WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PILAR VALDEZ, *Applicant*

vs.

IN-HOME SUPPORT SERVICES, legally uninsured; adjusted by YORK RISK SERVICES/CMS, *Defendants*

Adjudication Numbers: ADJ10540177 (MF), ADJ10547062
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 as quoted below, we will deny reconsideration.

We disagree with the statement in the WCJ's Report that it was improper for defendant to attempt to amend the facts and issues at trail from those listed in the Pre-Trial Conference Statement. Rather, it is the stipulations, issues and exhibits listed at the trial in the Minutes of Hearing and Summary of Evidence (MOH/SOE) that supersede. (Cal. Code Regs., tit. 8, § 10787.)

We adopt and incorporate the following quote from the WCJ's Report:

II
BACKGROUND
Facts

> Applicant commenced employment as a caregiver for In Home Supportive Services (IHSS) in 2006. [*App Ex 1, p. 2*] After transferring a client to and from a chair, walker and commode on 11/2/2015, Applicant reported sustaining bilateral knee injuries. [*App Ex 1, p. 2; Def Ex F, p.5*] She sought initial medical treatment with Deidre Defoe, M.D., at Permanente Medical Group, on 11/17/2015, reporting constant bilateral knee pain, radiating to the upper and lower leg, associated with numbness and tingling around the knee, Dr. Defoe also documented Applicant reported her IHSS patient was becoming more ill,

which was putting more pressure on Applicant's knees, causing more pain, aggravated by standing and walking. Dr. Dafoe recommended bilateral x-rays, and released Applicant to return to work full duty, yet instructed Application to avoid aggravating activity. [*Defendant Ex F, p.5*] Applicant returned two days later 11/19/2015, reporting continued bilateral knee complaints, with bilateral knee x-rays revealing degenerative changes with small suprapatellar joint effusions, wherein Dr. Defoe then imposed modified duty, recommending a second opinion. [*Def Exhibit x F, p.5*] On 12/2/2015, Shahzad Jaromi, M.D. examined Applicant and opined Applicant needed bilateral knee replacement surgery, yet concurrently determine Applicant's condition was permanent and stationary (P&S). [*Def Ex F, p.5*]

On September 26, 2016, Lonnie Powell, D.C. was designated as Applicant's primary treating physician. [*App Ex 7*] Applicant commenced treatment with Dr. Powell at Visalia Industrial Medicine on 10/25/2016, with Dr. Foxley managing medical prescriptions. [*App Ex 1, p. 2; Def Ex E, p. 3*] While under treatment of Drs. Powell and/or Foxley, Applicant was placed on temporary disability, while they managed her care, initially ordering updated bilateral knee MRIs. [*Def Ex E, pp. 4-11*]. On 3/17/2017, Dr. Powell referred Applicant to Peter Simonian, M.D. for surgical consultation based on findings of MRI Applicant began experiencing back pain by 3/17/2017, with Applicant also presenting with back pain complaints. [*Def Ex E, p. 4*]. When Applicant presented to Dr. Simonian on 5/4/2017, she was using a walker, and underwent cortisone injections with Dr. Simonian opining that if the injections were not successful he would make a referral for knee arthroplasty. [*Defense Ex. E, p. 5*] On 5/19/2017, Dr. Powell requested authorization of total knee replacement surgery as recommended by Dr. Simonian. [*Def Ex E, p. 5*] On 7/18/2017, surgeon Paramjeet Gill, M.D. at Sierra Pacific Orthopedic examined Applicant for surgical consultation, with Dr. Gill opining Applicant needed to lose weight to be a candidate for the recommended knee replacement surgery, with applicant proceeding with a viscosupplementation injections in the meanwhile. [*Def Ex E, p.6*] Applicant continued to treat with Drs. Powell and Foxley monthly over the next before being cleared for surgery, with Dr. Gill performing right knee total arthroscopy on 8/16/2018, then left knee total arthroscopy on 2/12/2019. [*Def Ex E, pp.7-11*] Drs. Powell and Foxley continued to manage Applicant's medical treatment post op, until Dr. Powell performed Applicant's P&S evaluation 8/31/2020. [*App Ex 6; Def Ex E, p. 11; Def Ex D, pp. 2-3*]

Charles Xeller, M.D. was selected to serve as the Panel Qualified Medical Evaluator, evaluating Applicant's complaints of bilateral knee pain on 5/24/2016. Dr. Xeller reviewed medical records in conjunction with the examination, which were summarized. [*Def Ex F, pp. 2-6*] Dr. Xeller diagnosed osteoarthritis of both knees, determined Applicant reached maximum medical improvement, and assessed impairment based on arthritic degeneration as revealed in the x-ray at 3% WPI for the right knee and 10% WPI for the left knee. [*Def Ex F, p. 7*] Dr. Xeller imposed work restrictions of no squatting or

kneeling. [*Def Ex F, p .7*] Dr. Xeller opined that while Applicant had a history of inclusive of partial menisectomy and a motor vehicle accident, was overweight and had age related changes from activities of daily living. [*Def Ex F, pp. 7&8]*

When deposed on 5/10/2017, Dr. Xeller acknowledged he was not aware Applicant filed an Application alleging injury to the bilateral knees, bilateral hips, back and sleep as a result of pain. [*Def Ex G, p. 9, lines 6-15*] Dr. Xeller acknowledged reviewing the 12/12/2015 report of the Dr. Jaromi and agreed Applicant was in need of bilateral knee replacement surgeries. [*Def Ex G, p. 18, lines 7-14; p. 20 lines 19-21; p. 23, lines 2-4*]

On 7/24/2019, Dr. Xeller re-evaluated Applicant's bilateral knees after she'd undergone bilateral total knee replacements arthroplasties, summarizing his review of interim medical records and operative reports, including treatment reports of Drs. Powell and Foxley, as well as surgical reports of Drs. Simonian and Gill and other providers at SPOC, under Dr. Gill's supervision. [*Defendant Ex E, pp. 3-11*] Dr. Xeller determined Applicant had not reached maximum medical improvement, recommended she continue therapy, and requested she return back in three months. [*Def Ex E, p 13*]

On 1/30/2020, Dr. Xeller re-evaluated Applicant's bilateral knees a second time, summarizing 4 interim reports of Drs. Powell and Foxley. Dr. Xeller determined Applicant's condition to be P&S again, assessed impairment at 20% WPI for the right knee and 20% WPI for the left knee, again, apportioning 80% to nonindustrial factors. [*Def Ex D, p. 4*] Dr. Xeller determined Applicant needed future medical care, and imposed work restrictions of desk, sedentary work only. [*Def Ex D, p. 5*]

Having failed to evaluate all alleged body parts, Dr. Xeller performed a third re-evaluation, 10/19/2020, evaluating Applicant's bilateral hips and spine, as well as knees. [*Def Ex B*] Dr. Xeller re-reviewed several prior reports of Drs. Powell and Foxley, Dr. Powell's subsequent P&S report, as well as the 5/21/2019 Post Op report Dr. Gill. [*Def Ex B, pp. 3-6*] Dr. Xeller conducted physical exam of the neck, bilateral shoulders, upper extremities, back, hips, knees, and lower extremities, documenting his findings for all body parts in less than half of a page. [*Def Ex B, p. 6*] Dr. Xeller determined Applicant's condition was P&S, and opined that he did not find significant injury to Applicant's neck, back, hips or shoulder. [*Def Ex B, p. 7*]

Findings, Award, Order

On 2/3/2022, the undersigned issued a Findings of Fact, Award and Opinion on Decision (hereinafter *Findings and Award*), finding the medical opinions of PQME Charles Xeller do not constitute substantial medical evidence, the medical opinions in Lonnie Powell, D.C. P&S report constitute substantial

medical evidence, injury to the bilateral knees, back, bilateral hips, and neck, causing temporary disability commencing 11/9/2015 through 8/5/2020. Petitioner filed [its] Petition for Reconsideration (hereinafter *Petition*) on 2/23/2022. It is from this *Findings and Award* that Petitioner seeks reconsideration. Applicant filed an Answer 3/1/2022.

III
DISCUSSION

A. PTP Lonnie Powell, D.C.

The *Petition* avers the reports of Applicant's PTP, Dr. Powell do not constitute substantial medical evidence contending they are speculative and conjectural lacking medical basis.

1. Dr. Powell Treatment

The *Petition* avers the Findings and Award's reliance on Dr. Powell's report is in error based on its contention that Dr. Powell never treated Applicant. [*Petition, p. 3, lines 19-20*]

….

b. Primary Treating Physician

The primary treating physician (PTP) is the physician who is primarily responsible for managing the care of an applicant, and who has examined the applicant at least once for the purpose of rendering or prescribing treatment and has monitored the effect of the treatment thereafter. (*8 C.C.R. 9785*) A PTP is primarily responsible for managing the care of the injured worker or the physician designated by that treating physician shall, in accordance with rules promulgated by the administrative director, 6 render opinions on all medical issues necessary to determine eligibility for compensation. (*8 C.C.R. 9785*) When the PTP determines an applicant's condition is P&S, the PTP must report any findings concerning the existence and extent of permanent impairment and limitations, and any need for continuing and/or future medical care resulting from the injury, submitted on the DWC Form PR-3 or DWC Form PR-4, or in such other manner which provides all the information required by Title 8, California Code of Regulations, section 10682. (*8 C.C.R. 9785(h)*.) The information may be submitted on the "Primary Treating Physician's Permanent and Stationary Report" form (DWC Form PR-3 or DWC Form PR-4) or in such other manner which provides all the information required by CCR 10682. (*8 C.C.R. 9785(h)*)

The evidentiary record demonstrates Defendant designated Dr. Powell to treat Applicant by letter dated 9/26/2016. The evidentiary records also demonstrates

in compliance with Dr. Powell's statutory and regulatory duty, Dr. Powell conducted P&S evaluation on 8/5/2020, issuing a P&S report dated 8/31/2020, reporting findings concerning the existence and extent of permanent impairment and limitations, and need for continuing and/or future medical care resulting from the injury. Despite Petitioner designating Dr. Powell as Applicant's PTP, Petitioner seeks to discredit Dr. Powell's role as the PTP based on an isolated statement in Dr. Powell's P&S report which indicates Applicant is followed by Dr. Foxley on an industrial basis once per month. [*App Ex 1, p. 2*] However, Dr. Foxley following Applicant does not negate Dr. Powell's role as the designated PTP. Furthermore, the *Petitions* reliance on this isolated statement, also seeks to disassociate the remainder of Dr. Powell's reference to Dr. Foley's role, in that Dr. Foxley, as a licensed medical doctor, prescribes Applicant's medication, which is a function Dr. Powell could not exercise as a licensed chiropractor. The *Petition* also seeks to overlook Dr. Powell's express representation that as Applicant's primary treater in this case, he has been asked to evaluate Applicant's subjective complaints of bilateral knee, bilateral shoulders, bilateral hands and spine pain in regard to the cumulative trauma claim from 11/9/2014 through 11/9/2015, and prepare a comprehensive P&S report. [*App Ex 1, p. 10*] The *Petition* also seeks to rely on Applicant Exhibit 6, various Primary Treating Physician Progress Reports (PR-2) with Request for Authorization dated 4/20/21, 3/16/21, 2/16/21, 1/19/2021, 12/15/20, 11/17/20, 10/20/20, 9/15/20, 8/18/20, 7/21/20, 6/16/20, 5/19/20, and 1/21/20, in support of its contention that Dr. Powell never treated Applicant. The medical reports are signed by both Dr. Foxley and Dr. Powell, with the box identifying Dr. Powell as the PTP, marked, rather than Dr. Foxley. Moreover, these reports are not exhaustive of treatment reports, but were offered by Applicant to prove Applicant's 7 need for medical treatment, which is why this Court allowed the reports of varying dates to be admitted into the evidentiary record as one exhibit, rather than marked for identification separately, and also why each PR-2 accompanies a corresponding RFA. Therefore, these reports fail to demonstrate that Dr. Powell never treated Applicant.

c. Secondary Treating Physician

If there is more than one treating physician, a single report shall be prepared by the physician primarily responsible for managing the injured worker's care that incorporates the findings of the various treating physicians. (*Labor Code § 4061.5*) A secondary physician is any physician other than the primary treating physician who examines or provides treatment to the employee, but is not primarily responsible for continuing management of the care of the employee. (*8 C.C.R. 9785(a)(2)*) A secondary physician who examines or provides treatment to the applicant, but is not primarily responsible for continuing management of the care of the applicant, shall report to the PTP. (*8 C.C.R. 9785(e)(3)*) The PTP shall be responsible for obtaining all of the reports of secondary physicians and incorporate, or comment upon, the findings and opinions of the other physicians in the PTP's report. (*8 C.C.R. 9785(e)(4)*) The

evidentiary record demonstrates Dr. Foxley also treated Applicant, at least for the purpose of evaluation to prescribe medication, since Dr. Powell is unable to prescribe medications as a licensed chiropractor. Therefore, to the extent Dr. Foxley served as the secondary treating physician, Dr. Powell was still obligated to obtain Dr. Foxley's reporting and issue all final PTP reports as to nature/extent, existence of impairment disability and need for medical treatment.

2. Medical Record Review

The *Petition* avers Dr. Powell's P&S report dated 8/31/2020 does not constitute substantial medical evidence contending his opinions are not based on any medical reports [*Petition, p. 3, lines 19-20*] Dr. Powell's 8/31/2020 P&S report indicates his opinions are based on having reviewed the history as provided by Applicant, physical examination findings, and the *voluminous records* reviewed. [*App Ex 1, pp. 10&15*] For the first time Petitioner seeks to present newly raised argument that Dr. Powell's 8/31/2020 report does not constitute substantial medical evidence because the report does not identify which reports he reviewed. As discussed *supra*, III.A.1. Dr. Powell is Applicant's PTP. As Applicants PTP, Dr. Powell has treated Applicant issuing progress reports and FRFA in regular intervals. Dr. Powell has also managed and coordinated Applicant's referrals for diagnostic studies, consultations and treatment authorization. While individual reports of Dr. Powell were not 8 offered into evidence based on Defendant's failure to properly and timely identify this as a contested issue, Panel QME Xeller summary of treatment reports submitted to him for review demonstrate Dr. Xeller managed Applicant's medical treatment commencing 10/25/2016, up through and until the time Dr. Powell issued his 8/31/2020, with the remaining evidentiary record demonstrating Dr. Powell continued to manage Applicant's medical care thereafter. While Dr. Xeller identified Dr. Foxley as the author of PTP treatment reports he reviewed, the evidentiary record demonstrates Applicant's PTP reports were signed jointly by both Dr. Foxley and Dr. Powell. In evaluating the evidentiary value of medical evidence, the physician's report and testimony must be considered as a whole, not segregated parts. (*Bracken v. WCAB (1989) 54 CCC 349, 355*) As Applicant's primary treating physician, Dr. Powell has had cause to examine and treat Applicant 4 years prior to conducting the P&S evaluation and issuing the P&S report dated 8/31/2020, therefore, accepts his medical opinions as a whole.

3. Temporary Disability

The *Petition* contends Dr. Powell's P&S report dated 8/31/2020 does not constitute substantial medical evidence because it does not address temporary disability. (*Petition, p. 4, line 24 – p. 5, line 5*] When the primary treating physician determines that the employee's condition is permanent and stationary, the physician shall report any findings concerning the existence and extent of permanent impairment and limitations and any need for continuing and/or future

medical care resulting from the injury. (*8 C.C.R. 9785 (e)*) PTPs are not required to address temporary disability in the permanent and stationary report. Therefore, Dr. Powell's P&S report not addressing temporary disability is not grounds to find the report does not constitute substantial medical evidence. However, while Dr. Powell did not render an express opinion as to Applicant's periods temporary disability, this Court found Dr. Powell's report probative as to Applicant's disability status as it pertains to Applicant's employment and work history, job duties, ability to work (or lack therefore) and ongoing medical treatment in support of Applicant claim for temporary disability benefits for the period of 11/6/2015, through 8/31/2020. Applicant commenced employment as a caregiver for IHSS 2007/2008 where her duties required repetitive binding, stooping, prolonged walking and standing, transferring and transporting patients to and from medical appointments, lifting patient's weight up to 225 lbs., lifting/loading walkers into vehicles, and loading/unloading patients in/out of vehicles. [*App Ex 1, p. 2*] Applicant informed her employer about the increasing pain wan was directed to Kaiser 9 Permanente, where she was examined had X-rays, and was advised she needed knee replacement recommended, but was only prescribed ibuprofen. [*App Ex 1, p. 2*] Applicant's complaints were progressive with her following treatment protocol, eventually undergoing bilateral knee arthroplasty 2018 and 2019. [*App Ex 1, p. 10*] Dr. Powell's P&S report dated 8/31/2020 parallels Applicant's treatment history as summarized in the Dr. Xeller's medical record review: Dr. Defoe Kaiser Permanente Medical Group, initially opined Applicant could return to work full duty when first examined on 11/17/2015, by the second exam, on 11/19/2015, work restrictions were imposed, with Applicant referred for consultation with Dr. Jaromi and on 12/2/2015, Dr. Jaromi opined Applicant needed total knee arthroplasties, and less than two months after initially submitting for treatment absent any course of conservative treatment, determined Applicant was P&S released from care with no need for continuing or future treatment restricted to modified duty of no lifting, carrying, pushing, or pulling more than 25 lbs, no repetitive squatting or kneeling, and no prolonged walking and standing. [*Def Ex F, pp. 5-6*] Applicant remained symptomatic, eventually came under the care Dr. Powell commencing treatment on 10/25/2016, who determined Applicant to be temporarily disabled, as Dr. Powell managed Applicant's medical care through various conservative modalities, as she underwent bilateral total arthroplasties 2018 and 2019. [*App Ex 1, p. 10*] until he determined her condition to have reached maximum medical improvement. Applicant was temporarily disabled from 11/9/2015, through the date Dr. Powell determined her to be P&S 8/5/2020.

B. PQME Charles Xeller, M.D.

1. Medical Record Review

The *Petition* avers that the reports of Panel QME Xeller constitute substantial medical evidence because they are based on a review of medical records and multiple evaluations of Applicant. This Court does not dispute Dr. Xeller

reviewed and summarized numerus medical records over the course of 5 years he served as the panel QME, and purportedly "evaluated" Applicant on at least 5 different occasions, issuing at least 6 reports, from this Court's evidentiary record and providing additional medical opinion by way of testimony during 1 deposition. Expert medical opinion, however, does not always constitute substantial evidence on which the board may rest its decision. Courts have held that the board may not rely on medical reports which it knows to be erroneous (*McCoy v. Industrial Acc. Com*. (1966) 64 Cal.2d 82, 92) This Court the Petitions averment that Dr. Xeller's medical opinion 10 constitutes substantial medical evidence merely because he reviewed medical records and evaluated Applicant multiple time is misplaced rather than basing it on the substance of his reporting misplaced.

2. Body Parts

The *Petition* avers the *Finding and Award* misstates Dr. Xeller's finding on causation with this Court confusing Dr. Xeller's findings as to body parts. [*Petition, p. 10, line 23- p. 11, line 2*.] The *Petition* then appears to render an entirely different medical-legal opinion on Dr. Xeller's behalf explicating "Dr. Xeller does in fact find injury those additional body parts. However, Dr. Xeller indicates that there is very little medical record to substantiate injury to the additional body parts on an industrial basis and therefore finds industrial causation to the knees. (Defendant's Exhibit A)" [*Petition, p. 10, line 23- p. 11, line 2*.] The *Petitions* assertion as to Dr. Xeller's opinion is inaccurate. Dr. Xeller's initial report dated 5/24/2016, "Defendants Exhibit A" does not address the additional body parts. With injury to bilateral knees is not disputed, Dr. Xeller only evaluated Applicant's bilateral knees at the time of his initial evaluation 5/24/2016. When deposed on 5/10/2017, Dr. Xeller acknowledged he was not aware Applicant filed an Application alleging injury to the bilateral knees, bilateral hips, back and sleep as a result of pain. [*Def Ex G, p. 9, lines 6-15*] However when Applicant retuned back for re-evaluation 7/24/2019 and 1/30/2020, Dr. Xeller still failed to evaluate the other body parts. Dr. Xeller finally evaluated the additional body parts when Applicant returned for third re-evaluation on 10/19/2020. Dr. Xeller reviewed 3 new treatment reports and re-reviewed several reports he previously reviewed and summarized from treatment reports of Drs. Powell and Foxley and Dr. Gill. [*Def Ex B, pp. 3-6*] Dr. Xeller documented Applicant's physical complaints as some hip aching, back stiffness after sitting too long, with no appreciable complaints of the neck or shoulder. [*Def Ex B, p. 2*] Dr. Xeller conducted a physical exam of Applicant's neck, bilateral shoulders, upper extremities, back, hips, knees, and lower extremities. Notably, the entirety of Dr. Xeller's findings associated form the "physical exam" are limited to one sentence per body part/system, with the entirety of the section encompassed in less than half a page. [*Def Ex B, p. 6*] Dr. Xeller diagnoses status post bilateral knee replacements and concludes "Basically, I do not find a significant injury to her neck, back, hips, or shoulders. She does complaint of difficulties sleeping secondary to pain. In order to

evaluate her for a sleep problem she needs a sleep test to make she does not have any sleep apnea." [*Def Ex B, p. 7*] Dr. Xeller's medical opinion finding "no significant" injury insubstantial to rely on as to whether Applicant's job duties as a caregiver caused cumulative trauma to the additionally alleged body parts. Regardless of the number of medical records Dr. Xeller reviewed, or times he evaluated Applicant, this Court finds the 10/19/2020 report unreliable, lacking sufficient indicia to demonstrate Dr. Xeller conducted a comprehensive evaluation with substantive inquiry from Applicant, even as to physical complaints, to constitute substantial medical evidence as to the contested issue of additionally alleged body parts.

3. Temporary Disability

The *Petition* contends the *Findings and Award* erroneously stated Dr. Xeller's position on temporary disability when it stated "Dr. Powell opined, Applicant not temporarily disabled unless Dr. Simonian recommends surgery." [*Petition, p. 8, lines 4-6*] This Court found Dr. Xeller's opinion as to temporary disability status did not constitute substantial. The evidentiary record clearly demonstrated the Kaiser Permanent Medical Group medical providers her employer initially referred her to, failed to adequately manage her care. In fact, less than one month after initially seeking medical treatment for her bilateral knee complaints, in lieu of affording her medical care by way of initiating conservative medical treatment to cure or relive her, they determined her condition to be P&S, released her to wok modified duty, and recommended bilateral knee replacement surgery. Dr. Xeller' initial report fails to address temporary disability and indicates Applicant's condition was P&S, even in light of Dr. Xeller's report of Kaiser treatment reports recommending bilateral knee replacement. When deposed Dr. Xeller's explained he determined Applicant to be P&S, having reached maximum medical improvement, because he did not expect significant alteration by 1 to 3 percent in percentage of disability in the next year. [*Def Ex G, p. 19, line 23 - p. 21, line 18*] Dr. Xeller explained that according to "his teaching", the definition of permanent and stationary, from "the book" is a condition or state that is well stabilized and unlikely to change substantially in the next year with or without medical treatment. [*Def Ex G, p. 21, lines 20-24*] However, Dr. Xeller acknowledged bilateral knee arthroplasty would result in an increase of more than 1 to 3 percent. [*Def Ex G, p. 20, line 22 - p. 21, line 3*] Dr. Xeller tried to defend his erroneous determination by explaining Applicant didn't have treatment and just treated with medicine he wouldn't expect her situation to change. [*Def Ex G, p. 22, lines 1-3*] However, Dr. Xeller acknowledged he failed to do any investigation whatsoever into the status of Dr. Jaromi's recommendation for bilateral knee replacement surgery, and whether Applicant intended to pursue recommended surgery, yet again tried to defend his opinion by explaining some people may not have knee replacement surgery for 10 years. 12 [*Def Ex G, p. 22, lines 12-24*] However, Dr. Xeller admitted, given Applicant's age, 61, he would not have recommended she wait before undergoing knee replacement surgery. [*Def Ex G, p. 23, lines 5- 20*] Dr. Xeller

went on to state he would not disagree with Dr. Powell's 10/25/2016 report finding Applicant totally temporarily disabled through 4/25/2017, pending referral to Dr. Simonian. [*Def Ex G, p. 23, line 21- p. 24, line 1; p. 25, lines 17-19*] Dr. Xeller subsequently fell back to his erroneous "definition" defending he would still make Applicant MMI and leave surgery up to future medical care. [*Def Ex G, p. 24, lines 12-15*] Dr. Xeller did ultimately acknowledge, that since Applicant was limited to returning to work with restrictions, at the time he initially evaluated her 5/14/2016, she would have been temporarily partially disabled, up through to 10/25/2016, at which time she was temporarily partially disabled. [*Def Ex G, p. 28, line 13- p. 29, line 1*]

An expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence. (*Zemke v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798. To support a finding of temporary disability, the medical reporting must show that the worker is unable to work for the period in question because of bodily impairment or physical incapacity that is reasonably expected to be cured or to materially improve with proper medical care. (Lab. Code, §§ 4653 and 4658; *Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254; *Chaviera v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473. The determination of temporary disability presents a question of fact. (*Rubulcava v. Workers' Comp. Appeals Bd* (1990) 220 Cal.App.3d 901, 908 [55 Cal.Comp.Cases 196].) WCAB is entitled to draw reasonable inferences from the evidence. (*Ybarra v. Workers' Comp. Appeals Bd*. (2002) 103 Cal.App.4th 987, 990.) And, whether an injured worker is P&S is a question of fact. In most cases, an employee's condition becomes P&S and the employee's entitlement to temporary disability payments ceases when the primary treating physician declares the disability to be "permanent and stationary." Permanent and stationary status is the point when the employee has reached maximum medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment.

Dr. Xeller's initial opinions as to P&S status is conclusory and premature therefore does not constitute substantial medical evidence. Dr. Xeller's subsequent opinion defending his erroneous determination and consequently, correlating opinion as to Applicant's temporary disability status relying on incorrect legal theory, incomplete history and inaccurate facts, therefore does not constitute substantial medical evidence.

4. Apportionment

The *Petition* avers the *Findings and Award* misstated evidence. [*Petition, p. 9, lines 21-22; p. 10, lines 12-14*] The Petition alleges the findings indicates that no medical was introduced as to the 2003 left knee menisectomy. [*Petition, p. 9, line 22-23*] The *Petition's* recitation of this Court's finding is inaccurate as this Court found that there is a legal basis for apportionment to non-industrial factors.

The *Findings and Award* notes Applicant had a left knee partial menisectomy from a twisting injury in 2003, Applicant treated for bilateral knees in 2011/2012, and Applicant had a motor vehicle accident on 11/16/2012, with neck and shoulder complaints as well as contusions to her knees. Dr. Xeller apportioned 80% of Applicant's disability to the 2003 left partial menisectomy, Applicant's 2012 motor vehicle accident, Applicant's weight and unidentified age related changes from activities of daily living. The *Findings and Award* noted "No medical was introduced as to 2003 left knee menisectomy nor relative injury and Dr. Xeller failed to explain how the 2003 left menisectomy contributed to current impairment of either knee."

The Petition's reference to the 10/12/2011 Adventist Health Central Valley Network progress report, Dr. Xeller reviewed and summarized fails to demonstrate the contention the *Petition* purports. First, the progress report as summarized by Dr. Xeller merely states "She had a history of meniscal tear of the left knee and was favoring the right knee surgery [sic]." [*Def Ex F, p. 3*]. Second, the report is prepared 2011, over 8 years after the 2003 left knee menisectomy. So again, no medical was introduced as to 2003 left knee menisectomy nor relative injury from 2003. And, the fact still remains, Dr. Xeller failed to explain how the 2003 left menisectomy contributed to current impairment for both the left and right knee.

While the *Petition* generalizes in repetition that Dr. Xeller provided a thorough apportionment analysis, it fails to specifically reference and/or identity wherein Dr. Xeller's medical opinions explains how other factors in which he apportioned disability contributed to impairment. In addition to the 2003 left knee menisectomy, this Court explained Dr. Xeller's apportionment opinion was not found to be substantial because Dr. Xeller failed to explain how knee contusions from Applicant's 2012 motor vehicle accident contributed to current impairment. The Court similarly explained Dr. Xeller's opinion as to apportionment was not found to be substantial because Dr. Xeller failed to identify what/which age related changes from activities of daily living contributed to Applicant's current impairment, and how those differed if any from Applicant's work activities.

IV
RECOMMENDATION

Based on the arguments, explanation and evidence discussed above, it is respectfully requested that the Finding of Fact in this matter go undisturbed and the Petition for Reconsideration be DENIED.

(Report, at pp. 2 - 14.)

For the reasons stated in the WCJ's report, we agree that the opinion of treating physician Lonnie Powell, D.C., is substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also 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. (*Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.).) We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 25, 2022

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

PILAR VALDEZ
LAW OFFICES OF BRYAN K. LEISER
COLEMAN, CHAVEZ & ASSOCIATES
EMPLOYMENT DEVELOPMENT DEPT.

PAG/ara

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