ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

JENNIFER FLETCHER, Employee, Claimant, v. PIKES ON THE RIVER, INC., Employer, and REPUBLIC INDEMNITY CO. OF AMERICA, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201320872 AWCB Decision No. 22-0033 Filed with AWCB Fairbanks, Alaska on May 20, 2022

Jennifer Fletcher's July 1, 2019 amended claim was heard in Fairbanks, Alaska on February 10, 2022, a date selected on October 13, 2021. An October 13, 2021 stipulation of the parties gave rise to this hearing. Jennifer Fletcher (Employee) appeared telephonically and represented herself. Attorney Vicki Paddock appeared and represented Pikes on the River, Inc., and Republic Indemnity Company of America (Employer). Witnesses included Employee, who testified on her own behalf, and Employee's physical therapist, Kathleen Pape, who also testified on Employee's behalf. The record was held open for further deliberations and closed following deliberations on March 4, 2022.

Prior decisions and orders in this case include, *Jennifer C. Fletcher v. Pikes on the River, Inc.*, AWCB Decision No. 17-0008 (January 17, 2017) (*Fletcher I*) (denying Employee's petitions alleging abuses of discretions concerning discovery rulings); *Jennifer C. Fletcher v. Pike's on the*

River, Inc., AWCB Decision No. 17-0039 (April 5, 2017) (*Fletcher II*) (denying Employer's petition to dismiss based on an untimely claim); *Jennifer C. Fletcher v. Pikes on the River, Inc.*, AWCB Decision No. 19-0017 (February 12, 2019) (*Fletcher III*) (denying Employer's request for dismissal based on Employee's failure to timely request a hearing*); Jennifer C. Fletcher v. Pikes on the River*, AWCB Decision No. 19-0116 (November 8, 2019) (*Fletcher IV*) (denying Employee's petition alleging abuse of discretion concerning discovery rulings).

ISSUES

Employee contends just because she has reported symptom improvements over the years does not mean she is pain free. She contends her work injury remains the substantial cause of her current need for medical treatment and she seeks medical and related transportation benefit awards.

Employer contends Employee's work injury resolved long ago and no further medical treatment is reasonable or necessary.

1) Is Employee entitled to medical and transportation costs?

Employee contends her work injury "limits" her employment and she seeks disability benefit awards, including temporary total disability (TTD) and temporary partial disability (TPD).

Employer contends it initially paid TTD and TPD based on Employee's work restrictions, but Employee returned to her two other jobs after the work injury, and her post-injury earning capacity must be considered. It seeks denial of Employee's claim for additional disability benefits.

2) Is Employee entitled to disability benefits?

Employee makes no specific contentions regarding her entitlement to a permanent partial impairment (PPI) benefit.

Employer contends Employee's claim seeking PPI should be denied since medical evaluators who examined Employee concluded she did not incur a permanent partial impairment.

3) Is Employee entitled to PPI?

Employee makes no specific contentions regarding her entitlement to a compensation rate adjustment but rather wants to "make sure" it was calculated correctly.

Employer contends Employee has not produced any evidence in support of her request for a compensation rate adjustment so her claim seeking one should be denied.

4) Is Employee entitled to a compensation rate adjustment?

Employee disputes she voluntarily resigned her position as stated in Employer's first controversion notice. Rather, she contends Employer dismissed her, along with other seasonal employees, at the season's end because it no longer needed her services. It is on this basis she seeks a finding of unfair or frivolous controversion.

Employer generally contends its controversions were based on substantial evidence, that being its medical evaluator's report, so they were neither unfair nor frivolous. Employer did not specifically address the basis for its first controversion, so its position is unknown. It is presumed Employer opposes a finding that it frivolously or unfairly controverted Employee's benefits.

5) Did Employer unfairly or frivolously controvert Employee's benefits?

Employee seeks a finding that Employer untimely filed its injury report.

Employer does not dispute the untimely filing but contends it is not clear what remedy Employee seeks.

6) Did Employer file an untimely injury report?

Employee contends she is entitled to penalty on all compensation that was not timely paid.

Employer contends its controversions were based on substantial evidence, so no penalty is due.

7) Is Employee entitled to penalty for late paid compensation?

Employee seeks an interest award as a matter of course.

Employer contends, since no benefits are owing, neither is any interest.

8) Is Employee entitled to interest?

Employee seeks a reimbursement of "filing fees" as litigation costs.

Employer contends Employee's claim should be denied so no costs should be awarded.

9) Is Employee entitled to litigation costs?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On May 7, 2008, Employee saw Scott Hardin, M.D., for work-related back pain that had started about 11 or 12 years previous. She was still waiting for her workers' compensation case to "get settled" more than 11 years after the injury and was getting "mentally worn out from her ongoing pain." Employee reported her overall symptoms were unchanged, and she continued to take "very rare doses of Hydrocodone" and had taken "very few Alprazolam tablets." She was working in Alaska as a substitute teacher and worked various jobs in the summer when school was out. (Hardin chart notes, May 7, 2008).

2) On December 26, 2012, Tara Ferris, PA-C, saw Employee for a low back pain consultation at Dr. Hardin's request. PA-C Ferris had not seen Employee for four years, though she had treated Employee for many years on an intermittent basis for low back pain following a 1996 workers' compensation injury that was now closed. Employee was doing all her activities in either a standing or seated position and she could not do any excessive standing or repeated squatting. She occasionally would get right leg symptoms of pain into her right thigh with prolonged sitting and repetitive standing and squatting. Employee's pain was not associated with any numbness or tingling and did not go below the knee. Low back pain and intermittent right leg pain were assessed. (Ferris chart notes, December 26, 2012).

3) On July 19, 2013, Employee fell on stairs while working for Employer as a server. She reported injuring both her knees, both her ankles, her right arm and her "right side." (Report of Occupational Injury or Illness, July 19, 2013). On that same day, Employer completed a Report of Occupational Injury or Illness, which was also signed by Employee on July 19, 2013. (*Id*.; observations). The date stamp on Employer's July 19, 2013 Report of Occupational Injury or Illness indicates it was received by the Workers' Compensation Division in Juneau on July 29, 2013. (*Id*.).

4) Employee attached a copy of Employer's July 19, 2013 Report of Occupational Injury or Illness to as an exhibit to her hearing brief, which is date stamped received by Employer's adjuster on August 16, 2013. (Employee's Hearing Brief, January 28, 2022).

5) On July 26, 2013, Employee sought treatment for bilateral knee and ankle pain and right-side soreness from her July 19, 2013 fall at work. She was evaluated by Ambria Ptacek, PA-C on behalf of Daniel Johnson, D.O. Previous surgeries included Employee's left knee in 1984 and right inguinal hernia repair in 2000. Employee complained of constant pain, stiffness and swelling that was aching in character. Upon physical examination, there were no gross deformities, swelling or ecchymosis in Employee's right shoulder. Her right shoulder was tender on palpation in the anterior portion of the rotator cuff and non-tender along the clavicle and acromioclavicular joint. Employee was non-tender at the elbow and wrist. She had a full range-of-motion in flexion and abduction and good shoulder strength. Internal and external shoulder rotation were without limitations. Employee's bilateral knees showed no gross deformities, swelling or ecchymosis. There was mild tenderness to palpation bilaterally at the medial and lateral joint lines, which Employee described as more "sore," than "pain." There was no tenderness over the patella, quadriceps tendon or patellar tendon. Employee had full range-of-motion at her knees and her hips moved without difficulty or limitation. Employee's bilateral ankles showed no gross deformities, swelling or ecchymosis. She was tender to palpation along the left anterior talofibular ligament and over the right medial malleolus and non-tender over the deltoid ligaments bilaterally. Employee had full range-of-motion and strength at her ankles. PA-C Ptacek assessed right shoulder joint pain, right upper arm joint pain, right forearm joint pain, along with bilateral lower leg joint pain and bilateral ankle joint pain. PA-C Ptacek thought Employee had a "big injury that caused swelling and pain into multiple joints from her fall." She agreed to give Employee a trial

period of rest and anti-inflammatories. Employee was taken off work for one week. (Ptacek chart notes, July 26, 2013; Work Release Form, July 26, 2013).

6) On August 2, 2013, Employee followed up with PA-C Ptacek and reported she was "somewhat better," but was still experiencing discomfort. Upon physical examination, there were no gross deformities, swelling or ecchymosis in Employee's right shoulder. Her right shoulder was minimally tender on palpation in the anterior portion of the rotator cuff and non-tender along the clavicle and acromioclavicular joint. Employee was non-tender at the elbow and wrist. She had a full range-of-motion in flexion and abduction and good shoulder strength. Internal and external shoulder rotation were without limitations. PA-C Ptacek decided to give Employee "more time to rest" and ordered Employee off work for another week but noted Employee could return to work August 10, 2013 with no restrictions. (Ptacek chart notes, August 2, 2013).

7) On August 16, 2013, Employee saw PA-C Ptacek and reported her ankle and knee pain had become worse since returning to work on August 10, 2013. PA-C Ptacek referred Employee to physical therapy for lower extremity range of motion and strengthening exercises. She also completed two work release forms for Employee: one restricting her to no more than four hours' work at a time with no stair climbing, and another releasing her to full-time work with no more than four hours of standing and no "excess of stairs." (Ptacek report, August 16, 2013; Work Release Forms, August 16, 2013; Physical Therapy Request form, August 16, 2013).

8) Employee contends PA-C Ptacek changed her work restrictions on August 16, 2013 at Employer's request. (Record).

9) On August 19, 2013, Dr. Johnson interpreted right ankle and right knee x-rays as normal. (Johnson Addendum, August 19, 2013).

10) On August 21, 2013, Employer reported it had mailed the injury report "but it must have gotten lost in the mail, the AWCB sent them notice of their receipt, but they didn't get anything from [its adjuster]." (Adjuster's note, August 21, 2013).

11) On August 23, 2013, Employer filed an electronic First Report of Injury (FROI), which was further noted as received in an August 26, 2013 event entry in the Workers' Compensation Division's legacy data base. (FROI, August 23, 2013; Incident and Claims Expense Reporting (ICERS) system event entry, August 26, 2013; observations). Employer's August 23, 2013 FROI sets forth Employee's pay as $310 per week.

12) On August 26, 2013, Employee began physical therapy. During her initial evaluation, she reported ". . . on 7/19/13 she was at work and must of [sic] caught her foot wrong on some rounded wooden steps and fell down 2 steps landing on the concrete on her right side. She reports immediate pain in both knees and both ankles and just a general overall body jarring" (Physical therapy notes, August 26, 2013).

13) Employer paid Employee temporary total disability (TTD) benefits from July 26, 2013 until August 10, 2013, and temporary partial disability (TPD) benefits from August 11, 2013 until August 15, 2013. On September 6, 2013, Employer issued its final compensation check to Employee. (Secondary Reports of Injury, September 23, 2013; November 18, 2013; Republic Indemnity check, September 6, 2013).

14) On September 9, 2013, Employee reported she had been laid off from Employer, her bilateral knees and right ankle were worse, and she still had pain with any activity. Dr. Johnston ordered Employee to continue with physical therapy. (Johnson chart notes, September 9, 2013).

15) On September 9, 2013, Employer also answered an August 31, 2013 petition from Employee, who was seeking a protective order against overbroad information releases. (Employee's Petition, August 31, 2013; Employer's Answer, September 9, 2013). Employer admitted Employee's entitlement to TTD benefits from July 26, 2013 through August 10, 2013; TPD benefits from August 11, 2013 through August 15, 2013; and reasonable and necessary medical benefits related to the injury. (Employer's Answer, September 9, 2013).

16) On September 25, 2013, Employee was "still painful almost all the time." Her physical therapist assessed Employee with "low tolerance for all activities both in therapy and out of therapy." (Physical therapy notes, September 25, 2013).

17) Employee continued her employment as a substitute teacher with the Fairbanks North Star Borough School District and concurrent employment with JoAnn Fabrics in Fairbanks, Alaska. (Martin Zwerin, D.O., report, July 14, 2021; Fletcher dep., June 14, 2017).

18) In October 2013, Employee relocated to Wisconsin, where she found work as a substitute teacher for the West Bend and Slinger school district. (*Id*.).

19) On December 30, 2013, Employee sought treatment in Wisconsin for her July 19, 2013 work injury from Tara Ferris, PA-C, and reported ". . . she fall down 2 stairs while at work on 7/19/2013. She fell onto her right knee and right side of her body, . . . had an inversion injury to her left ankle and twisted her left knee." She stated her knees and ankles were still painful and her

entire right hip was painful as well. Employee could not report any specific problems with her right shoulder or right arm and she was using her upper extremities without difficulty. Upon physical examination, there was no evidence of swelling or erythema in Employee's bilateral knees, which had a full range of motion. There was no pain with internal or external right hip rotation and Employee's right hip range of motion was equal to that on her left. No areas of tenderness could be found on Employee's right trunk. PA-C Ferris assessed bilateral knee, right ankle, right foot and right hip pain. Employee was prescribed Tramadol for pain, Flexeril for sleep and referred to Kathy Pape for additional physical therapy. (Ferris chart notes, December 30, 2013). Her Tramadol prescription was for 180 tablets of 50mg Tramadol, with no refills, and she was to take a maximum of six Tramadol tablets per day. (Office Visit report, January 28, 2014).

20) On December 30, 2013, PA-C Ferris also prescribed the following work restrictions for Employee:

> Pt may work full time. She may stand for 4 hours in an 8 hour shift with a max of one hour standing at a time and 30 minutes rest after every hour of standing. Max lift of 15 lbs. Occasionally. She can sit for an hour at a time and stand for 15 minutes. She should be allowed to change positions at will. . . .

(Certificate of Work, December 30, 2013).

21) On January 9, 2014, Employee began physical therapy with Katherine Pape. Employee described feeling her left ankle "give" and falling, striking her right side. Her complaints included left ankle, right foot and ankle, bilateral knee, and right hip pain. Employee stated her torso was "not right," and her back felt "jarred." She reported her ability to sit was limited and walking, especially on inclines, was difficult. (Physical therapy notes, January 9, 2014). Ms. Pape's initial evaluation that day did not include Employee's right shoulder. (*Id*.; observations).

22) On January 21, 2014, PA-C Ferris reported she had diagnosed Employee with bilateral knee pain, right foot and ankle pain and right hip pain and catching. She opined the work injury was the substantial cause of Employee's need for medical treatment because "[Employee] did not have these issues prior to the fall." Employee was attending physical therapy twice per week and was still using pain medication and muscle relaxers. Employee was not medically stable and PA-C Ferris thought further objectively measurable improvements would include decreasing Employee's pain and improving her functionality. PA-C Ferris stated Employee's anticipated date of medical stability was unknown at that time. (Ferris responses, January 21, 2014).

23) On January 24, 2014, Employer's adjuster memorialized a conversation with Employer:

> S/w [Employer's Manager], [e]xplained that claim has reopened and that the IW has been given a LD work release. She is released to full duty work, but with limited hours. ER indicates that if the IW were still in Alaska he would be able to accommodate the restrictions. H[e] states that we can fax him the work release for his review and signature . . . .

(Adjuster's notes, January 24, 2014). On that same date, Employer responded to a fax from its adjuster, indicating it could accommodate PA-C Ferris's December 30, 2013, light-duty restrictions. (Employer's response, January 24, 2014).

24) On January 28, 2014, Employer controverted time-loss benefits after August 9, 2013 because Employee had been released to light-duty work by her physician and Employer had light-duty work available within Employee's work restrictions at her full salary. It also controverted because Employee had voluntarily resigned from her position with Employer and moved out-of-state, thus voluntarily removing herself from the labor market. (Controversion Notice, January 28, 2014). On that same day, Employee followed-up with PA-C Ferris and reported she had found work within her restrictions as a substitute teacher. (Ferris chart notes, January 28, 2014).

25) Employee vigorously disputes she voluntarily resigned from her position with Employer and has repeatedly contended Employer dismissed her, along with other seasonal employees, at the season's end because it no longer needed her services. (Employee's hearing Brief, January 28, 2022, record; experience). Employee also points out; Employer never again raised this defense in any of its subsequent controversions. (*Id*.).

26) On February 10, 2014, Employee was prescribed 180 tablets of 50mg Tramadol, with one refill, and was to take a maximum of six Tramadol tablets per day. (Office Visit report, February 10, 2014).

27) On March 3, 2014, Employee saw PA-C Ferris and reported she felt her pain was about the same as at her last visit and she denied any new or different symptoms. Overall, Employee felt improvement from the time of injury but did not feel she was back to baseline. The plan was to wean Employee from Tramadol and for her to continue with physical therapy. (Ferris chart notes, March 3, 2014). Light duty work restrictions were continued. (Certification of Work, March 3, 2014).

28) On April 21, 2014, Employee reported she tried to walk more over the weekend and needed to ice her bilateral feet, knees and hips, as well as her right shoulder, upon her return due to pain. (Physical therapy notes, April 14, 2014).

29) On April 15, 2014, Employee followed-up with PA-C Ferris and stated she does not know if she is getting better, staying the same or getting worse. Employee thought she may be getting better but was still having problems and her pain was constant and limiting her activity. She found therapy "somewhat helpful." Employee also "tried to go off the Tramadol, but realized it was helping her." She was prescribed another 180 tablets of 50mg Tramadol, with two refills, and was to take a maximum of six Tramadol tablets per day. The plan was to continue with medications physical therapy. (Ferris chart notes, April 15, 2014). Light duty work restrictions were continued. (Certificate of Work, April 15, 2014).

30) On May 29, 2014, PA-C Ferris reported Employee was attending physical therapy twice per week and was still using pain medication and muscle relaxers. Employee was not medically stable, and PA-C Ferris thought further objectively measurable improvements would include decreasing Employee's pain and improving her functionality. (Ferris responses, May 29, 2014).

31) On July 10, 2014, Employee had attended 45 physical therapy sessions with Ms. Pape. Both Employee and Ms. Pape thought Employee was continuing to improve but Employee still reported pain complaints, especially in her right foot and bilateral knees. (Physical therapy notes, July 10, 2014). On that same day, Employee thought her body was "getting in better alignment," but she was still "having to use medications regularly." Employee "tried to come off them" "but then she cannot be active." PA-C Ferris's physical examination that day was recorded as:

> **PHYSICAL EXAM:**
> **VITALS:** . . . .
> **GENERAL:** Well-groomed, well-nourished female in no acute distress. Pleasant. Appropriate. Exhibits a full range of affect. Does not appear to be toxic from medications or otherwise. Does not reflect any pain behaviors.
> **NEUROLOGIC:** A&Ox3. Coordination intact. Speech fluent. Able to rise from a seated to standing position independently.
> **GAIT:** Normal, casual, non-antalgic.
> **RESPIRATORY:** Normal respirations without labored breathing.

PA-C Ferris thought Employee was "making very good progress" with physical therapy and planned for it to continue. Employee was not working at the time due to the seasonal nature of teaching, but if she were working, PA-C Ferris planned for her work restrictions to remain the

same. (Ferris chart notes, July 10, 2014). PA-C Ferris prescribed 180 tablets of 50mg Tramadol, with two refills, and Employee was to take a maximum of six Tramadol tablets per day. (Office Visit report, July 10, 2014).

32) On July 14, 2014, John Swanson, M.D. performed an Employer's Medical Evaluation (EME), during which Employee refused to answer questions concerning prior surgeries, prior hospitalizations, allergies and current medications other than Tramadol and Flexeril. Employee denied any prior illnesses, and she could not recall if she had ever been involved in an automobile accident, suffered any sports injuries, suffered previous fractures or had ever had a prior workers' compensation claim. Employee could not "guess" how many hours per day, or per week, she worked while employed by Employer. She refused to answer how much she smoked, or for how long, prior to quitting two years previous. Employee refused to answer when, or from where, she received her bachelor's degree. Her chief complaints that day were pain in the right ankle and foot, right hip, bilateral knees and torso. She acknowledged taking between two to six Tramadol tablets per day. Dr. Swanson reviewed medical records that were dated from December 18, 2012 to May 29, 2014. He repeatedly described PA-C Ferris's charts notes as: "The physical examination was unchanged," "The impressions were unchanged," "The plans were unchanged," "Employee's work release was unchanged." Upon his own physical examination, Dr. Swanson noted numerous non-physiologic behavioral signs he interpreted as symptom magnification. Dr. Swanson's impressions were: 1) A personal history of an abrasion over the right knee on 07/19/13, stable; 2) A history in the records of an unknown type of "left" knee surgery in 1984. There are scars on the right knee consistent with a prior arthroscopy; 3) Possible left ankle sprain, 07/19/13, stable; 4) Possible right hip contusion, 07/19/13, stable; 5) Somatic focus with subjective complaints outweighing objective abnormalities; 6) Possible physical dependence and possible psychological addiction to narcotics; and 7) Behavioral signs with possible secondary gain. Dr. Swanson thought Employee's July 19, 2013 work injury must have been mild as she continued to work and did not seek medical attention before seeing PA-C Ptacek on July 26, 2013. He opined continued physical therapy one year after mild injuries from a fall was neither reasonable nor necessary, but Employee should have two physical therapy visits to teach her range of motion and strengthening exercises. He also thought Employee should wean off Tramadol, have a psychiatric evaluation and possible cognitive behavioral therapy to treat her non-work-related psychosocial factors, including her somatic focus with subjective complaints outweighing objective

abnormalities, her possible physical and psychological dependence on narcotics, and her behavioral signs with possible secondary gain. Regarding Employee's Tramadol usage, Dr. Swanson noted, "It is possible Ms. Fletcher has a physical dependance and psychological addiction to narcotics. She currently takes 300 mg of Tramadol per day, which equals 60 MED (morphine equivalent doses). Ms. Fletcher has been taking Tramadol at this dose since at least the first visit with Ms. Ferris on 12/30/13." Dr. Swanson observed Employee's symptoms and examinations had not significantly changed since she first saw PA-C Ferris in December 2013 and opined all of her diagnosed conditions were medically stable and she had incurred no permanent partial impairment (PPI). Specifically, Employee's personal history of a right knee abrasion was medically stable when she was seen by PA-C Ptacek on July 26, 2013, since there was no history of an abrasion reported; her possible left ankle sprain was medically stable at the time of Dr. Swanson's evaluation; and her possible right hip contusion was medically stable by September 9, 2013. (Swanson report, July 14, 2014).

33) On July 23, 2014, Employer controverted all benefits based on Dr. Swanson's July 14, 2014 report. (Controversion Notice, July 23, 2014).

34) On August 7, 2014, Employee reported the EME trip "really aggravated her symptoms" due to the long plane ride and walking at airports. She also wanted to wean off the Tramadol, but her pain was still too high to do that. PA-C Ferris's physical examination that day was recorded as:

> **PHYSICAL EXAM:**
> **VITALS:** . . . .
> **GENERAL:** Well-groomed, well-nourished female in no acute distress. Pleasant. Appropriate. Exhibits a full range of affect. Does not appear to be toxic from medications or otherwise. Does not reflect any pain behaviors.
> **NEUROLOGIC:** A&Ox3. Coordination intact. Speech fluent. Able to rise from a seated to standing position independently.
> **GAIT:** Normal, casual, non-antalgic.
> **RESPIRATORY:** Normal respirations without labored breathing.

PA-C Ferris planned for Employee to continue with physical therapy and medications. (Ferris chart notes, August 7, 2014).

35) On September 18, 2014, Employee reported her pain was improving. Her knees were the most improved, her right hip was still the worst, and her foot and knees were still "not right." Employee stated she was able to use less Tramadol and was no longer using Flexeril. She had

resumed working as a substitute teacher. PA-C Ferris planned for Employee to return to physical therapy and to continue weaning from Tramadol. (Ferris chart notes, September 18, 2014).

36) On October 16, 2014, Employee was prescribed 180 tablets of 50mg Tramadol, with no refills, and was to take a maximum of six Tramadol tablets per day.

37) On November 3, 2014, Employee denied any changes in the quality or character of her symptoms. PA-C Ferris planned a referral to transfer care regarding Employee's Tramadol use. (Ferris chart notes, November 3, 2014). PA-C Ferris prescribed 180 tablets of 50mg Tramadol, with no refills, and Employee was to take a maximum of six Tramadol tablets per day. (Office Visit report, November 3, 2014).

38) On December 1, 2014, Employee had attended 15 additional physical therapy sessions with Ms. Pape since July 17, 2014. (Physical therapy notes, July 17, 2014 to December 1, 2014).

39) On December 16, 2014, Employee reported continuing with physical therapy twice per week and continued Tramadol use as needed. Overall, she felt like she was improving but she was unable to say how much. PA-C Ferris planned for Employee to continue with physical therapy, continue weaning from Tramadol, and a referral to transfer care regarding Employee's Tramadol use as well as Employee working to find a primary care provider who might be willing to prescribe Tramadol for a few more months. (Ferris chart notes, December 16, 2014). PA-C Ferris prescribed 180 tablets of 50mg Tramadol, with no refills, and Employee was to take a maximum of six Tramadol tablets per day. (Office Visit report, December 16, 2014).

40) On January 13, 2015, Employee reported continuing with physical therapy twice per week and continued Tramadol use as needed although sometimes she would choose to not take Tramadol, even if she was in pain, just to minimize her use of it. Employee thought her medication use may have been going down overall. PA-C Ferris planned for Employee to continue with physical therapy and to continue to wean Tramadol. If Employee continued to need Tramadol, she would have to establish treatment at a pain clinic or see if a primary care provider would be willing to prescribe it to her. (Ferris chart notes, January 13, 2015). PA-C Ferris prescribed 180 tablets of 50mg Tramadol, with no refills, and Employee was to take a maximum of six Tramadol tablets per day. (Office Visit report, January 13, 2015).

41) There is a gap in the physical therapy records from December 1, 2014 until February 3, 2015, when physical therapy notes show Employee had attended 33 additional physical therapy sessions with Ms. Pape. (Pape chart notes, February 3, 2015).

42) On March 3, 2015, Employee reported she was continuing with physical therapy twice per week and still using Tramadol as needed, anywhere from zero to six tablets per day. Overall, Employee still felt she was improving, although more demanding days at work "take a toll on her." PC-C Ferris planned for Employee to continue with physical therapy and to continue to wean Tramadol. An appointment was scheduled on April 14, 2015 for "continued management with Tramadol." PA-C Ferris also renewed Employee's work restrictions. (Ferris chart notes, March 3, 2015).

43) On April 14, 2015, Employee reported she was continuing with physical therapy twice per week and still using Tramadol as needed, anywhere from zero to six tablets per day. Overall, she still felt like she was improving. PA-C Ferris planned for Employee to continue with physical therapy and to continue to wean Tramadol "until her supply runs out." (Ferris chart notes, April 14, 2015).

44) On June 11, 2015, Employee reported she was working about 17 hours per week as a teacher's aide and this decrease in hours had helped her pain somewhat but when she does more chores at home, her pain increases. PA-C Ferris's physical examination that day was recorded as:

> **PHYSICAL EXAM:**
> **VITALS:** . . . .
> **GENERAL:** Well-groomed, well-nourished female in no acute distress. Pleasant. Appropriate. Exhibits a full range of affect. Does not appear to be toxic from medications or otherwise. Does not reflect any pain behaviors.
> **NEUROLOGIC:** A&Ox3. Coordination intact. Speech fluent. Able to rise from a seated to standing position independently.
> **GAIT:** Normal, casual, non-antalgic.
> **RESPIRATORY:** Normal respirations without labored breathing.

PA-C Ferris planned for Employee to continue with physical therapy and Tramadol until her supply ran out. (Ferris chart notes, June 11, 2015). PA-C Ferris also renewed Employee's work restrictions. (Certificate of Work, June 11, 2015).

45) On August 11, 2015, Employee reported she was not working at that time due to summer hours. She was on call but had not been called into work. PA-C Ferris's physical examination that day was recorded as:

> **PHYSICAL EXAM:**
> **VITALS:** . . . .

> **GENERAL:** Well-groomed, well-nourished female in no acute distress. Pleasant. Appropriate. Exhibits a full range of affect. Does not appear to be toxic from medications or otherwise. Does not reflect any pain behaviors.
> **NEUROLOGIC:** A&Ox3. Coordination intact. Speech fluent. Able to rise from a seated to standing position independently.
> **GAIT:** Normal, casual, non-antalgic.
> **RESPIRATORY:** Normal respirations without labored breathing.

PA-C Ferris planned for Employee to continue with physical therapy and Tramadol until her supply ran out. (Ferris chart notes, August 11, 2015).

46) There is a gap in the physical therapy records from February 3, 2015 until August 20, 2015, but physical therapy notes show Employee attended 46 additional physical therapy sessions with Ms. Pape. (Physical therapy notes, June 10, 2015; August 20, 2015; observations).

47) On January 25, 2016, Employee claimed TTD benefits from August 9, 2013 to present, penalty, interest and a finding of unfair or frivolous controversion. (Claim, January 25, 2016).

48) On April 19, 2016, Employee reported she was continuing to see Ms. Pape for physical therapy and still working as a substitute teacher. She indicated her symptoms were worse with increased activity. Employee stated the quality and character of her symptoms had not really changed at all, but she felt that she had improved since the injury, although she could not quantify it. PA-C Ferris planned for Employee to continue with physical therapy and Tramadol until her supply ran out. (Ferris chart notes, April 19, 2016). She also continued Employee's work restrictions. (Certificate of Work, April 19, 2016).

49) At an April 26, 2016 prehearing conference, Employee amended her claim to include medical and related transportation costs. (Prehearing Conference Summary, April 26, 2016).

50) On June 10, 2016, Employee reported she was "trying to do more, including some consistent lawn care," and was sore at the top of her right shoulder. (Physical therapy notes, June 10, 2016).

51) On July 14, 2016, Kim Hansen, M.D., evaluated Employee on referral from PA-C Ferris. The reason for the consultation was listed as, "Chronic shoulder hip and ankle pain on the right side since 2013." Employee reported she injured herself during the summer of 2013 while working as a waitress in Fairbanks, Alaska. She stated she slipped and fell while descending a couple of steps and twisted her left ankle and jammed her right ankle, knee and shoulder. Dr. Hansen thought her findings "seem to be most consistent with fibromyalgia although it is unclear why symptoms are right-sided." She ordered labs tests to rule out other causes, such as thyroid impairment,

myositis, Lyme's disease or rheumatologic cause and Employee was to continue with physical therapy. (Hansen chart notes, July 14, 2016).

52) On August 18, 2016, Employee followed-up with Dr. Hansen, who continued to think her findings were most consistent with fibromyalgia although some of Employee's complaints might possibly be attributed to degenerative changes in the shoulder and hip. Employee agreed to investigate possible degenerative changes further. Dr. Hansen ordered shoulder and hip x-rays, and a trial of Lyrica. Employee was to return to Dr. Hansen's office in three months. (Hansen chart notes, August 18, 2016).

53) On August 22, 2016, right hip x-rays were interpreted to show osteoarthritis of the right hip and no acute osseus findings. Right shoulder x-rays were interpreted to show no acute osseus findings and a magnetic resonance imaging (MRI) study was suggested for evaluation of internal derangement or an occult injury. (X-ray reports, August 22, 2016).

54) On November 14, 2016, Ms. Pape authored a letter to Dr. Hansen that included Employee's description of her work injury, which now included her right shoulder, Employee's course of physical therapy with her, and her recommendation that Employee continue with physical therapy. Ms. Pape wrote she initially assessed Employee's shoulder "however, with the severe lower quarter imbalances present, treatment was deferred in this region." Ms. Pape thought Employee's symptoms were initially "more attributable to mechanical imbalances and resultant inflammatory response of tissues/joints versus specific fracture, tear, neural impingement symptoms." She was continuing her efforts to "balance" Employee's femoral alignment and positioning in the pelvis to allow muscle and tissue "normalization". Employee's symptoms had consistently decreased with the "advancing balance of mechanics," but in cases such as this the timeline for healing is "very difficult to determine due to the complex alterations of fascia, muscle, and bone." In Ms. Pape's opinion, the forces sustained in Employee's injury were similar to forces sustained in a rollover accident. These forces led to a "cycle of continuous compromise." Ms. Pape urged continued physical therapy since "progress was still being made." (Pape letter, November 14, 2016).

55) On November 23, 2016, Employee saw Dr. Hansen, who noted Employee had been trying to wean off Tramadol for the past year. Employee reported getting "some relief" with physical therapy and "partial relief" with Tramadol but such relief was not long-lasting. She further reported her pain can migrate from joint to joint but is always on the right side. Dr. Hansen

continued to think Employee's symptoms were consistent with fibromyalgia and she had no further treatment interventions to offer Employee. (Hansen chart notes, November 23, 2016).

56) On June 14, 2017, Employee sought treatment from Ms. Pape and reported her right neck, head and upper quarter were still quite sore from a motor vehicle accident. Ms. Pape noted Employee "Neurologically appears without problem. Rotational bias in shoulder girdle with offset mastoid region and suboccipital tension." Ms. Pape directed treatment that day to Employee's bilateral upper quarters and including axilla, glenohumeral joint, scapular/thoracic, clavicle and sternocleidomastoid muscle. At the conclusion of the session, Ms. Pape assessed, "Improved alignment and a decline in held tension." (Physical therapy notes, June 14, 2017).

57) On June 14, 2017, Employee was deposed and testified regarding her employment history and other injuries. (Employee dep., June 14, 2017). She had worked for the Fairbanks North Star Borough School District for 13 or 14 years; and had also worked for JoAnn Fabrics in Fairbanks for approximately 13 years, where she would work one night per week. (*Id*. at 15-16). Employee previously held jobs in Fairbanks at Yukon Quest, Exclusive Paving and Rivers Edge. (*Id*. at 25-26). She moved to Wisconsin in October 2013, where she was unemployed for approximately two months. (*Id*. at 16). Employee then began working for Teachers On Call in the Slinger and West Bend School District. (*Id*. at 28). She has worked for Teachers On Call since January 2014. (*Id*.). Employee did not know the name of her direct supervisor at Teachers On Call. (*Id*.). Employee is restricted in the types of jobs she can perform for Teachers On Call because of the work injury. (*Id*. at 29). She has difficulty with stairs, walking, stooping, and standing for long periods of time. (*Id*.). Employee was not collecting unemployment at that time. (*Id*. at 31-32). She was hired by Employer as a server on June 23, 2013. (*Id*. at 55). It was a full-time, seasonal job for the summer that was expected to conclude at the end of August. (*Id*.). "Full-time" work for Employer meant 40 hours per week. *Id*. Employee still has pain in her right ankle but her left ankle resolved not long after the work injury. (*Id*. at 70-71). She still has pain in both of her knees, her right shoulder and right hip. (*Id*. at 71). Employee has pain that limits her from daily activities, such as climbing stairs and walking. (*Id*. at 72-73). Her daily life was "limited." (*Id*. at 73). Employee testified as follows regarding unemployment benefits:

> Q. Were you unemployed for any period of time after you lived in Wisconsin?
>
> A. Yes.

Q. For how long?

A. Two - - two months approximately.

Q. And when did you move to Wisconsin?

A. October 2013.

Q. Okay. So was it the two months following that that you received unemployment?

A. Correct.

Q. So would it be fair to say it was October, November of 2013 that you received unemployment?

A. You didn't ask if I received unemployment. You asked if I was unemployed.

Q. Did you receive unemployment for those two months?

A. Yes, I did.

Q. And which two months would it be?

A. Those two months, I'm sure. Actually, prior to that. I'm not sure. I received it prior to that.

Q. So to be clear for the Board's purposes, was it October or November of 2013 that you received unemployment?

A. I did receive it those months.

Q. Did you receive it at any other period of time?

A. Yes.

Q. And when would that be?

A. Earlier that year.

Q. And which months or dates would that have been?

A. I don't recall. I did not receive it after the injury.

Q. Okay. So for clarification, the date of the injury was July 19, 2013, and your testimony was that you received it in October and November of 2013. So you just said that you did not receive unemployment after the injury, but your testimony is contradicting that, so I want to make sure it's clear.

A. When I was removed from work, I reported that, and did not receive any unemployment.

Q. Did you apply for unemployment benefits?

A. Prior to this injury I had.

Q. And then after the work injury did you apply for unemployment benefits?

A. It was - - I don't believe applying for. They were - - I don't know what you would call it. I did receive benefits after - - after the work release.

Q. Who did you receive benefits from?

A. Unemployment.

Q. And was that in the state of Wisconsin?

A. I was living in Alaska.

Q. So did you receive unemployment benefits after the date of injury?

A. I was taken off unemployment due to the injury, and then I received it after I was released back to work.

Q. Okay. So you did receive unemployment benefits after the day of the injury?

A. Correct.

(*Id*. at 16-18).

58) Prior to Employee's deposition, the agency record does not evidence Employee notifying Employer she was collecting unemployment benefits following the work injury. (Observations).

59) On April 2, 2018, Employee sought treatment from Henry Alba, M.D., for right hip and right shoulder pain that she related to her work injury. She reported her knee and ankle symptoms had "cleared up" though they were initially a problem. Dr. Alba assessed a likely right shoulder labral tear "given the chronicity from 2013 to present, which is nearly five years," and ordered continued physical therapy. Employee was to bring a CD-ROM of her prior right shoulder and right hip x-rays to her next visit. (Alba chart notes, April 2, 2018).

60) On June 12, 2018, Employee brought her prior right hip and right shoulder x-rays to a follow-up appointment with Dr. Alba, who interpreted the x-rays as essentially normal. Dr. Alba recommended MRI studies, referred Employee for acupuncture and ordered continued physical therapy. (Alba chart notes, June 12, 2018).

61) On November 11, 2018, Employee completed a document she captioned her "declaration" and explained her departure from her job with Employer. "As of the first week of September 2013, [Employer] no longer needed my services, and my employment ended-as did that of other seasonal workers. I returned to my usual job of substitute teaching . . . ." She also described her use of Tramadol. "Tramadol, which I took following physical therapy, gave me some relief as the

physical therapy aggravated my pain on session days. But it had disagreeable side effects, leaving me itchy and causing gastrointestinal issues." Employee signed her document under the attestation, "I declare under penalty of perjury that the foregoing is true and correct," but her document was not notarized, does not state the place of execution, and does not state that a notary was unavailable to her. (Employee's Declaration, November 11, 2018; observations). Employee refers to this document as her "sworn declaration," and she relies on it as evidence for this hearing. (Employee's Hearing Brief, January 28, 2022).

62) On November 20, 2018, Employee filed documentary evidence that included time slips documenting her work hours for Employer. Numerous time slips are illegible, but those that are show the number of hours per day Employee worked for Employer after the work injury were consistent with those she worked before it. Specifically, before the work injury, Employee worked between two to seven and one-half hours per day, including, five, five and one-half, six, and six and one-half hour-workdays. After the work injury, Employee worked between two to seven and three-quarter hours per day, including, five, five and one-half, six, six and one-half and seven-hour workdays. (Employee's Evidence, November 20, 2018; observations).

63) On July 1, 2019, Employee amended her claim to include TTD, TPD, PPI, a finding of unfair or frivolous controversion, medical and transportation costs, compensation rate adjustment, penalty, interest and "filing costs." (Claim, July 1, 2019).

64) On July 16, 2019, Employer wrote Employee to inform her it had identified "additional wage information" from her 2012 earnings that resulted in a higher compensation rate than previously paid. It recalculated Employee's compensation rate and paid additional amounts of TTD and TPD due, as well as a late payment penalty and interest. (Daniels letter, July 16, 2019; Paddock letter August 6, 2019). Employer did not identify the "additional wage information," but used an amount of $33,596.25 for Employee's 2012 gross annual earnings to arrive at gross weekly earnings of $671.93 and a compensation rate of $436.71. (Daniels letter, July 16, 2019).

65) An itemized statement of Employee's Social Security earnings shows Employee earned more money in 2012 than she did in 2011. Employee's gross annual earnings from all occupations in 2012 was $32,716.25 ($1,956.86 from JoAnn Stores, LLC, $26,152.58 from Yukon Quest International, Ltd., $4,511.43 from the Fairbanks North Star Borough School District, and $975.38 from Rivers Edge, Inc.). (Social Security Administration Itemized Statement of Earnings, August 4, 2021; observations).

66) Weekly compensation rate tables for 2013 show a weekly compensation rate of $436.13 for a gross weekly wage of $671, and a weekly compensation rate of $436.75 for a gross weekly wage of $672. (2013 Workers' Compensation Weekly Compensation Rate Tables).

67) On September 1, 2019, Employee claimed additional benefits, including TPD, PPI and litigation costs. She also sought a compensation rate adjustment. (Claim, September 1, 2019).

68) On June 14, 2021, Employee had attended 124 additional physical therapy sessions with Ms. Pape since December 3, 2015. (Physical therapy notes, December 3, 2015 to June 14, 2021).

69) On July 14, 2021, Marvin Zwerin, D.O., evaluated Employee's right shoulder, right hip, right ankle and bilateral knees during a secondary independent medical evaluation (SIME). He reviewed five volumes of Employee's medical records, consisting of 921 Bates stamped pages, describing Ms. Pape's physical therapy reports as, "Ongoing serial and essentially boilerplate reports from Kathleen J. Pape, PT," and noting her reports were "redundant, w/o change in condition and reflect an ongoing course of treatment which is clearly palliative, but equally clearly, ineffective." While taking Employee's history, she acknowledged a prior left knee arthroscopy in 1984 for a soccer injury. Employee told Dr. Zwerin her work injury was to "both ankles, both knees and later it became apparent that it all hurt; my right shoulder and my hip." When Dr. Zwerin asked Employee if she was any better that day than when she was injured in 2013, she answered "yes." When Dr. Zwerin asked Employee to quantify her improvement, she stated "it still limits me." When Dr. Zwerin asked Employee if she was 50 percent or more improved, she replied "I don't think so." Dr. Zwerin's impressions were: 1) fall at work on July 19, 2013; 2) cessation of employment for Employer by November 1, 2013; 3) multiple imaging studies, none of which reveal any surgically remediable lesions/injury; 4) "ongoing, unremitting course of treatment spanning >7 years without recovery"; 5) "reporting of 'improvement' with current course of myofascial type treatment by Physical Therapist w/o recovery other than transient relief of symptoms since 2014"; and 6) likely mild right rotator cuff/long head of biceps strain chronically that was not the cause of Employee's lower extremity complaints. He diagnosed, left leg, right leg, right knee, left knee, shoulder, and right hip pain, right biceps tendinosis, and right trochanteric bursitis. The causes of Employee's need for medical treatment initially included the July 19, 2013 injury but natural aging and her ongoing employment as a substitute teacher in Wisconsin were also causes. He thought Employee's work injuries had "long ago resolved," left no permanent disability or limitations and were "entirely unrelated" to any aggravation,

acceleration or combination of a preexisting condition. The effects of the work injury were "distant and remote," in Dr. Zwerin's opinion. He explained, when considering what is causing pain to persist more than eight years following a "relatively minor injury," one must look at several factors. One of Dr. Zwerin's considerations was none of the initial evaluators and contemporaneous imaging studies led to the diagnosis of a fracture, dislocation or ligamentous tearing type injury. Consequently, Dr. Zwerin thought Employee's work injury was clearly a soft tissue injury. Citing medical literature, he explained, soft-tissue injuries typically recover within six to eight weeks, but some severe soft-tissue injuries can take up to two years to fully recover and recovery can be delayed by ongoing injurious exposure. Given these considerations, Dr. Zwerin opined the work injury was the predominant cause of Employee's need for treatment for a period of 24 months, although he also characterized Employee's injury as "far from severe." The substantial cause of Employee's ongoing complaints and her "perceived" need for medical treatment was her ongoing injurious exposure as a teacher. Dr. Zwerin would impose no work restrictions on Employee, but if she "self-imposes" work restrictions, those restrictions would not be related to the work injury. According to Dr. Zwerin, Employee's disability ended when she returned to full-duty employment in Wisconsin. He opined Employee was medically stable by July 15, 2015, and had incurred a zero precent PPI as a result of the work injury. Dr. Zwerin reviewed nine job descriptions for Waitress and Teacher, and concluded Employee was "entirely able" to perform "any of the duties" listed on those descriptions. (Zwerin report, July 14, 2021).

70) The presentation of Dr. Zwerin's SIME report is highly professional. It is well organized, comprehensive and includes photographs of Employee taken during various phases of his physical examination, which demonstrate his findings. (Experience, observations).

71) On July 6, 2021, Employee continued physical therapy with Ms. Pape. (Physical therapy notes, July 6, 2021).

72) On July 21, 2021, after reviewing supplemental physical therapy records, Dr. Zwerin issued an addendum report where he commented, "The one thing that stands out in these records is that [Employee's] teaching duties during the school year flare up her symptoms and cause her to seek more attention that [sic] during non-school periods." Dr. Zwerin's opinions from his report were unchanged and "in fact . . . reinforced by these records." (Zwerin addendum, July 21, 2021).

73) On August 12, 2021, Employee saw Dr. Alba "with a common complaint related to a work-related injury occurring back in 2013 while she was working in Alaska as a waitress." Dr. Alba again recommended a right shoulder MRI. (Alba chart notes, August 12, 2021).

74) At an August 12, 2021 prehearing conference, the designee noted Employee filed a request for cross examination for Dr. Zwerin. Employer's attorney and the designee referred Employee to 8 AAC 45.092(j), governing communications with an SIME physician following his evaluation. (Prehearing Conference Summary, August 12, 2021). Eight days later, Employee wrote the Workers' Compensation Division and stated, "The [Alaska Administrative Code] was not located on the [Workers' Compensation Division's] website." (Employee's letter, August 20, 2021).

75) The Alaska Administrative Code is available on the Workers' Compensation Division's website. (Observations; experience).

76) On August 30, 2021, Dr. Zwerin reviewed 22 job descriptions for Waitress, Teacher and other positions consistent with Employee's prior work history. He approved 18 of the 22 job descriptions and noted Employee's work injury was not the substantial cause of her inability to perform jobs not approved. (Zwerin responses, August 30, 2021).

77) On September 1, 2021, a right shoulder MRI showed superior labral tear that extended around the anterior labrum through the five o'clock position, a humeral avulsion of the glenohumeral ligament (HAGL) deformity, a partial tear of the glenohumeral ligament and moderate subcoracoid and subacromial impingement with the partial-thickness rotator cuff tear. (MRI report, September 1, 2021).

78) On September 7, 2021, Employee followed-up with Dr. Alba, who discussed Employee's MRI findings. Dr. Alba opined, the "highest probability of causation regarding [Employee's] right shoulder problems was during her workplace injury on 7/19/2013 while working at a restaurant in Alaska." He further opined Employee also injured her right hip trochanteric region, right ankle and to a lesser extent her right knee. Dr. Alba referred Employee to Rick Papandrea, M.D., an orthopedist specializing in shoulder dysfunctions. He disagreed with an "independent medical assessment that stated she essentially healed two years after the incident." Dr. Alba discussed treatment options including intra-articular injections with corticosteroids, ketorolac, and triamcinolone acetonide. He recommended Employee start a trial use of diclofenac gel on her knees and ankle. Dr. Alba also opined Employee was unable to return to work as a Waitress and

as a substitute teacher for Math, Physical Education and Special Education, and referred Employee to physical therapy "once to twice per week as needed." (Alba chart notes, September 7, 2021).

79) At an October 13, 2021 prehearing conference, the parties agreed to a hearing on Employee's September 1, 2019 workers' compensation claim seeking TTD, TPD, PPI, medical and transportation costs, compensation rate adjustment, penalty, interest, "filing costs," and a finding of unfair or frivolous controversion. Employer's untimely filing of an injury report was also added as a hearing issue. (Prehearing Conference Summary, October 13, 2021).

80) On November 9, 2021, Employer filed Dr. Alba's September 7, 2021 chart notes on a medical summary and requested an opportunity to cross-examine Dr. Alba on those chart notes. (Employer's Medical Summary, November 9, 2021; Employer's Request for Cross-Examination, November 9, 2021).

81) On November 29, 2021, Employee saw Dr. Papandrea for chronic right shoulder pain and represented her symptoms had been present since a fall down stairs in 2013. Dr. Papandrea reviewed x-rays taken that day and Employee's previous MRI. His impressions were chronic right shoulder pain with clinical and MRI findings of subscapularis partial tearing and possible subcoracoid impingement as well as acromioclavicular arthritis. He discussed treatment options with Employee, including an injection and surgery. Employee declined the injection but wanted to proceed with surgery. (Papandrea chart notes, November 29, 2021).

82) On December 17, 2021, Dr. Swanson was deposed and testified regarding his EME report. (Swanson dep., December 17, 2021). He explained his examination was "limited" because of Employee's refusal to answer questions about her past medical history more than two years prior to the work injury or questions she did not feel were relevant. (*Id*. at 8-9). Employee could not remember her prior motor vehicle accidents, sports injuries, fractures or prior work injuries. (*Id*.). Dr. Swanson's opinions may have been "made more valid" if he had known about Employee's prior injuries but he thought he was able to 'pick up most of that" in the medical record. (*Id*. at 9). Employee did not complete the pain scale form and she circled both knees and both ankles in her pain diagram for the evaluation. (*Id*. at 10). She also drew a bracket on the pain diagram with a line going down her right side, from her shoulder to her ankle. (*Id*. at 11). Dr. Swanson explained his findings on physical examination, his diagnosis and the basis for his diagnosis. (*Id*. at 11-30). He also identified the causes for each condition he diagnosed and the substantial causes of Employee's disability and need for treatment. His opinions remained the same as those expressed

in his July 14, 2014, EME report. (*Id*. at 33). At the time of Dr. Swanson's evaluation, Employee did not have any complaints concerning her right shoulder. (*Id*. at 31). When Dr. Swanson reviewed the medical records, he found references to Employee's right shoulder complaints having been resolved. (*Id*.). These included, PA-C Ptacek's August 2, 2013 report, which documented minimal tenderness remaining over the right shoulder, and on August 16, 2013, her report indicated no abnormalities on physical examination. Employee saw Dr. Johnson on September 9, 2013, where she was noted to have a full range of motion to her shoulder, normal strength in her upper extremity and no pain. (*Id*.). Then, Employee was seen by PA-C Ferris, whose report specifically states Employee has no complaints about her right shoulder. (*Id*. at 32). Dr. Swanson did not think there was a need for Employee to continue with physical therapy, as recommended by PA-C Ferris, because Employee had not made any significant progress in over a year. (*Id*. at 37-38). He reviewed 154 pages of additional medical records since his evaluation, which did not change any of the opinions expressed in his report. (*Id*. at 41). Dr. Swanson reviewed Dr. Zwerin's July 14, 2021, SIME report and observed there were no significant discrepancies between his physical examination of Employee and Dr. Zwerin's. (*Id*. at 44-45). He also agreed with Dr. Zwerin's impressions but disagreed with Dr. Zwerin's opinion that it could take a soft tissue injury as long as two years to heal. (*Id*. at 45-46). Evidence-based medicine suggests this time-period is one year rather than two. Otherwise Dr. Swanson agrees with Dr. Zwerin's SIME report. (*Id*. at 46). Dr. Swanson also agrees with Dr. Zwerin's July 31, 2021 and August 30, 2021 addendum reports, including Dr. Zwerin's approval of job descriptions Employee can perform. (*Id*. at 46-47).

83) Employer contends, in preparation for Dr. Swanson's testimony at a 2018 hearing, it had sent him updated medical records from the time of his EME report until the scheduled hearing, but at the time of his deposition, it was learned Dr. Swanson had not retained those interim medical records. Therefore, Dr. Swanson did not review medical records from May 29, 2014 to June 12, 2018 prior to his deposition. Dr. Swanson did have medical records from June 12, 2018 for his review prior to his deposition. (Employer's hearing representations).

84) On January 11, 2022, Employee had attended five additional physical therapy sessions with Ms. Pape since July 6, 2021. (Physical therapy notes, July 6, 2021 to January 11, 2022).

85) On January 28, 2022, Employee explained, "when school recessed that summer [after the 2013 school year], Fletcher accepted a seasonal job as a waitress for [Employer] . . ." "During the first week of September 2013, [Employer] dismissed Fletcher (and other seasonal employees) as

their services were no longer needed." "As noted, Fletcher's job at [Employer's business] was seasonal. When summer ended, she and other seasonal employees were let go." (Employee's Hearing Brief, January 28, 2022).

86) On February 10, 2021, Employee testified she completed an injury report after her fall and her supervisor "cut" her from work that day. Employer then repeatedly cut her from work on the following days. Employer would not accept PA-C Ptacek's work restrictions, so PA-C Ptacek changed her work restrictions for Employer. Work continued to aggravate all her symptoms. Employer "pushed" her to work a little more and she would repeatedly have to tell Employer she had to leave work. Employer dismissed her from employment during first week of September. School had already started. She offered to be on-call or work weekends, but Employer told her they no longer needed her. She returned to work the next day at the Fairbanks North Star Borough School District. Her pain continued, but she could tell a big difference since waitressing was not aggravating her symptoms any longer. Employee then returned to Wisconsin and began treating with Dr. Hardin and Terra Ferris. Her pain continued. PA-C Ferris prescribed pain medication and physical therapy with Ms. Pape. Employee was also given a "narrow" set of work releases so she could work within her limits. She was working as a teacher's aide when she returned because there was a new system being implemented, so she had to wait before she could obtain her license as a substitute teacher. Employee disputed Employer's January 28, 2014 controversion. She did not resign but rather Employer no longer needed her. This dispute is the basis of her claim seeking a finding of unfair and frivolous controversion. Employee's doctors just treated her knees and ankles in the beginning and were just hoping her shoulder would resolve on its own, but activity still aggravates her shoulder. Although she returned to work at Joann Fabrics and the Fairbanks North Star Borough School District after the injury, it was in a "limited capacity." Employee did not collect unemployment while she was taken off work but when she was medically released for work, PA-C Ptacek sent her work release to the unemployment office. Employee continued to receive unemployment benefits through the State of Alaska when she relocated to Wisconsin. She thinks her unemployment benefits ended in April 2014 because they were exhausted. Employee also received unemployment benefits from the State of Wisconsin at the beginning of the pandemic, but she could not say for how long. (Fletcher).

87) On February 10, 2021, Kathleen Pape testified regarding her educational and work history. She has worked for approximately 40 years as a physical therapist and worked with hundreds of

doctors. She began treating Employee's injuries in January 2014 and has been Employee's treating physical therapist from then until now. Ms. Pape estimated she has treated Employee several hundred times since Employee's work injury. At Employee's initial visit on January 14, 2014, Employee had imbalances in her right lower extremity and her left leg had an imbalance too, so she had multiple parts that were not moving correctly. Employee's symptoms directed Ms. Pape to start treating her lower body first. She continued to work on balancing Employee's lower quarters first, then started on her upper quarters. Her November 14, 2016 letter represented her opinions at that time and represents her opinions today. Ms. Pape thought Employee's injuries are very similar to those sustained in motor vehicle rollover accidents. Her November 7, 2018 physical therapy notes indicate Employee continued to have right lower quarter problems. There were still a lot of things wrong with the right foot and ankle. The left leg was doing very well. The upper right quarter also had upper trapezius trigger points that she felt were due to imbalance in the elbow, forearm and wrist that cause bicep overuse and eventually compensation in the shoulder girdle. Ms. Pape's assessment on November 7, 2018 was there were areas in both the upper and lower extremities on the right that cause compensation leading to symptoms with use. The right lower extremity continued to hold remnants of a compressive fall and the right upper extremity held remnants of an impactive fall. Employee is now "Better, much better, but not totally better." She continues to make progress, but a body heals in its own time and sometimes it takes a long time. Employee has improved but is not "totally improved." Ms. Pape relies on a patient's subjective reporting in deciding what body parts to treat during a physical therapy session. She cannot say for certain how many times she has treated Employee but thinks 239 sounds like a reasonable and accurate number. Employee tells Ms. Pape her discomfort is now much less severe and she can tolerate more activities now. Employee's pain complaints decrease when she is not working, and Employee has correlated time away from work with feeling better. Ms. Pape was aware of a non-work-related injury Employee sustained. It was a rear-end auto accident, but it did not change her course of treatment for Employee's work injury. Her treatment on June 14, 2017 was not directed to Employee's motor vehicle accident injuries. Ms. Pape could not say when Employee reported her symptoms from the motor vehicle accident had resolved. She thinks Employee is credible in her symptom reporting. Ms. Pape did not directly answer questions regarding whether she had prepared any treatment plans for Employee, including frequency, scope or duration of treatment, because the goals are always the same and she operates a private pay

clinic so her patients can come when they want. Ms. Pape's prognosis for Employee's right lower extremity is, with enough time, Employee can get to the point to where she is functioning without significant pain, though Ms. Pape was unable to state a timeframe. Her prognosis for Employee's right hip is the same. Ms. Pape thinks the prognosis for Employee's right upper quadrant is more difficult because there is a structural alteration to her labrum. (Pape).

88) At hearing, Employer contended it requested an opportunity to cross-examine Dr. Alba on his causation opinion, but since Employee did not produce him at hearing, his opinions should be afforded little or no weight. (Employer's hearing arguments, February 10, 2022).

89) Employee has neither submitted a PPI rating nor a prediction she will incur a PPI. (Observations).

PRINCIPLES OF LAW

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage**. Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an Employee if the disability . . . or the Employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the Employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

In *Lindhag v. State Department of Natural Resources*, 123 P.3d 948; 954 (Alaska 2005), the Alaska Supreme Court rejected the use of *post hoc, ergo prompter hoc* logical fallacy: just because an asthma diagnosis came after a workplace exposure does not mean the workplace exposure caused

the asthma. Citing *Lindhag*, the Alaska Workers' Compensation appeals Commission has also rejected the argument that "because someone was fine before the work injury, the work injury was the cause of the disability." *Rife v. B.C. excavating, LLC*, AWCAC Decision No. 274 (December 31, 2019); *accord Abonce v. Yardarm Knot Fisheries, LLC*, AWCAC Decision No. 111 (June 17, 2009).

> **AS 23.30.070. Report of injury to the division.** (a) Within 10 days from the date the employer has knowledge of an injury . . . alleged by the employee . . . to have arisen out of and in the course of the employment, the employer shall file with the division a report . . . .

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
>
> (o) . . . [A]n employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection.

In *Bockness v. Brown Jug, Inc.*, 980 P.2d 462 (Alaska 1999), the Court rejected an injured employee's theory that employers are obligated to pay for any and all medical treatment chosen by the employee, no matter how experimental, medically questionable, or expensive it might be. *Id*. at 466-67. Instead, it held the statute's provision requiring employers to provide only that medical care "which the nature of the injury and the process of recovery requires," indicates the board's proper function includes determining whether the care paid for by employers is reasonable and necessary. *Id*. at 466.

The statute does not require continuing rehabilitative or palliative care be provided in every instance. Rather, it grants the board discretion to award "indicated" care "as the process of recovery may require." *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664 (Alaska 1991).

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter . . . .

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id*. An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-

evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion in light of the record as a whole. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services,* 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
>
> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009). If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *DeRosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013). The board alone is charged with determining the weight it will give to medical reports. *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

In *Rockstad v. Chugach Eareckson Support Services*, AWCAC Decision No. 140 (November 5, 2010), the Appeals Commission upheld the board's denial of the employee's claim, finding the board had properly discounted the weight of the employee's treating physicians' reports, as they were based on the employee's inaccurately reported history and symptoms. The board panel had noted, "While [Employee's treating physicians are all fine doctors in their fields and well-meaning in this case, their opinions are no more reliable than the false or exaggerated information provided them by an untruthful reporter." (*Chugach Eareckson Support Services*, AWCB Decision No. 09-0195 (December 16, 2009).

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days . . . .
>
> (d) . . . . If the employer controverts the right to compensation after payments have begun, the employer shall file with the division . . . a notice of controversion not later than the date an installment of compensation payable without an award is due.
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the

> division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (p) An employer shall pay interest on compensation that is not paid when due. . . .

An employer must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it formally controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). The penalty provision gives employers a direct financial interest in making timely benefit payments. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). It has long been recognized the statute provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams v. Abood*, 53 P.3d 134, 145 (Alaska 2002). If an employer neither controverts employee's right to compensation, nor pays compensation due, the statute imposes a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992).

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp*, 831 P.2d at 358. "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." But when nonpayment results from "bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *State of Alaska v. Ford,* AWCAC Decision No. 133, at 8 (April 9, 2010) (citations omitted). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp*, 831 P.2d at 358 (citation omitted). Evidence in Employer's possession "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id*. at 359.

The Alaska Workers Compensation Appeals Commission held in *Ford*, and reiterated in *Mayflower Contract Services, Inc. v. Redgrave*, AWCAC Decision No. 09-0188 (December 14,

2010), the requisite analysis to determine whether a controversion is frivolous or unfair under AS 23.30.155(o):

> First, examining the controversion, and the evidence on which it was based in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion, the board must decide if the controversion is a 'good faith' controversion. Second, if the board concludes that the controversion is not a good faith controversion, the board must decide if it is a controversion that is frivolous or unfair. If the controversion lacks a plausible legal defense or lacks the evidence to support a fact-based controversion, it is frivolous; if it is the product of dishonesty, fraud, bias, or prejudice, it is unfair. But, to find that a frivolous controversion was issued in bad faith requires a third step -- a subjective inquiry into the motives or belief of the controversion author.

Id. *Redgrave* also added clarification to the three-part test under the *Ford*:

> A controversion based upon a legal defense (such as that AS 23.30.095(a) barred the claim, or that a current medical opinion was required) is a "good faith" controversion (the first step of the analysis) if it is objectively "not legally implausible" or consists of "colorable legal arguments … based in part on undisputed facts;]" (citation omitted), it is frivolous (the second step of the analysis) if it is "completely lacking" in plausibility, (citation omitted). It may be found to be subjectively in bad faith (the third step of the analysis), if it is "utterly frivolous," that is, has "such a complete absence of legal basis ... that ... there is no possibility of mistake, misunderstanding, ... or other conduct falling in the borderland between bad faith and good faith. (citation omitted).

Redgrave at 16.

A workers' compensation award accrues legal interest from the date it should have been paid. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Vetter v. Alaska Workmen's Compensation Bd.*, 524 P.2d 264; 266 (Alaska 1974). An award for

compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness. *Id*. If, however, through voluntary conduct unconnected with his injury, an employee takes himself out of the labor market, there is no compensable disability. *Id.* If a determination that an employee is no longer employed, not because of the work injury, but because of her own personal desires, and there is no actual impairment to her earning capacity, her claim for compensation is correctly denied. *Id*. at 267.

When an employee's medical providers release him to light-duty work, and his employer provides it, the employee is not totally disabled. *Humphries v. Lowe's HIW, Inc.*, AWCAC Decision No. 179 (March 28, 2013), *aff'd* 337 P.3d 1174 (Alaska 2014).

> **AS 23.30.187. Effect of unemployment benefits.** Compensation is not payable to an employee under AS 23.30.180 or 23.30.185 for a week in which the employee receives unemployment benefits.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

Where a claim for PPI is contested, the employee has the duty to obtain a PPI rating if he does not agree with a rating by the employer's physician or a PPI rating has not already been obtained. *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Dec. No. 153 (June 14, 2011).

> **AS 23.30.200. Temporary partial disability.** (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability . . . . Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

TPD is determined by comparing an employee's actual weekly earnings with her spendable weekly wage. *Lubov v. McDougall Lodge*, LLC, AWCAC Dec. No. 257 (March 7, 2019). The burden is

on the employee to provide sufficient evidence she could not earn the wages she was receiving at the time of injury due to the work injury. *Id*. Where the employee fails to provide evidence of her actual earnings, there is no evidence to determine a TPD calculation. *Id*.

> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
> . . . .
>
> (1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;
> . . . .
>
> (4) if at the time of injury the employee's earnings are calculated . . . by the hour, . . . then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
> . . . .
>
> (6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection . . . and the employment is exclusively seasonal or temporary, then the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;
> . . . .
>
> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;

> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;
> . . . .
>
> **8 AAC 45.052. Medical Summary.**
> . . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.
> . . . .
>
> (3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,
>
> (A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and
> . . . .

Alaska's worker's compensation system favors the production of medical evidence in the form of written reports, and this preference serves a legitimate purpose. *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819; 822 (Alaska 1974). However, "the statutory right to cross-examination is absolute and applicable to the Board." *Id*. at 824. The medical summary and request for cross-examination process set out in 8 AAC 45.052 was developed in response to the Alaska Supreme Court's decision in *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976) (holding the employer did not waive its right to cross-examine the employee's treating physicians). This decision is so firmly entrenched in Alaska's workers' compensation system that the objection to the admission of medical reports based on the unavailability of the author for cross-examination is commonly referred to as a "*Smallwood* objection." AAC 45.900(11).

> **8 AAC 45.060. Service.**
> . . . .

(b) A party may file a document with the board . . . by mail . . . . If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.
. . . .

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.
. . . .

8 AAC 45.120. Evidence. (a) Witnesses at a hearing shall testify under oath or affirmation. . . .

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision . . . .

8 AAC 45.180. Costs and attorney's fees.
. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

8 AAC 45.900. Definitions.
. . . .

(11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by the physician; *see Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976);
. . . .

AS 09.63.020. Certification of documents. (a) A matter required or authorized to be supported, evidenced, established, or proven by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making it . . . may be supported, evidenced, established, or proven by the person certifying in writing "under penalty of perjury" that the matter is true. The certification shall state the date and place of execution, the fact that a notary public or other official empowered to administer oaths is unavailable, and the following:

"I certify under penalty of perjury that the foregoing is true."

(b) A person who makes a false sworn certification which the person does not believe to be true under penalty of perjury is guilty of perjury.

Sec. 09.63.030. Notarization. (a) When a document is required by law to be notarized, the person who executes the document shall sign and swear to or affirm it before an officer authorized by law to take the person's oath or affirmation and the officer shall certify on the document that it was signed and sworn to or affirmed before the officer.

(b) The certificate required by this section may be in substantially the following form: Subscribed and sworn to or affirmed before me at _____ on _____.

_____
Signature of Officer

_____
Title of Officer

(c) If the document is sworn to or affirmed before a notary public of the state, the notary public shall

(1) affix on the document the

(A) notary public's official signature and official seal; and

(B) date of expiration of the notary public's commission; and
. . . .

AS 23.20.360. Earnings deducted from weekly benefit amount. The amount of benefits, excluding the allowance for dependents, payable to an insured worker for a week of unemployment shall be reduced by 75 percent of the wages payable to the insured worker for that week that are in excess of $50. . . .

AS 23.20.485. False statement to secure benefits. A person who makes a false statement or misrepresentation knowing it is false or who knowingly fails to disclose a material fact, with intent to obtain or increase a benefit . . . is guilty of a class B misdemeanor. Each false statement or misrepresentation or failure to disclose a material fact is a separate offense.

ANALYSIS

1) Is Employee entitled to medical and transportation costs?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the continuing medical and transportation benefits she seeks. *Carter*. Employee's trip-and-fall while working for Employer involves an obvious mechanism of injury and her injury report is sufficient to attach the presumption. *Wolfer*. Employer rebuts the presumption with the opinion of its medical evaluator, Dr. Swanson, who opined all Employee's injuries were medically stable at the time of his evaluation and continued physical therapy was no longer reasonable or necessary. *Miller*. Employee must now prove, by a preponderance of the evidence, that her July 19, 2013 work injury is the substantial cause of her need for continuing medical treatment. *Koons.*

During Dr. Swanson's EME, Employee refused to answer questions concerning prior surgeries, prior hospitalizations, allergies and current medications other than Tramadol and Flexeril. Employee denied any prior illnesses and she could not recall if she had ever been involved in an automobile accident, suffered any sports injuries, suffered previous fractures or had ever had a prior workers' compensation claim. Employee could not guess how many hours per day, or per week, she worked while employed by Employer. She refused to answer how much she smoked, or for how long, prior to quitting two years previous. Employee refused to answer when, or from where, she received her bachelor's degree. AS 23.30.122.

Employee's representation to Dr. Swanson that she could not recall any sports injuries is demonstrably insincere since, seven years later, she acknowledged to Dr. Zwerin that she had undergone a left knee arthroscopy in 1984 for a soccer injury. AS 23.30.122. So too is her representation to Dr. Swanson that she could not even guess how many hours per week she worked for Employer when, three years later, at her deposition, she testified her work for Employer was a full-time, 40-hour per week, job. *Id*. Employee's statement to Dr. Swanson that she could not remember a prior workers' compensation claim is patently unbelievable in light of the medical record in this case, which contains a May 7, 2008 chart note from Dr. Hardin that mentions Employee being "mentally worn out from her ongoing pain" in a prior workers' compensation case that had lasted over 11 years, and another chart note from PA-C Ferris that indicates she had treated Employee for many years following a 1996 workers' compensation injury. *Id*. Neither is Employee's deposition testimony, where she denied knowing the name of her supervisor at Teachers on Call, believable since, at that point, she had worked for Teachers on Call for over

three years. *Id*. Her August 20, 2021 statement that the Alaska Administrative Code was unavailable on the Workers' Compensation Division's website was untrue as well. Furthermore, Employee cannot be believed when she stated she could not remember previous illnesses, previous automobile accidents or previous fractured bones, since these are memorable life events. AS 23.30.122; *Rogers & Babler*.

Employee relies on her November 11, 2018 declaration as factual support for her representations but, conspicuously, it was not notarized. Since it was not notarized, AS 09.63.030, or otherwise sufficiently certified, AS 09.63.020, it cannot be considered as her testimony because it was not given "under oath or affirmation." 8 AAC 45.120(a). Nevertheless, this panel my still rely on the document in reaching its decision. 8 AAC 45.120(f). In that document, Employee contends, "Tramadol, which I took following physical therapy, gave me some relief as the physical therapy aggravated my pain on session days. But it had disagreeable side effects, leaving me itchy and causing gastrointestinal issues." While Employee's representation may well be true enough to the extent stated, considering her numerous acknowledgements to PA-C Ferris and Dr. Swanson that she was taking up to six Tramadol's per day, and considering PA-C Ferris's chart notes and office visit reports, which show repeated Tramadol prescriptions for 180 tablets at a time being written throughout 2014, it is not a sincere representation of her actual Tramadol use given that she was only attending physical therapy twice weekly during that time period. AS 23.30.122.

Moreover, TTD benefits are not payable for any week during which an employee receives unemployment benefits. AS 23.30.187. Prior to Employee's deposition, the agency record does not evidence Employee notifying Employer she was collecting unemployment benefits following the work injury. *Rogers & Babler*. Thus, it appears Employer only learned of Employee's receipt of unemployment benefits through routine questioning at Employee's deposition. *Id*. Even then, this decision's factual findings set forth a tortured attempt by Employee at her deposition to obfuscate unemployment benefits she collected following the work injury. Ultimately, Employee admitted to collecting them for just two months - during October and November 2013. However, at hearing Employee acknowledged she collected unemployment benefits until they were exhausted in April 2014. It is unknown whether Employee reported her earnings in Wisconsin, which began in January 2014, to the State of Alaska Unemployment Insurance program, as

required by law, AS 26.20.360, or whether Employee made any false statements, contrary to law, to obtain unemployment benefits, 23.20.485, but Employee's repeated lack of candor, her untruthful factual assertions, and her contradictory statements and testimony, show her to have not been credible throughout these lengthy proceedings. AS 23.30.122. This conclusion necessarily raises concerns regarding representations Employee made to her medical providers as well. *Rogers & Babler*.

Two of Employee's medical providers have explicitly opined on the cause of Employee's need for continuing medical treatment, Dr. Alba and PA-C Ferris. On September 7, 2021, Dr. Alba, opined the "highest probability of causation" of Employee's need for right shoulder medical treatment was her July 19, 2013 work injury. He further opined Employee also injured her right hip trochanteric region, right ankle and to a lesser extent her right knee as well.

During Employee's first visit to Dr. Alba on April 2, 2018, she related her right hip and right shoulder pain to the work injury. Dr. Alba then assessed a likely right shoulder labral tear "given the chronicity from 2013 to present, which is nearly five years." Dr. Alba did not review the entire medical record, but if he had, he would have learned that Employee's right shoulder pain had not been chronic since 2013. Employee did not report injuring her shoulder at the time of injury, and although her right shoulder was tender on palpation when she first sought treatment on July 26, 2013 for general "right-side soreness," a week after the work injury; by August 2, 2013, her right shoulder was only minimally tender and by December 30, 2013, Employee could not report any specific right shoulder problems at all and she was using her upper extremities without difficulty. Moreover, she had a full range-of-motion in flexion and abduction and good shoulder strength throughout this timeframe and her internal and external shoulder rotation were without limitations.

On June 10, 2016, Employee specifically reported right shoulder soreness after performing yard work to her physical therapist, Ms. Pape. From this point onwards, Employee began reporting her right shoulder pain as "chronic" to her medical providers and relating it to the 2013 work injury, not performing yard work in 2016, as demonstrated by Dr. Hansen's July 14, 2016 chart notes, Ms. Pape's November 14, 2016 letter to Dr. Hansen, and Dr. Papandrea's November 29, 2021 chart notes. AS 23.30.122. By August 12, 2021, Employee's right shoulder complaints had

become a "common complaint related to a work-related injury occurring back in 2013 while [Employee] was working in Alaska as a waitress," according to Dr. Alba. *Id*.

On November 9, 2021, Employer timely requested an opportunity to cross-examine Dr. Alba on his September 7, 2021 causation opinion. 8 AAC 45.052(c)(3)(A). Employee did not produce him for hearing or deposition. *Rogers & Babler*. Since the right to cross-examination is absolute, Dr. Alba's September 7, 2021 causation opinions will not be considered. *Schoen*; *Smallwood*. Nevertheless, even if they were considered, it would be afforded little weight because Dr. Alba did not review Employee's medical record but instead relied on unreliable symptom reporting by an equally unreliable historian who is not credible. AS 23.30.122; *Rockstad*.

On January 21, 2014, PA-C Ferris opined the July 19, 2013 work injury was the substantial cause of Employee's need for continuing medical treatment because, "[Employee] did not have these issues prior to the fall." The Alaska Supreme Court and the Alaska Workers' Compensation Appeals Commission have previously dismissed PA-C Ferris's theory of causation as a logical fallacy. *Lindhag*; *Rife*; *Abonce*. Additionally, PA-C Ferris's physical examination at Employee's initial visit was negative. There was no evidence of swelling or erythema in Employee's bilateral knees, which had a full range of motion. There was no pain with internal or external right hip rotation and Employee's right hip range of motion was equal to that on her left. No areas of tenderness could be found on Employee's right trunk. Yet, relying on Employee's symptom reporting, PA-C Ferris assessed generic bilateral knee, right ankle, right foot and right hip pain. Like Dr. Alba, PA-C Ferris did not review Employee's medical record, including such documents as PA-C Ptacek's August 2, 2013 work release and Employee's August 19, 2013 x-rays, which Dr. Johnson interpreted as normal, but instead relied on Employee's symptom reporting and her representation she "did not have these issues prior to the fall." PA-C Ferris's reliance on Employee's unreliable reporting cause her opinions to be as infirmed as Dr. Alba's, so they too are afforded little weight. AS 23.30.122; *Rockstad*.

Physical therapy sessions with Ms. Pape were, by far, the predominant component of Employee's treatment since the work injury. Her November 14, 2016 letter to Dr. Hansen included Employee's recently modified description of her work injury, which now specifically included her right

shoulder, descriptions of Employee's physical therapy course, and her recommendation that Employee continue with physical therapy. In that letter, Ms. Pape wrote that she initially assessed Employee's right shoulder, but treatment was "deferred in that region due to severe lower quarter imbalances." However, Ms. Pape's notes for Employee's January 9, 2014 initial evaluation do not evidence a right shoulder assessment. AS 23.30.122. At hearing, Ms. Pape testified she relies on a patient's subjective reporting in deciding what body parts to treat during a physical therapy session. Yet, she also testified her treatment on June 14, 2017 was not directed at Employee's motor vehicle accident injuries notwithstanding Employee's subjective complaints that day of being sore from the motor vehicle accident. *Id*. Furthermore, Ms. Pape would not directly answer questions at hearing regarding treatment plans she might have prepared for Employee; and with her 40 years' experience, and after having treated Employee for eight years, and several hundred times by her own estimate, she was still unable to state a timeframe when Employee might be able to function without significant pain. AS 23.30.122.

Ms. Pape's November 14, 2016 letter is undermined, if not contradicted, by her January 9, 2014 physical therapy notes, and her hearing testimony is contradicted by her June 14, 2017 physical therapy notes as well. Ms. Pape's hearing testimony was evasive and unspecific. Ms. Pape is not credible and any opinions or factual assertions she has expressed concerning her physical therapy treatments, including any alleged improvements Employee has made resulting from her physical therapy treatments, are given no weight. AS 23.30.122.

An EME and an SIME were both undertaken in this case. Save for a notable difference in their medical stability dates, the EME and SIME physicians' opinions generally comported with one another. Both physicians opined Employee sustained "mild," "relatively minor," soft-tissue injuries that resolved and no further medical treatment was reasonable or necessary.

Dr. Zwerin was the SIME physician. He performed his evaluation on July 14, 2021, eight years after Employee's work injury. His medical stability opinion is based on medical literature that shows soft-tissue injuries typically recover in six to eight weeks, but some severe soft-tissue injuries can take up to two years to fully recover and recovery can be delayed by ongoing injurious exposure. Based on this literature, Dr. Zwerin opined the work injury was the predominant cause

of Employee's need for medical treatment for 24 months, and Employee was medically stable by July 15, 2015. Thereafter, Employee's "perceived" need for medical treatment was her ongoing injurious exposure as a teacher, according to Dr. Zwerin.

At the time of his evaluation, Dr. Zwerin reviewed Employee's entire existing medical record, which spanned five volumes, and is the only physician to have done so. The presentation of his SIME report is highly professional. It is comprehensive, well organized, and includes photographs of Employee during various phases of Dr. Zwerin's physical examination that demonstrate his findings. Significant weight is given to his opinion as a neutral examiner, and because of his comprehensive review of Employee's medical record and the presentation of his report. AS 23.20.122.

Dr. Swanson was the EME physician, and his evaluation was performed far more proximate in time to Employee's work injury than Dr. Zwerin's. He performed his evaluation on July 14, 2014, one year after Employee's work injury. Dr. Swanson observed Employee's symptoms and examinations had not significantly changed since she first saw PA-C Ferris in December 2013 and opined all Employee's diagnosed conditions were medically stable at the time of his evaluation. Specifically, Employee's personal history of a right knee abrasion was medically stable when she was seen by PA-C Ptacek on July 26, 2013; her possible left ankle sprain was medically stable at the time of Dr. Swanson's evaluation; and her possible right hip contusion was medically stable at the time of Employee's follow-up appointment with Dr. Johnson on September 9, 2013. According to Dr. Swanson, continued physical therapy one year after mild injuries from a fall were no longer reasonable or necessary and he also thought Employee should wean off Tramadol.

A broad overview of the contemporaneous medical record shows, at the time of Dr. Swanson's EME, Employee had already attended at least 45 physical therapy sessions with Ms. Pape. Employee consistently reported feeling a little better but never recovered. A year later, when the SIME physician, Dr. Zwerin, opined Employee was medically stable, Employee had attended over 100 physical therapy sessions with Ms. Pape and was still reporting feeling a little better but never recovered. In other words, there is no change in Employee's subjective reporting between when the EME opined her to be medically stable and when the SIME opined her to be medically stable

notwithstanding an additional year of Ms. Pape's continuing physical therapy sessions and PA-C Ferris's ongoing Tramadol prescriptions.

PA-C Ferris's chart notes show no objective improvements in Employee's condition either. Dr. Swanson repeatedly noted her physical examinations, impressions, treatment plans and work releases were "unchanged" from her previous notes. Similarly, Dr. Zwerin also described PA-C Ferris's chart notes during this time-period as "boilerplate regurgitation of [her] prior reports." Indeed, PA-C Ferris's findings on physical examination, immediately before Dr. Swanson's medical stability date, and immediately after Dr. Swanson's medical stability date; and immediately before Dr. Zwerin's medical stability date, and immediately after Dr. Zwerin's medical stability date, are identical, word-for-word. Medical stability means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment and medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days. AS 23.30.395(28). PA-C Ferris's chart notes show Employee was medically stable at the time of Dr. Swanson's EME, as he opined. *Id.*; AS 23.30.122. Dr. Swanson's medical stability date more closely comports with Alaska law than Dr. Zwerin's and is given the most weight. AS 23.30.122.

Additionally, Dr. Zwerin's medical stability date, two years after the work in jury, is just an arbitrary date. No particular event happened on that date. Instead, his medical stability date is based on medical literature that shows soft-tissue injuries can take up to two years to heal. Meanwhile, each of Dr. Swanson's medical stability dates are correlated with actual events in the record, further enhancing the weight of his report. AS 23.30.122.

Other considerations augment the weight of Dr. Swanson's EME report too. He arrived at specific diagnoses, *i.e.*, right knee abrasion, left ankle sprain, and right hip contusion, whereas, Dr. Zwerin's and PA-C Ferris's diagnoses were generic, *i.e.*, right knee, left leg, and right hip pain. AS 23.30.122. Furthermore, the medical record plainly supports Dr. Swanson's opinion on Employee's Tramadol usage as well. PA-C Ferris's chart notes and office visit reports show repeated Tramadol prescriptions for 180 tablets at a time being written throughout 2014. However, after Dr. Swanson identified Employee's Tramadol usage as an area of concern in his EME report,

PA-C Ferris immediately undertook a year-and-a-half long effort to wean Employee off Tramadol, during which she ceased writing Tramadol prescriptions for Employee and referred her out to another provider to manage her Tramadol use. Employee next began treating with Dr. Hansen, and PA-C Ferris, who had treated Employee for 20 years, never saw Employee again. *Rogers & Babler*. Dr. Swanson's perceptive identification of Employee's Tramadol usage as an issue early in this case further enhances the weight of his report. For each of the numerous reasons discussed above, Dr. Swanson's EME report is given the most weight. AS 23.30.122.

An employer must provide medical care for the period which the nature of the injury or the process of recovery requires. AS 23.30.095(a). However, Employee is not entitled to all the care she desires, but rather only that care which is reasonable and necessary. *Bockness*. The board's own, independent physician, Dr. Zwerin, opined Employee's injuries "long ago resolved" and any effects from those work injuries were "distant and remote." He remarked, Employee's "ongoing, unremitting course of treatment" was "redundant, [without] a change in condition and reflect an ongoing course of treatment which is palliative, but equally clearly, ineffective." He went on to opine Employee's "perceived" need for any palliative care was due to her ongoing injurious exposure as a substitute teacher and not the work injury. AS 23.30.155(o). The EME physician, Dr. Swanson, agrees with Dr. Zwerin on these points. The presumption analysis required Employee to prove her entitlement to continuing medical care by a preponderance of the evince. Not only was she unable to do so, but overwhelming medical evidence demonstrates she is not entitled to the care she seeks. *Saxton*.

2) Is Employee entitled to disability benefits?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the disability benefits she seeks. AS 23.30.120(a)(1). TTD compensation is payable for a disability that is total in character and temporary in quality. AS 23.30.185. The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Vetter*. It is undisputed that Employee was not totally disabled. Following PA-C Ptacek's two, one-week, work releases, Employee returned to work for Employer, continued working for Joann Fabrics and resumed her substitute teaching job for the Fairbanks North Star Borough School District. Employee was not

totally disabled, and she is unable to attach the compensability presumption she was, so her claim for TTD will be denied. *Cheeks*.

TPD is payable during the time-period an injured worker's earning capacity is decreased from what she was earning at the time of injury because of the work injury. AS 23.30.200. Although PA-C Ptacek prospectively released Employee back to work without restrictions on August 10, 2013, on August 16, 2013, she imposed work restrictions, including limiting Employee to four hours' work per day. Such a limitation on Employee's potential to earn wages is sufficient, albeit minimal, evidence to attach the presumption she is entitled to TPD. *Cheeks*; *Wolfer*. The presumption is rebutted by Employee's time slips, which show her actual hours worked after the work injury were consistent with those she worked before it. *Miller*. Employee must prove she is entitled to TPD by a preponderance of the evidence. *Koons*.

Although work restrictions may be indicative of a potential entitlement to TPD, TPD cannot be determined in the absence of actual earnings that show Employee suffered a decrease in her earning capacity following the work injury. *Lubov*; *Vetter*. Employee submitted no evidence showing a diminished earning capacity following the work injury such that TPD could be awarded and, for that reason, her claim seeking TPD will be denied. *Id*.

3) Is Employee entitled to PPI?

Where a claim for PPI is contested, the employee has the duty to obtain a PPI rating if she does not agree with a rating by the employer's physician. *Settje*. Both the EME and the SIME rated Employee with a zero percent whole person impairment. Employee seeks a PPI award, but since she has not obtained a PPI rating greater than zero, her claim seeking PPI will be denied. *Id*.

4) Is Employee entitled to a compensation rate adjustment?

Employee makes no specific contentions regarding her entitlement to a compensation rate adjustment but rather wants to "make sure" it was calculated correctly. On August 23, 2013, Employer filed an electronic FROI that sets forth Employee's pay as $310 per week. Therefore, Employee's weekly amount would her gross weekly earnings of $310. AS 23.220(a)(1). However, since Employee's employment with Employer was seasonal, Employee's gross weekly

earnings would be 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury. AS 220(a)(6).

Based on the instant record, it is unknown how Employer arrived at $33,596.25 for Employee's annual income. However, given that an itemized Social Security earnings statement shows Employee's gross annual earnings from all occupations in 2012 was $32,716.25, Employer's figure may represent Employee's earnings from all occupations during the 12 calendar months immediately preceding the injury versus her earnings for the 2012 calendar year. *Rogers & Babler*. Dividing Employer's figure by 50 pursuant to AS 23.30.220(a)(6) yields the gross weekly earnings of $671.93, as Employer set forth in its July 16, 2019 letter. The 2013 weekly compensation rate tables, which show a weekly compensation rate of $436.13 for a gross weekly wage of $671, and a weekly compensation rate of $436.75 for a gross weekly wage of $672, demonstrate Employer accurately calculated Employee's compensation rate so her claim seeking an adjustment will be denied. Incidentally, the same result would be obtained if Employee's gross weekly earnings were calculated as an hourly employee. AS 23.30.220(a)(4).

5) Did Employer unfairly or frivolously controvert Employee's benefits?

For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits. *Harp*. Evidence in Employer's possession at the time of controversion is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id*. If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was made in bad faith and was therefore invalid and a penalty is required. *Id*.

On January 28, 2014, Employer controverted time-loss benefits after August 9, 2013 because Employee had been released to light-duty work by her physician and Employer had light-duty work available within Employee's work restrictions at her full salary. It also controverted because Employee had voluntarily resigned from her position with Employer and moved out-of-state, thus voluntarily removing herself from the labor market. Since either one of Employer's stated reasons could support a legal conclusion Employee was not entitled to additional disability benefits, *Vetter*;

Humphries, the inquiry then becomes the factual evidence in Employer's possession at the time of controversion, *Harp*.

Regarding Employer's second stated reason, the controversion, and the evidence on which it was based, are first examined isolation, without assessing credibility, and drawing all reasonable inferences in favor of the controversion. *Ford*. The adjuster's notes indicate she was aware in January 2014 that Employee had relocated to Wisconsin and was seeking care there from PA-C Ferris. Thus, it cannot be concluded that it was initially unreasonable for the adjuster to have inferred that moving to Wisconsin required Employee to quit her waitressing job in Alaska. *Rogers & Babler*. Thereafter, as Employee points out, Employer never again raised this defense in any of its subsequent controversions. *Id*. Since Employer's second stated reason for its January 28, 2014 controversion was grounded on a good faith inference its adjuster drew from the evidence before her at the time, it was neither frivolous or unfair. *Ford*.

Employer's first stated reason for its January 28, 2014 controversion is more troubling. Employer commenced paying Employee disability benefits after her injury. Then, for some unexplained reason, and without the requisite controversion, it stopped paying her. *Contra* AS 23.30.155(a), (b), (d), (e); 8 AAC 45.182(a). Next, nearly five months after issuing its final compensation check, Employer retroactively controverted disability benefits back to August 9, 2013 because Employee had been released to light-duty work by her physician and Employer had light-duty work available within Employee's work restrictions at her full salary.

The evidence for Employer's stated reason at that time would have included the adjuster's January 28, 2014 notes of her conversation with Employer and Employer's January 28, 2014 written response, indicating Employer could accommodate PA-C Ferris's December 30, 2013 light-duty restrictions. Based on this evidence, Employer might have controverted disability compensation after December 30, 2013, if it had done so timely, which it did not. AS 23.30.155(d). It remains unknown what evidence Employer had in its possession on January 28, 2014 that would retroactively support a controversion of disability benefits back to August 9, 2013. *Contra Harp*. Although PA-C Ptacek originally anticipated Employee returning to work without restrictions by August 10, 2013; on August 16, 2013, she changed her opinion and prescribed work restrictions

for Employee. Moreover, Employer's stated reason also stands in direct opposition to its September 9, 2013 answer to one of Employee's petitions seeking a protective order, where it admitted Employee's entitlement to TTD benefits from July 26, 2013 through August 10, 2013; and TPD benefits from August 11, 2013 through August 15, 2013. *Id*. Consequently, since it was not supported by factual evidence, Employer's first stated reason for its January 28, 2014 controversion was frivolous. *Ford*. Nevertheless, since the controversion as a whole was supported by one of Employer's stated reasons, it was issued in still good faith; and hence, neither frivolous nor unfair. *Id*.

6) Did Employer file an untimely injury report?

An employer is required to file an injury report with the Workers' Compensation Division within 10 days after it has knowledge of an injury alleged by an employee. AS 23.30.070(a). Employer completed a Report of Occupational Injury or Illness on July 19, 2013, the same day Employee was injured. Employee also signed the report on July 19, 2013. The date stamp on Employer's July 19, 2013 Report of Occupational Injury or Illness indicates it was received by the Workers' Compensation Division in Juneau on July 29, 2013. The relevant date is when the injury report was filed with the Workers' Compensation Division, not when Employer's adjuster receives a copy of it. *Id*. Employer's injury report was timely filed, even before adding an additional three days for mailing pursuant to regulation. 8 AAC 45.063(a); 8 AAC 45.060(b).

7) Is Employee entitled to penalty for late paid compensation?

Since no unpaid installments of compensation are due, Employee is not entitled to penalty. AS 23.30.155(e).

8) Is Employee entitled to interest?

Since no unpaid installments of compensation are due, Employee is not entitled to interest. AS 23.30.155(p).

9) Is Employee entitled to litigation costs?

Since Employee did not prevail on any issues at the hearing on her claim, Employee is not entitled to a litigation costs award. 8 AAC 45.180(f).

CONCLUSIONS OF LAW

1) Employee is not entitled to medical transportation costs.
2) Employee is not entitled to disability benefits.
3) Employee is not entitled to PPI.
4) Employee is not entitled to a compensation rate adjustment.
5) Employer did not unfairly or frivolously controvert Employee's benefits.
6) Employer did not file an untimely injury report.
7) Employee is not entitled to penalty for late paid compensation.
8) Employee is not entitled to interest.
9) Employee is not entitled to litigation costs.

ORDER

Employee's July 1, 2019 amended claim is denied.

Dated in Fairbanks, Alaska on May 20, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Lake Williams, Member

/s/
Robert Weel, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of JENNIFER FLETCHER, employee / claimant v. PIKES ON THE RIVER, INC., employer; REPUBLIC INDEMNITY CO. OF AMERICA (RIG), insurer / defendants; Case No. 201320872; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on May 20, 2022.

/s/
Ronald C. Heselton, Office Assistant II