WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TERRY KELLY, *Applicant*

vs.

SAFEWAY, permissibly self-insured, *Defendants*

Adjudication Number: ADJ12582828
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings, Award and Order (FA&O) issued by the workers' compensation administrative law judge (WCJ) on October 11, 2022. By the FA&O, the WCJ found that applicant sustained an injury arising out of and in the course of employment (AOE/COE) to the cervical spine, thoracic spine, lumbar spine, bilateral knees, bilateral elbows and bilateral wrists. The WCJ also found that a butcher has an occupational code of 420. It was found that further development of the record was necessary to determine permanent disability for both knees and the parties were ordered to develop the record.

Defendant contends that applicant is a meat cutter and his occupational code must be 322. Defendant also contends that there is not substantial evidence to support the finding of injury AOE/COE to the knees, elbows and wrists. Lastly, defendant contends that the record does not require further development to address permanent disability for the knees.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, rescind the FA&O and issue a new decision finding that there is insufficient evidence to determine the occupational group number. The new decision will retain the finding of injury AOE/COE to all the same body parts.

The issue of permanent disability for all parts will be deferred pending further development of the record regarding the occupational group number and permanent disability for the knees.

FACTUAL BACKGROUND

Applicant claims injury to the cervical spine, thoracic spine, lumbar spine, bilateral knees, bilateral elbows and bilateral wrists from July 1, 1991 through August 23, 2019 while employed by Safeway. Defendant has accepted the claim, but disputes compensability for the knees, elbows and wrists. (Minutes of Hearing and Summary of Evidence, May 9, 2022, p. 2.)

Stephen Dell, M.D. evaluated applicant as the neurological qualified medical evaluator (QME) on April 14, 2020. (Joint Exhibit DD, Qualified Medical Evaluation report by Stephen Dell, M.D., April 14, 2020.) He diagnosed applicant with: cervical strain/sprain, thoracic strain/sprain, lumbosacral strain/sprain, probable lumbosacral radiculopathy, bilateral (right more than left) elbow strain/sprain, bilateral (right more than left) wrist strain/sprain and bilateral knee strain/sprain. (*Id.* at p. 15.) Dr. Dell concluded that applicant sustained a cumulative trauma injury to these body parts. (*Id.* at pp. 15 and 18.) His condition was considered permanent and stationary as of the examination date. (*Id.* at p. 16.) Whole person impairment (WPI) ratings were provided as follows: 5% to the cervical spine, 5% to the thoracic spine, 10% to the lumbar spine, 0% for both elbows, 0% for both wrists, 2% for each knee and 3% add-on for pain to be divided equally between the three spinal regions. (*Id.* at pp. 16-17.) Dr. Dell found no basis for apportionment. (*Id.* at pp. 18-19.)

Dr. Dell issued three supplemental reports. (Joint Exhibit AA, Qualified Medical Evaluation report by Stephen Dell, M.D., January 7, 2021; Joint Exhibit BB, Qualified Medical Evaluation report by Stephen Dell, M.D., October 2, 2020; Joint Exhibit CC, Qualified Medical Evaluation report by Stephen Dell, M.D., July 20, 2020.) He did not alter any of his prior opinions in these supplemental reports.

The matter proceeded to trial over two days, May 9, 2022 and August 15, 2022. The issues at trial included: injury AOE/COE for the bilateral knees, bilateral elbows and bilateral wrists, permanent disability, and occupational code with applicant claiming 420 and defendant claiming 322. (Minutes of Hearing and Summary of Evidence, May 9, 2022, pp. 2-3.) Defendant's trial exhibits included a job analysis dated April 23, 1999. (*Id.* at p. 4; Defendant's Exhibit A, Job analysis form – Meat Cutter Usual and Customary, April 23, 1999.) Applicant testified at trial as

follows in relevant part:

> When applicant came into work, there was a list of assignments waiting for him. The meat was in boxes on pallets and boxes were sometimes stacked head high. Boxes of meat usually weighed 50 to 70 pounds. The number of boxes on a pallet would vary. For example, on the weekends, it would be a full pallet whereas during the week it could be half a pallet.
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> Applicant would take the boxes off the pallet, stack them against the wall, then unbox the meat. Applicant would cut the meat, debone the meat, trim the meat, tie the meat such as a roast, grind the meat, prepare the meat for sale, weigh the meat, and display meat. Sometimes the applicant did inventory if they needed meat. Applicant inspected the meat as he worked. Applicant answered the customers' questions about the meat.
>
> Applicant used the following tools: cut gloves, knives, scabbard to hold four knives, the grinder, the slicer, and the bandsaw. Applicant had to provide his own knives. Applicant had to hose down/clean his department and clean the meat grinder. Applicant had to clean the preparation area and maintain its cleanliness throughout the day.
>
> Applicant believes he worked for defendant employer as a butcher because he cut animals all day. Additionally, signage at defendant employer said he was a butcher. A sign stated this was a Butcher Block. A sign encouraged customers to ask the butcher about special cuts. A sign stated when the butcher would be back/available.
>
> Boxes weighed up to 75 pounds. When there were four pork loins in a box, the box weighed more than 100 pounds. Daily, applicant lifted boxes that weighed more than 75 pounds.
>
> Applicant reviewed and disagreed with Defendant Exhibit D as follows:
>
> Applicant was reaching eight hours per day especially when providing customer service. Applicant reached up/overhead for trays about 80% of his day. If applicant was working the shift of the middle person, he reached up/overhead for trays about 90% of his day.
>
> Applicant pushed and pulled for eight hours of his day. Applicant had to push/pull a nondirectional cart with hundreds of pounds of meat on it. Applicant lifted and carried meat racks the whole shift.
>
> At the end of the day, applicant had to clean the area and lift the equipment. The meat tenderizer weighed 80 pounds. The saw weighed 400 to 500 pounds. The meat slicer weighed 120 pounds.

Applicant lifted and carried all day. Meat would be lifted onto trays, then racks, to machines, back to trays, then racks, and then placed on the counters.

Twenty percent of the time the trays weighed 11 to 25 pounds. Forty percent of the time, the trays weighed 26 to 50 pounds. Twenty percent of the time, the trays weighed 51 to 75 pounds. Five percent of the time, the trays weighed 76 pounds or more.

Daily, applicant lifted 400 pounds of equipment. Bone barrels are 55-gallons drums full of discarded meat. Nightly, applicant would have to move the bone barrel to a second room and put it on the pallet. Once there were three bone barrels on a pallet, applicant would wrap the bone barrels and a truck would pick them up.

Applicant gripped six to eight hours per day. Finger manipulation was constant with cutting meat and vegetables. Applicant used his elbows eight hours per day.

A meat cutter is somebody who slices boneless meat like a deli clerk.
…
Applicant told Dr. Dell he had to disassemble a saw by tilting it, swinging it around, pulling it out, and cleaning it every night. The saw is inspected for cleanliness. Applicant never weighed the saw.

The meat grinder weighs 900 pounds. Applicant disassembled and cleaned the meat grinder.

Applicant picked up the meat slicer all the time. It weighed 120 pounds.
…
The meat slicer, saw and meat grinder all weigh over 100 pounds.
…
Applicant last saw signage by defendant employer calling his job a butcher yesterday.

(Minutes of Hearing and Summary of Evidence, May 9, 2022, pp. 6-9.)

On the second day of trial, defendant called a supervisor, Richard Hecht, as a witness. (Minutes of Hearing and Summary of Evidence, August 15, 2022, p. 1.) Mr. Hecht testified as follows in pertinent part:

Witness knows applicant. At the meat manager's request, witness moved applicant to the Curtis Park store where he opened a new store. Applicant was a meat cutter at the Curtis Park store. Applicant was a good meat cutter.

Meat arrives in boxes on pallets. Animals are butchered at plants, sometimes in Colorado, and distributed out of Tracy, California, to various stores. No Safeway employee butchers an animal.

When he was a meat cutter, witness had the same duties as applicant. Boxes of meat weighed about 60 pounds. Boxes are opened. The meat is taken out and cut. Seafood is also delivered in boxes. Each box weighed differently because each cut weighed differently. Chuck weighs 12 to 20 pounds. Eye of round weighs 4 to 8 pounds.

Applicant testified correctly about the duties of a meat cutter.

Applicant testified correctly about the tools and machines used by a meat cutter. A meat cutter also works with the public.

Witness disagrees that the applicant reached up overhead for trays 80% of the time. He thinks reaching occurred 15 to 20% of the time. Additionally, at applicant's store, there are no boat racks which require overhead reaching. The trays are waist-high or a little higher.

Witness disagrees that applicant reached up overhead for trays about 90% of his workday when working the middle person shift. It takes longer than that to cut and put meat in a boat.

Applicant cleaned the slicer, broke it down and slid it to a different block to clean it. Occasionally, applicant lifted the slicer. How often this happened varied because sometimes there are specials. Safeway asked meat cutters to buddy up and have a coworker help them lift. Witness saw applicant cut meat. Witness did not see applicant break down the meat cutter.

Trays of meat could weigh 11 to 25 pounds. Witness personally handled meat trays. He estimates they range in weight from 10 pounds to 30 pounds.

Butcher signage is advertising for customers.

Applicant testified accurately about moving three bone barrels. Barrels are always full when they are discarded. Barrels are pushed and pulled to the pallet and then lifted onto it. Safeway encourages meat cutters to buddy up and have a coworker help them lift the bone barrels.

Applicant did not cut animals all day. The meat was already cut and received in boxes.

At the Curtis Park store, witness saw applicant work as a meat cutter.

Witness never hired a butcher, just a meat cutter.

…
The last time witness worked as a meat cutter was this year. Witness cut, trayed, wrapped, and trimmed the meat.

Witness took boxes of meat off the pallet. Witness did not weigh the meat.

Witness never saw applicant unload the pallets. Boxes on the pallet do not get weighed. Boxes arrive on trucks on pallets. The pallets are moved into the cooler. Boxes are taken off the pallets and put on the wall.

A list is generated, the meat cutter goes to the cooler and gets a box of meat or a piece of meat from a box, trims it, boats it, wraps it, or puts it on display.

Applicant moved boxes of meat from the pallets to the wall. The boxes weighed around 50 pounds. Witness does not know the exact weight of the boxes that the applicant moved.

At the Curtis Park store, there are no boat racks. Applicant worked at stores with boat racks.

Pieces of meat called "primals" are received in boxes. Witness does not know if butchers break down primals. Witness has never been a butcher and never hired a butcher while at Safeway nor has seen a butcher work for Safeway. Safeway advertises using the word "butcher."

(*Id.* at pp. 2-4.)

The WCJ issued the resulting FA&O as outlined above.

DISCUSSION

I.

Defendant contends that there is not substantial evidence to support the finding of injury AOE/COE to the knees, elbows and wrists. The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.)[1] Applicant must only show that industrial causation was "not zero" to show sufficient contribution from work exposure. (*Clark*, *supra*, 61 Cal.4th at p. 303.) It has also long been established that "all reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246

[1] All further statutory references are to the Labor Code unless otherwise stated.

Cal.App.4th 1301, 1310 [81 Cal.Comp.Cases 324], citing *Clemmons v. Workmen's Comp. Appeals Bd.* (1968) 261 Cal.App.2d 1, 8; see also *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; Lab. Code, § 3202.)

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza*, *supra*; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], italics and citations omitted.) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

The record reflects that the QME Dr. Dell performed a thorough and complete evaluation of applicant. He reviewed applicant's voluminous medical records and obtained additional diagnostic testing of the thoracic spine, lumbar spine and both knees. His causation opinion was provided to a reasonable medical probability and is consistent with the several years that applicant performed repetitive work for defendant. There is no medical evidence in the record challenging the conclusions reached by Dr. Dell. In the absence of contrary evidence, we are bound to accept the uncontradicted and unimpeached findings of the medical expert where it constitutes substantial medical evidence to support industrial causation for the employee's injury.

The WCJ also based her finding of injury AOE/COE to the knees, elbows and wrists in part on applicant's credible testimony. We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza*,

supra, 3 Cal.3d at pp. 318-319.) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

There is substantial evidence in the record to support the finding of injury AOE/COE to the knees, elbows and wrists. Therefore, our new decision will retain the finding of injury AOE/COE to these parts, as well as to the other parts the parties stipulated to as injured. (See Lab. Code, § 5702.)

II.

Applicant's injury occurred in 2019 and thus, his permanent disability must be rated pursuant to section 4660.1. (Lab. Code, § 4660.1.) The injured employee's occupation is one of the component parts for rating permanent disability. (Lab. Code, § 4660.1(a).) Permanent disability for injuries that occurred on or after January 1, 2013 is rated by use of the 2005 Permanent Disability Rating Schedule (PDRS) until the schedule has been amended by the administrative director. (Lab. Code, § 4660.1(d).)

The 2005 PDRS contains 45 occupational group numbers. (2005 PDRS, p. 1-8.) Which occupational group number applies is a question of fact to be determined by the trier of fact. (*Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 503 [37 Cal.Comp.Cases 393].) It is well established that an "employee is entitled to be rated for the occupation which carries the highest factor in the computation of disability." (*Id.* at pp. 505-506.) However, to be entitled to an occupational group, there must be evidence that applicant actually performed the duties required of the more arduous occupation. (*Holt v. Workers' Comp. Appeals Bd.* (1986) 187 Cal.App.3d 1257 [51 Cal.Comp.Cases 576].) An employee may also be entitled to a higher occupational group number for an activity that is an integral part of the employee's occupation. (*National Kinney v. Workers' Comp. Appeals Bd.* (*Casillas*) (1980) 113 Cal.App.3d 203, 215-216 [45 Cal.Comp.Cases 1266].)

Defendant contends that applicant is a meat cutter with an occupational code of 322. Applicant asserts that he is a butcher with an occupational code of 420. According to the 2005 PDRS, occupational group number 322 applies to food preparation and service occupations, while occupational group number 420 applies to meat processing. (2005 PDRS, pp. 3-33 and 3-35.) Group 420 is categorized as heavy hand intensive under the strength designator while 322 is categorized as medium. (*Id.* at p. 3-27.)

Both applicant and defendant's witness, Mr. Hecht, testified regarding applicant's job duties. The WCJ found both witnesses testified credibly. As discussed above, the WCJ's credibility determinations are entitled to great weight. However, applicant's testimony about his job duties conflicts to some extent with Mr. Hecht's testimony. Mr. Hecht testified that applicant testified correctly about the duties of a meat cutter. Yet Mr. Hecht disagreed with portions of applicant's testimony including the amount of overhead reaching required and whether applicant cut animals. The job analysis that defendant offered as an exhibit is from 1999 and there is nothing on it to indicate it applied to applicant specifically. It is unclear whether this job analysis accurately reflects applicant's job duties.

There is insufficient evidence in the current record to determine whether applicant's occupational group number is 322 or 420. Upon return to the trial level, the parties must further develop the record on this issue. An updated job analysis may be obtained and any other necessary discovery to address this dispute again by the trier of fact.

III.

Defendant contends that it was improper for the WCJ to order development of the record to address permanent disability for the knees. A WCJ has broad authority to issue orders to ensure proper adjudication of each claim, including "any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case." (Cal. Code Regs., tit. 8, § 10330.) This includes the authority to defer issues that the trier of fact determines are not ripe for adjudication. (See e.g., Cal. Code Regs., tit. 8, § 10787(a) [the WCJ may bifurcate the issues for trial and try them separately upon a showing of good cause].)

Furthermore, as noted above, the employee's occupation is one of the necessary components to rate permanent disability. Since determination of the occupational group number requires further development of the record, applicant's level of permanent disability for *all* body parts must be deferred.

In conclusion, we will grant reconsideration, rescind the FA&O and issue a new decision as outlined herein.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award and Order issued by the WCJ on October 11, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued by the WCJ on October 11, 2022 is **RESCINDED** in its entirety and is **SUBSTITUED** with the following:

FINDINGS OF FACT

1. Terry Kelly, while employed from July 1, 1991 through August 23, 2019 by Safeway, sustained injury arising out of and in the course of employment to the cervical spine, thoracic spine, lumbar spine, bilateral knees, bilateral elbows and bilateral wrists.

2. The employer was permissibly self-insured at the time of the injury.

3. At the time of injury, the employee's earnings were $1,028.28 per week warranting indemnity rates of $685.53 for temporary disability and $290.00 for permanent disability.

4. The employer paid temporary total disability at the weekly rate of $685.53 for the period of January 8, 2020, through April 14, 2020, and permanent disability at the weekly rate of $290.00 for the period of April 15, 2020, through October 21, 2021.

5. The employer has furnished some medical treatment. The primary treating physician is Susan E. Scholey, M.D.

6. No attorney fees have been paid and no attorney fee arrangements have been made.

7. Applicant was not temporarily disabled from April 14, 2020 through November 8, 2020.

8. Applicant's condition became permanent and stationary on April 14, 2020.

9. There is insufficient evidence to determine applicant's occupational group number.

10. The record must be further developed regarding permanent disability for the bilateral knees. Permanent disability is deferred for all parts pending determination of the occupational group number.

11. Applicant is in need of future medical care for the cervical spine, thoracic spine, lumbar spine, bilateral knees, bilateral elbows and bilateral wrists.

AWARD

AWARD is made in favor of **TERRY KELLY** against **SAFEWAY** of:

Further medical treatment reasonably required to cure or relieve from the effects of this injury.

ORDER

IT IS ORDERED that the parties further develop the record regarding the occupational group number and permanent disability for the knees.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 3, 2023

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

LAW OFFICE OF TIMOTHY HUBER
MASTAGNI HOLSTEDT
TERRY KELLY

AI/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS