

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

RICHARD BRAND, *Applicant*

vs.

**BUSH CONSTRUCTION; FEDERAL INSURANCE COMPANY,
administered by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ12897344
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 7, 2022

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

**GROVE LAW
HANNA BROPHY
RICHARD BRAND**

PAG/oo

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

1. Date of Injury: CT 6/22/2017~6/22/2018
 Applicant's Occupation: Carpenter
 Parts of Body Injured: low back, neck, left shoulder and right knee
 Mechanism Injury Occurred: Traction on forklift

2. Date of Issuance of Award/Order: 12/14/2021

3. Identity of Petitioner: Defendant
 Petition Dated: 1/3/2022
 Petition Filed: 1/4/2022
 Timeliness: The Petition is timely.
 Verification: The Petition is verified.

4. Answer: No Answer was filed.

5. Defendant (hereinafter Petitioner), contends that the evidence does not justify the findings of fact.

6. It is recommended the Petition be denied.

**II
BACKGROUND**

Facts

On November 14, 2019, Applicant filed Application alleging injury to the neck, back, bilateral shoulders and right knee as a result of cumulative trauma due to day-to day activities while employed as a carpenter for employer Bush Construction. Injurious exposure to the right shoulder has been accepted, but Petitioner denies Applicant's claim of injury to the neck, back, left shoulder and right knee as a result of cumulative trauma while employed for Bush Construction. [*Minutes of Hearing, 10/20/2021, page 2, lines 4-9*] Nathan Oehlschlaeger, D.C. serves as the Panel Qualified Medical Evaluator to evaluate Applicant's alleged cumulative trauma injury. Dr. Oehlschlaeger's initial report demonstrates he interviewed Applicant, documenting Applicant's medical and employment history, alleged mechanism of injurious exposure, physical complaints, prior injuries and limitations in activities of daily living. [*Joint Exhibit AAA, Oehlschlaeger,*

2/12/21, pp. 7-8, 13-18] Applicant described his job duties to Dr. Oehlschlaeger, in detail, which included going up and down ladders, working on roofs, moving materials, swinging hammers and sledgehammers, lifting heaving braces, and equipment at times, weighting over 100 lbs. [*Joint AAA, Oehlschlaeger, 2/12/21, pp. 15-16*] Applicant complained of left shoulder pain, neck pain, low back pain and right knee pain which he reports as worsening during the time of his employment for Bush Construction. [*Joint AAA, Oehlschlaeger, 2/12/21, p. 15*] Applicant also complained of right shoulder pain, with no prior symptoms before employment at Bush Construction. [*Joint AAA, Oehlschlaeger, 2/12/2021, p. 15*] Dr. Oehlschlaeger reviewed a litany of medical records, including prior treatment reports, diagnostic studies and medical legal evaluations, which were summarized. [*Joint AAA, Oehlschlaeger, 2/12/2021, pp. 2-7, 8-13*] Dr. Oehlschlaeger conducted Applicant's physical examination, notating the findings. [*Joint AAA, Oehlschlaeger, 2/12/21, pp. 17-18*] Dr. Oehlschlaeger diagnosed right shoulder internal derangement, right shoulder pain, left shoulder internal derangement, left shoulder pain, cervical DDD, cervical radiculitis, post cervical anterior discectomy and fusion, chari malformation, headaches and right knee internal derangement. [*Joint AAA, Oehlschlaeger, 2/12/21, pp. 13-14*] Applicant disclosed, and medical records confirmed, prior injuries, and surgeries, to the neck, low back, left shoulder, right shoulder, and right knee. [*Joint AAA, Oehlschlaeger, 2/12/21, p. 21*] Noting Applicant has a significant history of previous injury, including multiple surgeries, Dr. Oehlschlaeger opined based on heavy physical labor Applicant engaged in while working as a carpenter for employer Bush Construction, combined with preexisting injuries and impairment, there exists a reasonable medial probability that Applicant's current condition arose out of and occurred in the course of employment at Bush Construction. [*Joint AAA, Oehlschlaeger, 2/12/21, pp. 22 & 25; Oehlschlaeger Deposition Testimony 8/25/21, p. 11, lines 8-17*]

Findings, Award, Order

This matter proceeded to trial to adjudicate parts of body (low back, neck, left shoulder and right knee), and whether Dr. Nathan Oehlschlaeger, D.C.'s medical opinions constitute substantial medical evidence. On December 14, 2021, the undersigned issued a Findings of Fact, Award, and Opinion On Decision (hereinafter Findings and Award), finding medical opinions of Panel Qualified Medical Evaluator Nathan Oehlschlaeger, D.C. opining Applicant sustained injury to the right shoulder, low back, neck, left shoulder and right knee constitutes substantial medical

evidence. It is from this Findings and Award that Petitioner seeks reconsideration. As of the writing of this Report, no answer to the petition has been filed by Applicant.

Labor Code §5900

A Petition for Reconsideration may only be had of a final order, decision or award. (Lab. Code, §§ 5900, subd. (a), 5902.) An order which does not dispose of the substantive rights or liabilities of those involved in the case is not a final order. (Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer) (1980) 104 Cal.App.3d 528; Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer) (1978) 82 Cal.App.3d 39.) In this case, this Court's Award/ addresses substantive rights and liabilities. Therefore, it is a final order subject to reconsideration.

III DISCUSSION

A. Substantiality

Petitioner avers the findings are not justified by the evidence, contending Dr. Oehlschlaeger opinions do not constitute substantial medical evidence. 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. (*Heggin v. Workers' Comp. Appeals Ed.* (1971) 4 Cal.3d 162, 169) Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess. (*Id.*) Petitioner contends Dr. Oehlschlaeger opinion that there exists a " ... reasonable medical probability ... arose out of and occurred during the course of employment at Bush Construction from the heavy physical labor required, ... " is conclusory and that there is no explanation of any connection between the conditions, how they developed, nor how any motions/stressors/activities related to his work created any type of injurious exposure such that his work as a carpenter with the employer, Bush Construction, caused those conditions. [*Petition for Reconsideration, 1/3/22, p. 4, lines 14-23*] This assertion discounts Dr. Oehlschlaeger's opinion is issued after interviewing Applicant and discussing Applicant's (1) medical history, (2) employment history, (3) alleged mechanism of injurious exposure, (4) chief complaints, (5) prior injuries, (6) limitations in activities of daily living, and (7) description of job duties, after Dr. Oehlschlaeger conducted physical examination, as well as consideration of a multitude of medical records, in which Dr. Oehlschlaeger's opinion is based.

Applicant did not deny prior symptomology in his neck, right knee, low back, and left shoulder, due to years of heavy labor, rather described worsening symptomology in these body parts while employed at Bush Construction, due heavier work. Dr. Oehlschlaeger opined that the heavy nature of Applicant's work at Bush Construction did at least partially contribute to increasing impairment. [*Joint CCC, Oehlschlaeger Depo., 8/25/21, p. 11, lines 8-17*] Dr. Oehlschlaeger found Applicant to be credible when describing his complaints. [*Joint CCC, Oehlschlaeger Depo., 8/25/21, p. 16, lines 8-9*] Defendant proffered no rebuttal evidence, by way of testimony or documents, to demonstrate Applicant's work duties as a carpenter as described to Dr. Oehlschlaeger, which Dr. Oehlschlaeger determined to constitute of heavy work contributing to medical conditions, were factually inaccurate.

Additionally, Petitioner appears to intimate Applicant could not have suffered injurious exposure from his employment at Bush Construction, because of the duration of his employment, 6 months, postulating Applicant was placed on modified duties several months after commencing employment due to specific injury to the right shoulder occurring April 9, 2018. [*Joint CCC, Oehlschlaeger Depo., 8/25/21, p. 14, lines 8-25*] While no evidence was offered to support the assertion, even based on the postulation as presented by Petitioner during Dr. Oehlschlaeger's deposition, the work restriction was only to the right upper extremity. Petitioner proffered no rebuttal evidence, by way of testimony or documents, to demonstrate the duration Applicant worked at Bush Construction, could not have caused injurious exposure. Nor, did Petitioner proffered rebuttal evidence to demonstrate Applicant was prescribed work restrictions from the April 9, 2018, specific injury, which would have rendered Applicant's job duties less strenuous, rather than requiring Applicant to have to compensate by more strenuous use of other body parts while he continued to work for Bush Construction.

B. Cervical Spine

Petitioner's assertion that Dr. Oehlschlaeger refuses to admit that the Chiari malformation diagnosis is too complex for him to determine causation for issues of the neck is a misstatement of The evidence demonstrates Applicant had preexisting cervical injury, including a cervical fusion at C5-C7 on 1/612008 after an automobile accident in 2007. [*Joint AAA, 2/21/17, page 14*] Dr. Oehlschlaeger opined Applicant neck sustained industrial injury because Applicant complaint worsening in neck after working at Bush. Dr. Oehlschlaeger also opined that Applicant's subsequent surgery at C3-C4 in 2019 could evidence worsening of the neck. Dr. Oehlschlaeger's

opinion. Petitioner erroneously asserts Dr. Oehlschlaeger admits he has no training in evaluating surgical procedures. [Petition for Reconsideration, 1/3/22, p. 6, line 6.] In fact, Petitioner posed as a statement with a question, with Dr. Oehlschlaeger responding solely to the question presented:

Q: Okay, I understand that you are not trained in surgeries, but is it possible that the surgery in 2019 is a natural progression of his 2009 fusion?

A: It's possible, yes.

[*Joint CCC, 8/25/21, Oehlschlaeger Depo., 8/25/21, p. 35, lines 16-19*]

Petitioner presents a hypothetical scenario to Dr. Oehlschlaeger as to whether Dr. Oehlschlaeger's opinion as to causation could change if an orthopedic surgeon opined that all of Applicant's cervical complaints are a natural progression of the 2009 fusion, in which Dr. Oehlschlaeger testified possibly. [*Joint CCC, 8/25/21, Oehlschlaeger Depo., 8/25/21, p. 36, lines 4-8*] However, this hypothetical is unsubstantiated as there is no medical evidence to support the hypotheticals. And, two years after Applicant filed the Application, Petitioner failed to produce medical evidence to support the hypothetical.

Neurosurgeon Henry Aryan, M.D., noted a Chiari Malformation (when brain/cerebellum) at the back of the skull bulges through a normal opening in the skull where it joins the spinal canal) in an MRI performed 3/16/2012. [*Defense Exhibit 2, SDT records Aryan, bates stamped pp. 36-38*] Dr. Aryan ordered an MRI of the brain and recommended consultation by a neurosurgeon at UCSF. (Id.) Applicant underwent consultation at UCSF 5/7/2012, then subsequent consultation at Stanford Neuroscience Health Center on 3/19/2014, and follow-up 12/129/16. [*Defense Exhibit 1, SDT Records Stanford Health; Defense Exhibit 2, SDT records UCSF, pp. 36-38*] Dr. Oehlschlaeger acknowledged the only aspect of the case that he was unfamiliar with was the notation Chiari malformation on the MRI, in which he researched. [*Joint CCC, 8/25/21, Oehlschlaeger, p. JO, lines 16-18*] Dr. Oehlschlaeger described Chiari malformation as a condition where brain tissue extends into spinal canal [*Joint CCC, 8/25/21, Oehlschlaeger, p. 30, lines 19-23*] Although Dr. Oehlschlaeger believes more likely that Applicant's Chiari malformation is congenital, he could not provide a definitive determination to that fact, therefore recommended a consultation with an appropriate specialist. [*Joint CCC, 8/25/21, Oehlschlaeger Depo., p. 31, lines 19-23*] Dr. Oehlschlaeger acknowledged that a Chiari malformation may cause symptomology in other body parts and symptoms and possibly be the cause of some of Applicant's pain complaints. [*Joint CCC, 8/25/21, Oehlschlaeger Depo., p. 32, lines 4-15*] And, while Dr. Oehlschlaeger

initially responded in the affirmative to Petitioner's inquiry of whether a neurosurgical evaluation is necessary, before a definitive opinion as to causation of the neck, he quickly clarified that such evaluation would only be necessary as to some of Applicant's neck complaints, explicating that it is not necessary before stating some of Applicant's cervical spine impairment is due to employment at Bush Construction. [*Joint CCC, 8/25/21, Oehlschlaeger Depo., 8/25/21, p. 33, lines 13-25*] Moreover, Dr. Oehlschlaeger did not opine that the head and/or skull, generally, nor Chiari malformation specifically, were industrial, nor did this Court find the head/brain, or Chiari to be industrial.

C. Left Shoulder

Petitioner's assertion that Dr. Oehlschlaeger "admits that he is not able to properly evaluate multiple aspects of [Applicant's] case" and further alleging Dr. Oehlschlaeger admitted" ... he is not able to competently compare current diagnostics to the past ones, ... " are factually inaccurate statements of Dr. Oehlschlaeger's actual testimony and representations. [Petition for Reconsideration, 1/3/22, p. 4, lines 23-24} The parties provided Dr. Oehlschlaeger records Petitioner subpoenaed from Zurich, 9/20/2018, which included medical reports from Jeffrey Lundeen, M.D. dated 11/13/2007 and 2/26/2007 pertaining to a left shoulder injury on 11/29/2005, which Dr. O reviewed and summarized. [Defense Ex 5, Zurich, 9/20/18, p. 1; Oehlschlaeger, 2/12/21, pp. 6-7). Dr. Lundeen, serving as an Agreed Medical Evaluator, reviewed and summarized a medical report of Lenita Williamson, M.D. dated 1/28/2003, identified as an Independent Medical Evaluator, examined Applicant for a for a left shoulder injury, and a left shoulder MRI report dated 3/25/2003. Dr. Oehlschlaeger also reviewed a report for a left shoulder MRI performed 2/23/2020. [*Joint BBB, Oehlschlaeger, 3/18/21; Oehlschlaeger Depo, 8/25/21, p. 36, lines 21-23*] When deposed, absent ever being presented with the 2003 left shoulder MRI, or Dr. Williamson's 2003 report, in response to Petitioner's inquiry as to whether there was" ... anything new that [Dr. Oehlschlaeger] specifically recalled that [Dr. Oehlschlaeger] found in the [recent] MRI" Dr. Oehlschlaeger testified:

"No, I do not believe there's anything new. You would have to have to compare this MRI to the previous MRIs and you would probably need a radiologist to do it to determine if there's progression"

[*Joint CCC, Oehlschlaeger Depo, 8/25/21, p. 37, lines 4-12*]

D. Right Knee

Petitioner avers Dr. Oehlschlaeger's opinion that in the event Applicant" ... is no more impaired after his employment at Bush Construction, as he was in 2013, then there would be no cumulative trauma", to be an improper causation analysis. [*Petition for Reconsideration, 1/3/22, p. JO, lines 15; Joint CCC, Oehlschlaeger Depo, 8/25/21, p. 13, line 19*] When deposing Dr. Oehlschlaeger, Petitioner inquired whether Dr. Oehlschlaeger was admitting he could not read and compare diagnostic studies of Applicant's right knee, after first pointing out he only had reports of studies, not actual studies, Dr. Oehlschlaeger testified it would be more valuable to have a radiologist make that determination, that he would not feel comfortable doing that, and would rather have a radiologist's opinion. [*Joint CCC, Oehlschlaeger Depo, 8/25/21, p. 40, lines 1-15*] Dr. Oehlschlaeger also testified factors to consider when determining whether there is cumulative trauma include range of motion deficit and limitations in activities of daily living. [*Joint CCC, Oehlschlaeger Depo, 8/25/21, p. 42, lines 9-12*]. Dr. Oehlschlaeger explained he was able to determine Applicant's right knee was causatively related to employment at Bush, Construction based on diagnostic studies, Applicant's interview, and consideration of Applicant's job duties. [*Joint CCC, Oehlschlaeger Depo, 8/25/21, p. 43 line 24- p. 44, line 3*]

Additionally, in further support of Petitioner's assertion that Dr. Oehlschlaeger "admits that he is not able to properly evaluate multiple aspects of [Applicant's] case" and further alleging Dr. Oehlschlaeger admitted" ... he is not able to competently compare current diagnostics to the past ones, ... " is not factually accurate, when Petitioner inquired whether Dr. Oehlschlaeger was admitting he could not read and compare diagnostic studies of Applicant's right knee, after first pointing out he only had reports of studies, not actual studies, Dr. Oehlschlaeger testified it would be more valuable to have a radiologist make that determination, that he would not feel comfortable doing that, and would rather have a radiologist's opinion. [*Joint CCC, Oehlschlaeger Depo, 8/25/21, p. 40, lines 1-15*]

IV

RECOMMENDATION

Petitioner presented numerous hypothetical scenarios to Dr. Oehlschlaeger as to whether Dr. Oehlschlaeger's opinion as to causation could change if a particular specialist (orthopedic surgeon, neurosurgeon, or radiologist) offered unsubstantiated opinions as to specific medical findings. The hypothetical scenarios are not germane as to causation as there is no medical evidence to support the hypotheticals. Based on the evidence discussed above, it is respectfully requested that the Finding of Fact in this matter go undisturbed and the Petition for Reconsideration be DENIED.

DATE: January 19, 2022

Angelique Scott
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE