

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JAMES BUCHANAN, *Applicant*

vs.

NETJETS SERVICES; ACE AMERICAN INSURANCE COMPANY, *Defendants*

**Adjudication Numbers: ADJ10082092, ADJ10082119
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings and Award of March 17, 2022, wherein it was found that, while employed as a service representative on July 4, 2014 (ADJ10082092) and during a cumulative period ending September 1, 2009 (ADJ10082119), applicant sustained industrial injury to his spine. It was found that both injuries combined to cause permanent total (100%) disability.

Defendant contends that the WCJ erred in making an unapportioned award of permanent total disability, arguing that apportionment should have been found to non-industrial factors. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we deny the defendant's Petition.¹

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

- | | |
|----------------------------|--|
| 1. Applicant's Occupation: | Service Representative (OGN 360) |
| Applicant's Age: | 60 years of age at time of both injuries |
| Date of Injury: | CT – 9/1/2009; 7/4/2014 |

¹ We previously issued an Opinion and Order Denying Petition for Removal on September 13, 2021. Deputy Commissioner Anne Schmitz who was on the panel issuing that Opinion and Order is not available to participate in the instant proceedings. She has been replaced by Commissioner Marguerite Sweeney.

- Parts of Body Injured: Spine
2. Identity of Petitioner: Defendant filed the petition.
Timeliness: The petition was timely filed on 04/05/2022
Verification: The petition was properly verified.
3. Date of Issuance of Order: 03/17/2022
4. Petitioner Contends: Petitioner contends the evidence does not justify the findings of fact and that the undersigned acted without or in excess of Board's powers when the undersigned failed to apply apportionment to causation.

Applicant filed an answer on or about 04/12/2022

II **FACTS**

By way of brief history, applicant sustained a specific injury to his low back on 7/9/2014 as well as cumulative trauma to his low back while working for NetJets. Dr. Richard Silver acted as the Agreed Medical Evaluator who authored several reports and found that the two industrial injuries were inextricably intertwined and that he could not apportion between the two injuries. Dr. Silver did however apportioned 5% to pre-existing non-industrial degenerative condition. Dr. Silver provided impairment ratings to the spine and provided work restrictions.

Mr. Tom Linvill served as the applicant's vocational expert and authored two reports wherein he opined that applicant could not compete in the open labor market, was not feasible for vocational rehabilitation and that applicant was totally disabled due to his work injuries at NetJets alone. Defendant did not seek its own vocational expert.

Matter proceeded to trial, was vacated to seek clarification from the AME, and upon receipt of supplemental report, re-submitted for decision.

Based on the review of the entire records, the undersigned found that applicant successfully rebutted the AMA guides and that applicant was 100% disabled as a result of his two industrial injuries.

It is from this findings that defendant seeks Reconsideration. Specifically, defendant contends that the undersigned must apply the 5% apportionment to the applicant's overall permanent disability and should issue an Award of 95% permanent disability.

III **DISCUSSION**

Defendant's only dispute is that while applicant is 100% disabled, the undersigned must apply the AME's 5% apportionment to non-industrial degenerative condition, and that applicant should be awarded 95% PD rather than 100% PD. Again, defendant is not challenging that applicant successfully rebutted the schedule nor that applicant is 100% disabled but that the AME's apportionment of 5% to pre-existing non-industrial degenerative condition must be applied.

Pursuant to LC 4663, permanent disability is to be apportioned based on causation. Further, apportionment of permanent disability under LC 4663 means causation to permanent disability, not causation to injury. *Escobedo v. Marshalls* (2005) 70 Cal.Comp. Cases 604 (*en banc*). Meaning, apportionment to causation must be to permanent disability, not impairment or injury. Apportionment must be based on substantial medical evidence. Employer holds the burden of proving apportionment to non-industrial factors. Applicant can still be found to be 100% disabled when an AME apportions to non-industrial cause based on vocational expert's opinion, if the vocational expert's report considers all relevant factors, including medical apportionment, and finds that applicant is permanently totally disabled as a result of industrial injury alone.

In *Fresno USD v. WCAB* (2021) 86 Cal.Comp.Cases 591 (writ denied), an AME found that applicant was 100% permanently disabled and also apportioned 15% to pre-existing non-industrial cervical fusion. Applicant's vocational expert found that applicant was precluded from returning to the open labor market and was not amenable to vocational rehabilitation as a consequence of applicant's industrial injury. The trial judge as well as the Board found that based on the vocational experts opinion that a consequence of applicant's industrial injury, applicant was not amenable to participate in vocational rehabilitation and precluded from returning to the labor market, applicant was entitled to an award of permanent total disability.

Similarly, in the present case, not only did applicant successfully rebut the scheduled rating, again not in dispute, applicant also successfully established that he was permanently totally disabled entirely due to his industrial injuries.

Mr. Linvill, applicant's vocational expert, after considering all relevant factors, including Dr. Silver's apportionment of 5% to non-industrial factors, opined that based on the work restriction assigned by Dr. Silver, along with effects of medication, applicant was not amenable to rehabilitation and that applicant was 100% disabled as a result of his industrial injuries at NetJets.

Although Dr. Silver apportionment 5% to degenerative spinal condition based on 4/16/2008 lumbar spine x-ray, Dr. Silver also opined that in a

hypothetical case where applicant only had his industrial disability, he would agree that applicant would still be totally disabled from the open labor market based on applicant's vocational expert's findings. Dr. Silver further expressed that this opinion was based on the fact that the combined effects of three failed back surgeries resulting from the industrial injuries, the consequent loss of concentration from ongoing pain and adverse side effects of pain medications rendered applicant unable to be vocationally rehabilitated.

Both the AME and applicant's vocational expert concluded that applicant was precluded from returning to the open labor market and that applicant was not feasible for vocational rehabilitation due to the effects of applicant's industrial injuries at NetJets. The AME and vocational expert's opinions were unrebutted.

Based on the above mentioned reasons, the undersigned found applicant to be 100% disabled due to his industrial injuries.

IV **RECOMMENDATION**

It is respectfully recommended that the defendant's Petition for Reconsideration be denied for the reasons stated above.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of March 17, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 3, 2022

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

**JAMES BUCHANAN
ROBERT T. BLEDSOE
MULLEN & FILIPPI**

DW/oo

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