties embrace the duties of two
21 forms of occupation, the rating should be for the occupation which carries the highest percentage.”
22 (*Grossmont U.H.S. Dist. v. Workers’ Comp. Appeals Bd. (Burns)* (1997) 62 Cal.Comp.Cases 687 (writ
23 denied).) We agree with the WCJ that the dual occupation rule is not implicated here, because
24 “occupation code 212 does in fact contemplate[] use of a computer by a professional or managerial
25 employee,” and that “the nature of computer use contemplated by occupation code 112 is in the order of
26 the ‘highest demand’ for keyboarding and although [applicant] utilized a computer every day, the nature
27 of his use was not in the ‘highest demand.’” (Report, pp. 5-6.)

1 Accordingly, we will grant the Petition and amend the F&A to defer the Findings of Fact and
 2 Award with respect to permanent disability (Finding No. 5; Award (b)) and attorney's fees (Finding
 3 No. 9; Award (b); Order). We will otherwise affirm the F&A.

4 For the foregoing reasons,

5 **IT IS ORDERED** that applicant's Petition for Reconsideration of the December 2, 2013
 6 Findings and Award is **GRANTED**.

7 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers'
 8 Compensation Appeals Board, that the December 2, 2013 Findings and Award is **AFFIRMED**,
 9 **EXCEPT** that Findings of Fact Nos. 5 & 9, Award (b), and the Order are **AMENDED** as follows:

10 **FINDINGS OF FACT**

- 11 5. The issue of permanent disability is deferred.
 12 9. The issue of attorney's fees is deferred.

13 **AWARD**

- 14 a. Temporary disability indemnity benefits for the period from February 18,
 15 2012 through October 2, 2012, payable at the rate of \$1.066.72 per week and
 16 subject to the lien of the Employment Development Department, less credit
 17 for any sums heretofore paid on account thereof;
 18 b. The award of permanent disability and associated attorney's fees is deferred;
 19 c. Future medical treatment reasonably required to cure or relieve from the
 20 effects of the injury herein.

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1 ORDER

2 **IT IS ORDERED** that the Order of Commutation is **DEFERRED** pending the
3 resolution of the issue of permanent disability.

4 **IT IS FURTHER ORDERED** that the matter is **RETURNED** to the trial level for further
5 proceedings consistent with this opinion.

6 **WORKERS' COMPENSATION APPEALS BOARD**

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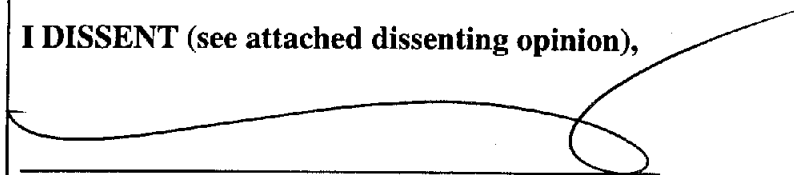
9 DEIDRA E. LOWE

10 **I CONCUR,**

11 
12 _____

13 ALFONSO J. MORESI

14 **I DISSENT** (see attached dissenting opinion),

15 
16 _____

17 **MARGUERITE SWEENEY, COMMISSIONER**



18
19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20
21 **FEB 18 2014**

22 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
23 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

24 **POPE POWELL**
25 **LAW OFFICES OF ROBERT A. FURTADO**
26 **CITY AND COUNTY OF SAN FRANCISCO**
27 **SAN FRANCISCO CITY ATTORNEY**



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CONCURRING AND DISSENTING OPINION OF COMMISSIONER SWEENEY

I concur with the majority's decision with respect to the erroneous Consultative Rating Determination provided by the DEU. However, in returning the matter to obtain an formal rating from the DEU, I would also rescind the finding of group 212 and find instead that applicant's occupational group code was 211, and direct the DEU to issue a rating accordingly.

When an applicant has job duties that include the duties of two occupational groups, the applicant is entitled to be rated on job duties producing the highest rating. (*Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497 [37 Cal.Comp.Cases 393].) *Dalen* does not set forth any particular time requirement for time spent on job duties, and so long as the duties are an "integral" part of the applicant's duties, and not "incidental" to the position, applicant may be considered to be part of that occupational group. (*National Kinney of California v. Workers' Comp. Appeals Bd. (Casillas)* (1980) 113 Cal.App.3d 203 [45 Cal.Comp.Cases 122].) The determination is made as of the applicant's occupation at the time of injury.

Our jurisprudence offers numerous examples of the dual occupation rule's application. In *Dalen*, the applicant worked in both construction and demolition; at the trial level, he was classified in the occupational group of "house wrecker," which encompassed general unskilled labor, not the higher-rated occupational group of "heavy construction worker," which encompassed specific types of skilled labor. (*Dalen, supra*, 26 Cal.App.3d at 501, 504-05.) The Court of Appeal noted that this classification "refers to a worker who 'may occasionally climb stairs, ramps, or ladders,' the uncontradicted testimony reflected that petitioner spent one-third of his time working off the ground, and that his work involved climbing, sometimes with ladders and sometimes without, and as well climbing on highsided trucks used in the demolition work." (*Id.* at 504.) Moreover, the Court noted, "in placing petitioner in [the "house wrecker" group], the referee and the board arbitrarily disregarded the specific evidence and findings in relation to petitioner's occupation." (*Id.* at 506.)

Similarly, in *Casillas*, the applicant was employed as a tree trimmer, and argued that he should be classified in the occupational group that encompassed trimming trees at 24 feet off the ground, using a

1 ladder, a task that he testified he performed. (*Casillas, supra*, 113 Cal.App.3d 203, 213-14.) At the trial
2 level, the WCJ found that such high level tree-trimming was “minimal or only incidental to the majority
3 of employee’s duties.” (*Id.* at 214.) The Court of Appeal disagreed, noting that the term “incidental to
4 employment” refers not to actual employment duties, but to “acts, though not themselves representing a
5 manipulation of the instrumentalities of the work, [which] are reasonably incidental to the employment
6 or impliedly contemplated by it, and are considered to be for the mutual benefit and convenience of the
7 employer and employee.” (*Id.* at 215 (citing 2 Hanna, Cal. Law of Employee Injuries and Workmen’s
8 Comp. (2d rev. ed. 1980) § 9.02 [2] [a]) (emphasis added).)

9 Finally, in *Grossmont Union High School District v. Workers’ Compensation Appeals Board*, the
10 applicant was initially hired to work as an English teacher, and then was also hired as an athletic coach.
11 (*Grossmont Union High School Dist. v. Workers’ Comp. Appeals Bd. (Burns)* (1997) 62 Cal.Comp.Cases
12 687 (writ denied).) He performed both of those jobs coterminously. (*Id.* at 688.) The Court of Appeal
13 upheld the use of the occupational group for athletes, which carries a higher factor than the occupational
14 group for teachers for permanent disability rating, because the applicant was engaged in two forms of
15 occupation. (*Ibid.*)¹

16 Here, it is uncontested that applicant spent 80-85% of his time working on his computer, and at
17 least five hours a day. (MOH/SOE, 7:24-25.) Applicant estimated that he dealt with more than 100
18 emails each day, and used his telephone two to three hours each day, in conjunction with his computer
19 use. (*Id.* at 7:25-31.) He wrote contracts, policies, and procedures; he and his staff all used computers,
20 and applicant did not have his staff perform computer tasks for him. (*Id.* at 7:18-22.) In addition to his
21 computer, he also used a mouse, a ten key (a tool for budgeting, reviewing requisitions for approval, and
22 keeping track of expenditures in his division), and a calculator. (*Id.* at 8:3-7.) Applicant, as noted in the
23

24 ¹ See also *Adams v. City of Moreno Valley* (2009) 2009 Cal.Wrk.Comp.P.D.LEXIS 476 (panel decision) (upholding WCJ’s
25 decision to use higher-rated occupational classification for park superintendent, not park grounds worker, when applicant
26 performed the duties of both positions); *Carr v. Dr. Pepper Snapple Group, Inc.* (2012) 2012 Cal.Wrk.Comp.P.D.LEXIS 505,
27 *7 (panel decision) (reversing WCJ’s decision to use lower-rated occupational classification for truck drivers, not loading and
unloading, because although applicant drove for six out of ten hours in a day, “the loading and unloading component of
[applicant’s] job was not incidental but rather a significant portion of his duties”).)

1 Petition, “had two different sets of job duties that were both integral to his job; his managerial duties and
2 his clerical duties.” (*Id.* at 8:28-9:4.) Thus, although his position was managerial in nature, I agree that
3 applicant “spent the majority of his time doing clerical type duties using a computer and keyboard ...
4 [which were] also integral to his overall job in that computer and ten key were the tools he needed to use
5 in order to carry out his functions as the director of fleet management and operations.” (Petition, 8:25-
6 28.) If his staff were to perform these clerical tasks on his behalf, they would likely be classified as
7 clerical workers; there is no reason to find otherwise simply because applicant received a greater salary.

8 As in *Dalen* and *Casillas*, applicant here has provided uncontested testimony that the clerical
9 duties and keyboarding were intrinsic to his position as director of fleet management and operations. His
10 computer use was not “impliedly contemplated” (*Casillas, supra*, 113 Cal.App.3d at 215) by his
11 employment; it was necessary and integral to the successful performance of the duties and
12 responsibilities inherent in his position. He performed his clerical duties coterminously and intertwined
13 with his managerial duties. (See *Burns, supra*, 62 Cal.Comp.Cases at 688.) Accordingly, I would apply
14 the dual occupation rule in rating applicant’s permanent disability.

15 Additionally, I note that the occupational variants are based on the Dictionary of Occupational
16 Titles, which the WCJ and the majority cite for definitions of occupational group codes 112 and 212.
17 The definitions are meant to be used as a guide, not applied rigidly. Here, I would find the description of
18 occupational group 211 – “mostly clerical occupations; emphasis on frequent fingering, handling, and
19 possibly some keyboard work; spine and leg demands similar to 210” – the most appropriate. I would
20 use the occupational variant for applicant’s injury under occupational group 211, as it is the higher rating.
21 (See *Dalen, supra*.) I would issue a final rating of 16.01.02.01 – 49 – [5]62 – 211G – 65 – 67.

22 Finally, I would offer the following word of caution. With the increased dependence on
23 computers and other forms of manually-operated technologies in the workplace, we will continue to see
24 an increase in injuries of the type alleged by applicant. To ensure that injured workers receive adequate
25 compensation for these injuries, we must take into account the dynamic and changing realities of the
26 workplace, and, as here, consider the occupational group codes that most accurately reflect the injured
27 worker’s actual work activities.

1 For this reason, I would grant reconsideration and amend the F&A as to applicant's permanent
2 disability rating.



5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **MARGUERITE SWEENEY, COMMISSIONER**

9
10 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

11
12 **FEB 18 2014**

13 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
14 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD**

15 **POPE POWELL**
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18 **SAN FRANCISCO CITY ATTORNEY**

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22 **RB/sye**