

# Alaska Workers' Compensation Appeals Commission

Jennifer Fletcher,  
Appellant,

vs.

Pike's on the River, Inc. and Republic  
Indemnity Company of America,  
Appellees.

## Final Decision

Decision No. 303

June 12, 2023

AWCAC Appeal No. 22-008  
AWCB Decision No. 22-0033  
AWCB Case No. 201320872

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 22-0033, issued at Fairbanks, Alaska, on May 20, 2022, by northern panel members Robert Vollmer, Chair, Lake Williams, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Jennifer Fletcher, self-represented appellant; Vicki A. Paddock, Meshke Paddock & Budzinski, PC, for appellees, Pike's on the River, Inc. and Republic Indemnity Company of America.

Commission proceedings: Appeal filed June 20, 2022; briefing completed February 27, 2023; oral argument was not requested.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

### *1. Introduction.*

There have been five decisions issued by the Alaska Workers' Compensation Board (Board) in this matter.<sup>1</sup> In *Fletcher V*, the Board denied Jennifer Fletcher's (Ms. Fletcher)

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<sup>1</sup> *Jennifer C. Fletcher v. Pikes on the River, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 17-0008 (Jan. 17, 2017)(*Fletcher I*); *Jennifer C. Fletcher v. Pikes on the River, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 17-0039 (Apr. 5, 2017)(*Fletcher II*); *Jennifer C. Fletcher v. Pikes on the River, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 19-0017 (Feb. 12, 2019)(*Fletcher III*); *Jennifer C. Fletcher v. Pike's on the River, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 19-0116 (Nov. 8, 2019)(*Fletcher IV*); and *Jennifer Fletcher v. Pikes on the River, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 22-0033 (May 20, 2022)(*Fletcher V*). *Fletcher V* is the decision on appeal to the Commission.

claim for temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, permanent partial impairment (PPI) benefits, and medical benefits, finding that Pike's on the River, Inc. and Republic Indemnity Company of America (Pike's) were not liable for the benefits she sought. Ms. Fletcher timely appealed this decision to the Alaska Workers' Compensation Appeals Commission (Commission).

2. *Factual background and proceedings.*<sup>2</sup>

a. *Medical history.*

Ms. Fletcher reported six work injuries with the Division of Workers' Compensation (Division) and pursued benefits for four of them: *Jennifer C. Fletcher v. Apocalypse Designs, Inc.*, AWCB Case No. 199624106 (benefits pursued); *Jennifer C. Fletcher v. Pacific Rim Geological Consulting, Inc.*, AWCB Case No. 200715534 (benefits pursued); *Jennifer C. Fletcher v. Pacific Rim Geological Consulting, Inc.*, AWCB Case No. 200717270 (benefits not pursued); *Jennifer C. Fletcher v. Jo-Ann Stores, Inc.*, AWCB Case No. 200810547 (benefits pursued); *Jennifer C. Fletcher v. Fairbanks Northstar Borough School District*, AWCB Case No. 201002256 (benefits not pursued); and *Jennifer Fletcher v. Pikes on the River, Inc.*, AWCB Case No. 201320872 (benefits pursued).

The Board noted that Ms. Fletcher represented herself in all four cases where she pursued benefits and her workers' compensation litigation experience covers decades.<sup>3</sup> The Board further found that Ms. Fletcher's *pro se* representation in this claim alone included extensive petition practice, protracted discovery litigation, filing of affidavits of readiness for hearing, affidavits of opposition, answers to petitions, medical summaries, objections to prehearing conference summaries, witness lists, requests for cross-examinations, and sophisticated hearing briefs with Lexis legal citations.<sup>4</sup> Her previous *pro se* litigation accomplishments included a successful defense of a petition to dismiss

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<sup>2</sup> We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

<sup>3</sup> *Fletcher III* at 2-3, No. 1.

<sup>4</sup> *Id.*

based on the limitation at AS 23.30.105(a) and success on an AS 23.30.110(c) limitation argument in another case.<sup>5</sup>

Ms. Fletcher has a long history of treatment for various conditions. For instance, on May 7, 2008, Ms. Fletcher saw Scott T. Hardin, M.D., for work-related back pain that had started about eleven or twelve years previous. She reported to him she was still waiting for her workers' compensation case to "get settled" more than eleven years after the injury, and he thought she was getting "mentally worn out from her ongoing pain." Ms. Fletcher 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.<sup>6</sup>

Again, on December 26, 2012, Tara J. Ferris, PA-C, saw Ms. Fletcher for a low back pain consultation at Dr. Hardin's request. PA-C Ferris had not seen Ms. Fletcher for four years, though she had treated Ms. Fletcher for many years on an intermittent basis for low back pain following a 1996 workers' compensation injury. Low back pain and intermittent right leg pain were assessed.<sup>7</sup>

In the present case, Ms. Fletcher, on July 19, 2013, fell down two stairs while working as a waitress for Pike's. She reported injury to her left ankle, right knee, right arm, right side, right ankle, and left knee.<sup>8</sup> On the same day, Pike's completed a Report of Occupational Injury or Illness (Report of Injury), which was also signed by Ms. Fletcher on the same day.<sup>9</sup> The Board found that the date stamp on Pike's July 19, 2013, Report of Injury indicated it was received by the Division in Juneau, Alaska, on July 29, 2013.<sup>10</sup>

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<sup>5</sup> *Fletcher III* at 2-3, No. 1.

<sup>6</sup> R. 3198-99.

<sup>7</sup> R. 2759-62.

<sup>8</sup> R. 2792-94.

<sup>9</sup> R. 2504.

<sup>10</sup> *Fletcher V* at 5, No. 3.

On July 26, 2013, Ms. Fletcher sought treatment for bilateral knee and ankle pain and right-side soreness from her fall at work. Ambria Ptacek, PA-C, evaluated her on behalf of Daniel R. Johnson, D.O. Ms. Fletcher indicated previous surgeries included her left knee in 1984 and right inguinal hernia repair in 2000. She complained of constant pain that was aching in character, stiffness, and swelling. Upon physical examination, there were no gross deformities, swelling, or ecchymosis in her right shoulder, but it was tender on palpation in the anterior portion of the rotator cuff and non-tender along the clavicle and acromioclavicular joint. Ms. Fletcher was non-tender at the elbow and wrist, with full range of motion in flexion and abduction and good shoulder strength. Internal and external shoulder rotation were without limitations. Ms. Fletcher's bilateral knees showed no gross deformities, swelling, or ecchymosis, although there was mild tenderness to palpation bilaterally at the medial and lateral joint lines, which Ms. Fletcher described as more "sore" than "pain." There was no tenderness over the patella, quadriceps tendon, or patellar tendon, and she had full range of motion at her knees. Her hips moved without difficulty or limitation. Her bilateral ankles showed no gross deformities, swelling or ecchymosis, but 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. Ms. Fletcher had full range of motion and strength at her ankles. PA-C Ptacek assessed right shoulder joint pain, right upper arm joint pain, and right forearm joint pain, along with bilateral lower leg joint pain and bilateral ankle joint pain. PA-C Ptacek thought Ms. Fletcher had a "big injury that caused swelling and pain into multiple joints from her fall." She agreed to give Ms. Fletcher a trial period of rest and anti-inflammatories. Ms. Fletcher was taken off work for one week.<sup>11</sup>

Ms. Fletcher followed up with PA-C Ptacek on August 2, 2013, and reported she was "somewhat better," but was still experiencing discomfort. Upon physical examination, there were no gross deformities, swelling, or ecchymosis in Ms. Fletcher'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.

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<sup>11</sup> R. 2757-58.

Ms. Fletcher was non-tender at the elbow and wrist. She had full range of motion in flexion and abduction and good shoulder strength. Internal and external shoulder rotation were without limitations. PA-C Ptacek gave Ms. Fletcher “more time to rest” and ordered Ms. Fletcher off work for another week, but noted Ms. Fletcher could return to work August 10, 2013, with no restrictions.<sup>12</sup>

On August 16, 2013, Ms. Fletcher 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 Ms. Fletcher to physical therapy (PT) for lower extremity range of motion and strengthening exercises. She also completed two work release forms for Ms. Fletcher: 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.”<sup>13</sup> Ms. Fletcher contended PA-C Ptacek changed her work restrictions at Pike’s request.<sup>14</sup> On August 19, 2013, Dr. Johnson interpreted right ankle and right knee x-rays as normal.<sup>15</sup>

Ms. Fletcher began PT on August 26, 2013. During her initial evaluation, she reported “on 7/19/13 she was at work and . . . 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.”<sup>16</sup>

In October 2013, Ms. Fletcher moved to Wisconsin and began work with the West Bend and Slinger School District as a substitute teacher. She sought treatment from PA-C Ferris on December 30, 2013, for her work injury, reporting she fell down two stairs at work and her knees, ankles, and entire right side were still painful. Ms. Fletcher did not report any specific problems with her right shoulder or right arm, and she was using her upper extremities without difficulty. PA-C Ferris assessed bilateral knee, right ankle, right

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<sup>12</sup> R. 2755-56.

<sup>13</sup> R. 2752-54, 0340, 1300.

<sup>14</sup> Hr’g Tr. at 14:11-17, Feb. 10, 2022.

<sup>15</sup> R. 3953.

<sup>16</sup> R. 2746-48.

foot, and right hip pain, prescribed Tramadol for pain and Flexeril for sleep, and referred her to Kathleen J. Pape for additional PT.<sup>17</sup> She prescribed Tramadol, 180 tablets of 50mg, with no refills, with a maximum of six Tramadol tablets per day.<sup>18</sup>

On January 9, 2014, Ms. Fletcher began PT with Ms. Pape. She 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. She stated her torso was “not right” and her back felt “jarred.” She reported her ability to sit was limited and walking, especially on stairs and inclines, was difficult.<sup>19</sup> Ms. Pape’s initial evaluation that day did not include Ms. Fletcher’s right shoulder.<sup>20</sup>

She continued to treat with PA-C Ferris, reporting bilateral knee pain, right foot and ankle pain, and right hip pain and catching. PA-C Ferris opined the work injury was the substantial cause of Ms. Fletcher’s need for medical treatment because “she did not have these issues prior to the fall.” Ms. Fletcher was attending PT twice per week and was still using pain medication and muscle relaxers. She was not medically stable.<sup>21</sup> Ms. Fletcher continued to be prescribed Tramadol.<sup>22</sup>

By July 10, 2014, Ms. Fletcher had attended 45 PT sessions with Ms. Pape. Both Ms. Fletcher and Ms. Pape thought she was continuing to improve, but Ms. Fletcher still reported pain complaints, especially in her right foot and bilateral knees.<sup>23</sup> PA-C Ferris thought Ms. Fletcher was “making very good progress” with PT and planned for her to continue.<sup>24</sup>

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<sup>17</sup> R. 2731-34.

<sup>18</sup> R. 2731-34.

<sup>19</sup> R. 2726-28.

<sup>20</sup> R. 2726-28; *Fletcher V* at 8, No. 21.

<sup>21</sup> R. 2724-25.

<sup>22</sup> *Fletcher V* at 9, No. 26. This was a 30-day prescription.

<sup>23</sup> R. 2614-15.

<sup>24</sup> R. 2848-50.

On July 14, 2014, John W. Swanson, M.D., performed an Employer's Medical Evaluation (EME) during which Ms. Fletcher refused to answer questions concerning prior surgeries, prior hospitalizations, allergies, and current medications other than Tramadol and Flexeril. Ms. Fletcher denied any prior illnesses and could not recall if she had ever been involved in an automobile accident, suffered any sports injuries, suffered previous fractures, or ever had a prior workers' compensation claim. She could not "guess" how many hours per day, or per week, she worked while employed by Pike's. She refused to answer how much she smoked, or for how long, prior to quitting two years previously. She 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 from December 18, 2012, to May 29, 2014. He described PA-C Ferris's charts notes as repeatedly stating: "The physical examination was unchanged," "The impressions were unchanged," "The plans were unchanged," and "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 Ms. Fletcher'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 PT one year after mild injuries from a fall was neither reasonable nor necessary, but she should have two PT visits to teach her range of motion and strengthening exercises. He also thought Ms. Fletcher 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 Ms. Fletcher'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 Ms. Fletcher'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 PPI. Specifically, Ms. Fletcher's personal history of a right knee abrasion was medically stable when she saw 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 5, 2013.<sup>25</sup>

On August 7, 2014, Ms. Fletcher complained to PA-C Ferris that the EME trip "really aggravated her symptoms" due to the long plane ride and walking at airports.<sup>26</sup> On September 18, 2014, Ms. Fletcher reported her pain was improving. Ms. Fletcher was to return to PT and to continue weaning from Tramadol.<sup>27</sup> On November 3, 2014, Ms. Fletcher denied any changes in the quality or character of her symptoms. PA-C Ferris indicated a referral was needed to transfer care regarding her Tramadol use.<sup>28</sup> By December 1, 2014, Ms. Fletcher had attended 15 PT sessions with Ms. Pape since July 17, 2014.<sup>29</sup>

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<sup>25</sup> R. 2588-611; Ms. Fletcher disagrees with Dr. Swanson's report and evaluation, contending he does not have the qualifications to make some of his findings.

<sup>26</sup> R. 2850-54.

<sup>27</sup> R. 2855-56.

<sup>28</sup> R. 2857-59.

<sup>29</sup> R. 2981-3007.

The Board found there was a gap in the PT records from December 1, 2014, until February 3, 2015, when the PT notes show Ms. Fletcher had attended 33 additional PT sessions with Ms. Pape.<sup>30</sup> On March 3, 2015, Ms. Fletcher reported she was continuing with PT twice per week and still using Tramadol as needed, anywhere from zero to six tablets per day.<sup>31</sup> On April 14, 2015, she stated that overall she still felt she was improving. PA-C Ferris planned for Ms. Fletcher to continue with PT and to continue to wean off Tramadol “until her supply runs out.”<sup>32</sup>

On June 11, 2015, Ms. Fletcher 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 did more chores at home, her pain increased.<sup>33</sup> On August 11, 2015, Ms. Fletcher reported she was not working at that time due to summer hours.<sup>34</sup>

The Board found another gap in the PT records from February 3, 2015, until August 20, 2015, but the PT notes showed Ms. Fletcher had attended 46 additional PT sessions with Ms. Pape.<sup>35</sup>

On April 19, 2016, Ms. Fletcher reported to PA-C Ferris that she was continuing to see Ms. Pape for PT and still working as a substitute teacher. She indicated her symptoms were worse with increased activity. Ms. Fletcher 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.<sup>36</sup> On June 10, 2016, Ms. Fletcher reported she

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<sup>30</sup> R. 3008.

<sup>31</sup> R. 2866-68.

<sup>32</sup> R. 2869-71.

<sup>33</sup> R. 0341.

<sup>34</sup> R. 0718-19.

<sup>35</sup> *Fletcher V* at 15, No. 46.

<sup>36</sup> R. 2875-77.

was trying “to do more including some more consistent lawn care,” and was sore at the top of her right shoulder.<sup>37</sup>

On July 14, 2016, Kim A. Hansen, M.D., evaluated Ms. Fletcher on referral from PA-C Ferris. Her conditions were listed as “chronic shoulder hip and ankle pain on the right side since 2013.” 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 Ms. Fletcher was to continue with PT.<sup>38</sup> On August 18, 2016, Ms. Fletcher followed-up with Dr. Hansen, who continued to think her findings were most consistent with fibromyalgia, although some of Ms. Fletcher’s complaints could possibly be attributed to degenerative changes in the shoulder and hip. Dr. Hansen ordered shoulder and hip x-rays, and a trial of Lyrica.<sup>39</sup> The right hip x-ray on August 22, 2016, showed osteoarthritis with no acute osseous findings. The right shoulder x-ray showed no acute osseous findings, and a magnetic resonance imaging (MRI) study was suggested for evaluation of internal derangement or an occult injury.<sup>40</sup>

On November 14, 2016, Ms. Pape wrote to Dr. Hansen describing Ms. Fletcher’s work injury and stating that it now included her right shoulder. She described Ms. Fletcher’s course of PT and recommended that Ms. Fletcher continue with PT. Ms. Pape stated she initially assessed Ms. Fletcher’s shoulder “however with the severe lower quarter imbalances present, treatment was deferred in this region.” Ms. Pape thought Ms. Fletcher’s symptoms were initially “more attributable to mechanical imbalance and resultant inflammatory response of tissues/joints versus specific fracture, tear, neural impingement symptoms.” She was continuing her efforts to “balance” Ms. Fletcher’s femoral alignment and positioning in the pelvis to allow muscle and tissue

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<sup>37</sup> R. 3057. [This appears to be the first mention of right shoulder pain since August 13, 2013, when PA-C Ptacek reported full range of motion and good shoulder strength.]

<sup>38</sup> R. 3276-85.

<sup>39</sup> R. 3286-96.

<sup>40</sup> R. 3641-47, 3635-40.

“normalization.” In Ms. Pape’s opinion, the forces sustained in Ms. Fletcher’s injury were like forces sustained in a rollover accident, and these forces led to a “cycle of continuous compromise.” Ms. Pape urged continued PT since “progress was still being made.”<sup>41</sup>

On June 14, 2017, Ms. Fletcher saw Ms. Pape and reported her right neck, head, and upper quarter were still quite sore from a motor vehicle accident. Ms. Pape noted Ms. Fletcher “neurologically appears without problem. Rotational bias in shoulder girdle with offset mastoid region and suboccipital tension.” Ms. Pape directed treatment to Ms. Fletcher’s bilateral upper quarters and including axilla, glenohumeral joint, scapular/thoracic, clavicle, and sternocleidomastoid muscle. Ms. Pape assessed, “Improved alignment and a decline in held tension.”<sup>42</sup>

Ms. Fletcher sought treatment from Henry M. Alba, M.D., on April 2, 2018, for right hip and right shoulder pain that she related to her work injury. She reported her knee and ankle symptoms had “cleared” 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 PT.<sup>43</sup> On June 12, 2018, Ms. Fletcher 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 Ms. Fletcher for acupuncture, and ordered continued PT.<sup>44</sup>

By June 14, 2021, Ms. Fletcher had attended 124 additional PT sessions with Ms. Pape since December 3, 2015.<sup>45</sup>

On July 14, 2021, Marvin B. Zwerin, D.O., evaluated Ms. Fletcher’s right shoulder, right hip, right ankle, and bilateral knees for a Second Independent Medical Evaluation (SIME). He reviewed five volumes of Ms. Fletcher’s medical records, consisting of 921

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<sup>41</sup> R. 3069-70.

<sup>42</sup> Exc. 878.

<sup>43</sup> R. 1163-64.

<sup>44</sup> R. 3115.

<sup>45</sup> R. 3044-114, 3668, 3670, 3672, 3675, 3677, 3679, 3681, 3683, 3685, 3687, 3689, 3691, 3693, 3695, 3701-10.

Bates stamped pages, describing Ms. Pape's PT 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 Ms. Fletcher's history, she acknowledged a prior left knee arthroscopy in 1984 for a soccer injury. Ms. Fletcher 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 Ms. Fletcher if she was any better that day than when she was injured in 2013, she answered "yes." When Dr. Zwerin asked Ms. Fletcher to quantify her improvement, she stated "it still limits me." When Dr. Zwerin asked Ms. Fletcher if she was fifty 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 Pike's 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 Ms. Fletcher'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 Ms. Fletcher'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 Ms. Fletcher's work injuries had "long ago resolved," with 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 his opinion. He explained, when considering what was 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 Ms. Fletcher'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 recover fully, and recovery can be delayed by ongoing injurious exposure. Given these considerations, Dr. Zwerin opined the work injury was the predominant cause of Ms. Fletcher's need for treatment for a period of 24 months, although he also characterized Ms. Fletcher's injury as "far from severe." The substantial cause of Ms. Fletcher'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 Ms. Fletcher, but if she "self-imposes" work restrictions, those restrictions would not be related to the work injury. According to Dr. Zwerin, Ms. Fletcher's disability ended when she returned to full-duty employment in Wisconsin. He opined Ms. Fletcher was medically stable by July 19, 2015, and she had a zero percent PPI rating as a result of the work injury. Dr. Zwerin reviewed nine job descriptions for Waitress and Teacher, and concluded Ms. Fletcher was "entirely able" to perform "any of the duties" listed in those descriptions.<sup>46</sup>

On July 21, 2021, after reviewing supplemental PT records, Dr. Zwerin issued an addendum report where he commented, "The one thing that stands out in these records is that her teaching duties during the school year flare up her symptoms and cause her to seek more attention that [sic] during the non-school periods." Dr. Zwerin's opinions from his report were unchanged and "in fact . . . reinforced by these records."<sup>47</sup>

The Board found that the presentation of Dr. Zwerin's SIME report was highly professional. It was well organized, comprehensive, and included photographs of Ms. Fletcher taken during various phases of his physical examination, which demonstrated his findings.<sup>48</sup> The Board gave significant weight to his report.<sup>49</sup>

On August 12, 2021, Ms. Fletcher 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

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<sup>46</sup> R. 3713-38.

<sup>47</sup> R. 3740-41.

<sup>48</sup> *Fletcher V* at 22, No. 70.

<sup>49</sup> *Id.* at 45.

waitress.” Dr. Alba again recommended a right shoulder MRI.<sup>50</sup> The right shoulder MRI, on September 1, 2021, showed a superior labral tear that extended around the anterior labrum through the five o’clock position, a humeral avulsion of the glenohumeral ligament deformity, a partial tear of the glenohumeral ligament, and moderate subcoracoid and subacromial impingement with a partial-thickness rotator cuff tear.<sup>51</sup>

Dr. Alba discussed, on September 7, 2021, Ms. Fletcher’s MRI findings. He opined, the “highest probability of causation regarding her right shoulder problems was during her workplace injury on 7/19/2013 while working at the restaurant in Alaska.” He further opined Ms. Fletcher also injured her right hip trochanteric region, right ankle and, to a lesser extent, her right knee. Dr. Alba referred Ms. Fletcher to Rick F. 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 Ms. Fletcher start a trial use of diclofenac gel on her knees and ankle. Dr. Alba also opined Ms. Fletcher was unable to return to work as a Waitress and as a substitute teacher for Math, Physical Education, and Special Education, and referred Ms. Fletcher to PT “once to twice per week as needed.”<sup>52</sup> On November 9, 2021, Pike’s filed Dr. Alba’s September 7, 2021, chart notes on a medical summary and requested an opportunity to cross-examine Dr. Alba on his opinions.<sup>53</sup>

On November 29, 2021, Ms. Fletcher saw Dr. Papandrea for chronic right shoulder pain and represented her symptoms had been present since a fall down two steps in 2013. Dr. Papandrea reviewed x-rays taken that day and Ms. Fletcher’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

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<sup>50</sup> R. 3823.

<sup>51</sup> R. 3824-25.

<sup>52</sup> R. 3828-29.

<sup>53</sup> R. 3822, 1893.

acromioclavicular arthritis. He discussed treatment options with Ms. Fletcher, including an injection and surgery. Ms. Fletcher declined the injection, but said she wanted to proceed with surgery.<sup>54</sup>

Dr. Swanson was deposed on December 17, 2021, and testified regarding his EME report.<sup>55</sup> He explained his examination was “limited” due to Ms. Fletcher’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.<sup>56</sup> Ms. Fletcher could not remember her prior motor vehicle accidents, sports injuries, fractures, or prior work injuries.<sup>57</sup> Dr. Swanson’s opinions may have been “made more valid” if he had known about Ms. Fletcher’s prior injuries, but he thought he was able to “pick up most of that” in the medical record.<sup>58</sup> Ms. Fletcher did not complete the pain scale form and she circled both knees and both ankles in her pain diagram for the evaluation.<sup>59</sup> She also drew a bracket on the pain diagram with a line going down her right side, from her shoulder to her ankle.<sup>60</sup> Dr. Swanson explained his findings on physical examination, his diagnosis, and the basis for his diagnosis.<sup>61</sup> He also identified the causes for each condition he diagnosed and the substantial causes of Ms. Fletcher’s disability and need for treatment. His opinions remained the same as those expressed in his July 14, 2014, EME report.<sup>62</sup> At the time of Dr. Swanson’s evaluation, Ms. Fletcher did not have any complaints concerning her right shoulder.<sup>63</sup> When Dr. Swanson reviewed the medical records, he

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<sup>54</sup> R. 3831-36.

<sup>55</sup> R. 1900-2060.

<sup>56</sup> John W. Swanson, M.D., Dep., Dec. 17, 2021, at 8:22 – 9:4.

<sup>57</sup> Swanson Dep. at 9:5-10.

<sup>58</sup> Swanson Dep. at 9:11-16.

<sup>59</sup> Swanson Dep. at 10:12 – 11:14.

<sup>60</sup> Swanson Dep. at 11:15-18.

<sup>61</sup> Swanson Dep. at 11:22 – 30:4.

<sup>62</sup> Swanson Dep. at 33:5-22.

<sup>63</sup> Swanson Dep. at 30:24 – 31:4.

found references to Ms. Fletcher's right shoulder complaints having resolved.<sup>64</sup> These included PA-C Ptacek's August 2, 2013, report, which documented minimal tenderness remaining over the right shoulder, and the August 16, 2013, report which indicated no abnormalities on physical examination. Ms. Fletcher saw Dr. Johnson on September 9, 2013, who noted she had full range of motion to her shoulder, normal strength in her upper extremity, and no pain.<sup>65</sup> Then, Ms. Fletcher was seen by PA-C Ferris, whose report specifically stated Ms. Fletcher had no complaints about her right shoulder.<sup>66</sup> Dr. Swanson did not think there was a need for Ms. Fletcher to continue with PT, as recommended by PA-C Ferris, because Ms. Fletcher had not made any significant progress in over a year.<sup>67</sup> He reviewed 154 pages of additional medical records since his evaluation which did not change any of the opinions expressed in his report.<sup>68</sup> Dr. Swanson reviewed Dr. Zwerin's SIME report and observed there were no significant discrepancies between his physical examination of Ms. Fletcher and Dr. Zwerin's.<sup>69</sup> 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.<sup>70</sup> Evidence-based medicine suggests this time-period is one year rather than two. Otherwise, Dr. Swanson agreed with Dr. Zwerin's SIME report.<sup>71</sup> Dr. Swanson also agreed with Dr. Zwerin's July 31, 2021, and August 30, 2021, addendum reports, including Dr. Zwerin's approval of job descriptions Ms. Fletcher could perform.<sup>72</sup>

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<sup>64</sup> Swanson Dep. at 31:5-11.

<sup>65</sup> Swanson Dep. at 31:12-25.

<sup>66</sup> Swanson Dep. at 32:1-6.

<sup>67</sup> Swanson Dep. at 37:12 – 38:1.

<sup>68</sup> Swanson Dep. at 41:10-20.

<sup>69</sup> Swanson Dep. at 44:7 – 45:21.

<sup>70</sup> Swanson Dep. at 45:23 – 46:14.

<sup>71</sup> Swanson Dep. at 46:9-14.

<sup>72</sup> Swanson Dep. at 46:15 – 47:10.

On February 10, 2022, Ms. Pape testified regarding her educational and work history. She began treating Ms. Fletcher's injuries in January 2014 and had been Ms. Fletcher's treating physical therapist since then. She could not say for certain how many times she has treated Ms. Fletcher, but thought 239 sounded like a reasonable and accurate number. At Ms. Fletcher's initial visit on January 9, 2014, Ms. Fletcher 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. Ms. Fletcher's symptoms directed Ms. Pape to start treating her lower body first. She continued to work on balancing Ms. Fletcher's lower quarters first, then started on her upper quarters. Her November 14, 2016, letter represented her opinions at that time and represented her opinions today. 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 caused bicep overuse and eventually compensation in the shoulder girdle. At Ms. Pape's assessment on November 7, 2018, there were areas in both the upper and lower extremities on the right that caused 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. Ms. Fletcher was now "Better, much better, but not totally better." She continued to make progress, but a body heals in its own time and sometimes it takes a long time. Ms. Fletcher had improved, but was not "totally improved." Ms. Pape relies on the patient's subjective reporting in deciding what body parts to treat during a PT session. Ms. Fletcher told Ms. Pape her discomfort was now much less severe, and she could tolerate more activities. Ms. Fletcher's pain complaints decreased when she was not working, and Ms. Fletcher correlated time away from work with feeling better.

Ms. Pape was aware of a non-work-related injury Ms. Fletcher sustained, which was a rear-end auto accident. It did not change her course of treatment for Ms. Fletcher's work injury. Her treatment on June 14, 2017, was not directed to Ms. Fletcher's motor vehicle accident injuries. Ms. Pape could not say when Ms. Fletcher reported her symptoms from the motor vehicle accident had resolved. She thought Ms. Fletcher was credible in her symptom reporting. Ms. Pape stated that in lieu of preparing treatment

plans, “her manual therapy works on a treatment-to-treatment basis, so the goal is always the same, decrease the symptoms and increase the function.”<sup>73</sup> She clarified that she has not prepared a written treatment plan for Ms. Fletcher.<sup>74</sup> She operates a private pay clinic so her patients can come when they want and she does not do insurance coverage.<sup>75</sup> Ms. Pape’s prognosis for Ms. Fletcher’s right lower extremity was, with enough time, Ms. Fletcher could get to the point to where she was functioning without significant pain, though Ms. Pape was unable to state a timeframe. Her prognosis for Ms. Fletcher’s right hip was the same. Ms. Pape thought the prognosis for Ms. Fletcher’s right upper quadrant was more difficult because there was a structural alteration to her labrum.<sup>76</sup>

*b. Non-medical history.*

In response to a question from Ms. Fletcher about late filing of the Report of Injury, the Board found that on August 21, 2013, Pike’s 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].”<sup>77</sup> Pike’s filed an electronic First Report of Injury (FROI) on August 23, 2013, which was further noted as received in an August 26, 2013, event entry in the Division’s legacy database.<sup>78</sup> Pike’s August 23, 2013, FROI set forth Ms. Fletcher’s pay as \$310.00 per week.

Ms. Fletcher continued her employment as a substitute teacher with the Fairbanks North Star Borough School District and concurrent employment with JoAnn Fabrics in

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<sup>73</sup> Hr’g Tr. at 76:12-15.

<sup>74</sup> Hr’g Tr. at 79:8-25.

<sup>75</sup> Hr’g Tr. at 80:12-16.

<sup>76</sup> Hr’g Tr. at 44:23 – 46:21, 47:9-13, 48:11-15, 50:1-13, 51:20 – 51:1, 53:2 – 54:5, 54:18-21, 55:19 – 63:12, 65:3 – 67:17, 68:24 – 69:8, 70:20 – 71:1, 73:10 – 75:20, 76:12-19, 77:19 – 78:13.

<sup>77</sup> R. 2113-14.

<sup>78</sup> R. 0001; *Fletcher V* at 6, No. 10.

Fairbanks, Alaska.<sup>79</sup> In October 2013, Ms. Fletcher relocated to Wisconsin, where she found work as a substitute teacher for the West Bend and Slinger School District.<sup>80</sup>

On January 24, 2014, Pike's adjuster recorded a conversation with Pike's:

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 . . . .<sup>81</sup>

On that same date, Pike's responded to a fax from its adjuster, indicating it could accommodate PA-C Ferris's December 30, 2013, light-duty restrictions.<sup>82</sup>

On January 28, 2014, Pike's controverted time loss benefits after August 9, 2013, because Ms. Fletcher had been released to light-duty work by her physician and Pike's had light-duty work available within Ms. Fletcher's work restrictions at her full salary. It also controverted because Ms. Fletcher had moved out of state, thus, voluntarily removing herself from the labor market.<sup>83</sup> On that same day, Ms. Fletcher followed up with PA-C Ferris and reported she had found work within her restrictions as a substitute teacher.<sup>84</sup>

The Board noted that Ms. Fletcher has vigorously disputed she voluntarily resigned from her position with Pike's and repeatedly contended Pike's dismissed her, along with other seasonal employees, at the season's end because it no longer needed her services.<sup>85</sup> She also pointed out Pike's never again raised this defense in any of its subsequent controversies.<sup>86</sup>

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<sup>79</sup> R. 3713-38; Jennifer Fletcher Dep., June 14, 2017, at 22:11-16, 21:16-21.

<sup>80</sup> Fletcher Dep. at 16:16-17, 28:11-18.

<sup>81</sup> R. 2534.

<sup>82</sup> R. 0950.

<sup>83</sup> R. 0297-98.

<sup>84</sup> R. 2714-16.

<sup>85</sup> R. 1066-84; *Fletcher V* at 9, No. 25.

<sup>86</sup> R. 1066-84.

Ms. Fletcher was deposed on June 14, 2017, and testified about her employment history and other injuries.<sup>87</sup> She had worked for the Fairbanks North Star Borough School District for 13 or 14 years and had also worked one night per week for JoAnn Fabrics in Fairbanks for approximately 13 years.<sup>88</sup> She moved to Wisconsin in October 2013, where she was unemployed for approximately two months.<sup>89</sup> Ms. Fletcher then began working for Teachers On Call in the Slinger and West Bend School District.<sup>90</sup> She had worked for Teachers On Call since January 2014,<sup>91</sup> but she did not know the name of her direct supervisor at Teachers On Call.<sup>92</sup> Ms. Fletcher stated she was restricted in the types of jobs she could perform for Teachers On Call because of the work injury.<sup>93</sup> She had difficulty with stairs, walking, stooping, and standing for long periods of time.<sup>94</sup> Ms. Fletcher was not collecting unemployment at that time.<sup>95</sup> She stated she was hired by Pike's as a server on June 23, 2013,<sup>96</sup> for a full-time, seasonal job for the summer that was expected to conclude at the end of August.<sup>97</sup> "Full-time" work for Pike's meant 40 hours per week.<sup>98</sup> Ms. Fletcher still had pain in her right ankle, but her left ankle resolved not long after the work injury.<sup>99</sup> She still had pain in both of her knees, her right shoulder,

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<sup>87</sup> R. 0795-0879.

<sup>88</sup> Fletcher Dep. at 15:3-10, 18:17 – 19:12.

<sup>89</sup> Fletcher Dep. at 16:10-17.

<sup>90</sup> Fletcher Dep. at 28:11-14.

<sup>91</sup> Fletcher Dep. at 28:17-20.

<sup>92</sup> Fletcher Dep. at 28:23-24.

<sup>93</sup> Fletcher Dep. at 29:2-5.

<sup>94</sup> Fletcher Dep. at 29:6-16.

<sup>95</sup> Fletcher Dep. at 31:25 – 32:1.

<sup>96</sup> Fletcher Dep. at 55:8-14.

<sup>97</sup> Fletcher Dep. at 55:15-25.

<sup>98</sup> Fletcher Dep. at 55:15-25.

<sup>99</sup> Fletcher Dep. at 70:22 – 71:5.

and right hip.<sup>100</sup> Ms. Fletcher had pain which limited her from daily activities, such as climbing stairs and walking.<sup>101</sup> Ms. Fletcher testified about receiving unemployment benefits and was somewhat vague and argumentative about when and where she was when she received those benefits.<sup>102</sup>

The Board found that prior to Ms. Fletcher's deposition, the agency record did not have any evidence that Ms. Fletcher notified Pike's she was collecting unemployment benefits following the work injury.<sup>103</sup>

On November 11, 2018, Ms. Fletcher completed a document she captioned her "declaration" and explained her departure from her job with Pike's. "As of the first week of September 2013, Pike's 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 PT, gave me some relief as the PT aggravated my pain on session days. But it had disagreeable side effects, leaving me itchy and causing gastrointestinal issues." The Board noted that Ms. Fletcher signed her document under the attestation, "I declare under penalty of perjury that the foregoing is true and correct," but the document was not notarized, did not state the place of execution, and did not state that a notary was unavailable.<sup>104</sup> Ms. Fletcher referred to this document as her "sworn declaration," and she relied on it as evidence at the hearing.<sup>105</sup>

On November 16, 2018, Ms. Fletcher filed documentary evidence including time slips for her work hours for Pike's. The Board found that numerous time slips were illegible, but those that were legible showed the number of hours per day Ms. Fletcher worked for Pike's after the work injury were consistent with those she worked before the

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<sup>100</sup> Fletcher Dep. at 71:6-18.

<sup>101</sup> Fletcher Dep. at 72:8 – 73:2, 73:9-12.

<sup>102</sup> Fletcher Dep. at 16:11 – 18:16.

<sup>103</sup> *Fletcher V* at 19, No. 58.

<sup>104</sup> R. 1066-84.

<sup>105</sup> R. 1066-84.

injury. Specifically, before the work injury, Ms. Fletcher 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, Ms. Fletcher 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.<sup>106</sup>

On July 16, 2019, Pike's wrote Ms. Fletcher 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 her compensation rate and paid additional amounts of TTD and TPD due, as well as a late payment penalty and interest.<sup>107</sup> The Board found that Pike's did not identify the source of the "additional wage information," but had used an amount of \$33,596.25 for Ms. Fletcher's 2012 gross annual earnings to arrive at gross weekly earnings of \$671.93 and a compensation rate of \$436.71.<sup>108</sup> An itemized statement of Ms. Fletcher's Social Security earnings showed Ms. Fletcher earned more money in 2012 than she did in 2011. Ms. Fletcher's gross annual earnings from all occupations in 2012 was \$33,596.25 (\$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.).<sup>109</sup> The weekly compensation rate tables for 2013 showed a weekly compensation rate of \$436.13 for a gross weekly wage of \$671.00, and a weekly compensation rate of \$436.75 for a gross weekly wage of \$672.00.<sup>110</sup>

On January 28, 2022, Ms. Fletcher explained, "when school recessed that summer, Fletcher accepted a seasonal job as a waitress for Pike's . . . ." "During the first week of September 2013, Pike's dismissed Fletcher (and other seasonal employees) as their

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<sup>106</sup> R. 1193-95.

<sup>107</sup> R. 5912.

<sup>108</sup> R. 5912.

<sup>109</sup> R. 2144-48.

<sup>110</sup> *Fletcher V* at 21, No. 66.

services were no longer needed.” “As noted, Fletcher’s job at Pike’s was seasonal. When summer ended, she and other seasonal employees were let go.”<sup>111</sup>

At hearing on February 10, 2022, Ms. Fletcher testified she completed an injury report after her fall and her supervisor “cut” her from work that day. Pike’s then repeatedly cut her from work on the following days. Pike’s would not accept PA-C Ptacek’s work restrictions, so PA-C Ptacek changed her work restrictions for Pike’s. Work continued to aggravate all her symptoms. Pike’s “pushed” her to work a little more and she would repeatedly have to tell Pike’s she had to leave work. Pike’s dismissed her from employment during first week of September. School had already started. She offered to be on-call or work weekends, but Pike’s 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. Ms. Fletcher then moved to Wisconsin and began treating with Dr. Hardin and PA-C Ferris. Her pain continued. PA-C Ferris prescribed pain medication and PT with Ms. Pape. Ms. Fletcher 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. Ms. Fletcher disputed Pike’s January 28, 2014, controversion. She did not resign, but rather, Pike’s no longer needed her. This dispute is the basis of her claim seeking a finding of unfair and frivolous controversion. Ms. Fletcher’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.” Ms. Fletcher did not collect unemployment when she was taken off work, but began when she was medically released for work and PA-C Ptacek sent her work release to the unemployment office. Ms. Fletcher continued to receive unemployment benefits through the State of Alaska when she relocated to Wisconsin. She thinks her unemployment benefits ended in April 2014

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<sup>111</sup> R. 2485-503.

because the benefits were exhausted. Ms. Fletcher also received unemployment benefits from the State of Wisconsin at the beginning of the pandemic, but she could not say for how long.<sup>112</sup>

At hearing, Pike's asserted it requested an opportunity to cross-examine Dr. Alba on his causation opinion, but since Ms. Fletcher did not produce him at hearing, his opinions should be afforded little or no weight.<sup>113</sup>

The Board found that Ms. Fletcher had submitted neither a PPI rating nor a prediction she will incur a PPI.<sup>114</sup>

The Board found that Pike's paid Ms. Fletcher TTD benefits from July 26, 2013, until August 10, 2013, and TPD benefits from August 11, 2013, until August 15, 2013. On September 6, 2013, Pike's issued its final compensation check to Ms. Fletcher.<sup>115</sup>

### *3. Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.<sup>116</sup> Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>117</sup> "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."<sup>118</sup> The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is

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<sup>112</sup> Hr'g Tr. at 13:6-17, 14:11-18, 15:8-21, 18:2-14, 21:8-20, 23:15-21, 85:3-9, 97:16 – 99:20.

<sup>113</sup> Hr'g Tr. at 106:15-23.

<sup>114</sup> *Fletcher V* at 28, No. 89.

<sup>115</sup> R. 0749.

<sup>116</sup> AS 23.30.128(b).

<sup>117</sup> *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

<sup>118</sup> *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

true even if the evidence is conflicting or susceptible to contrary conclusions.<sup>119</sup> The Board's conclusions with regard to credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.<sup>120</sup>

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.<sup>121</sup> Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.<sup>122</sup>

#### *4. Discussion.*

Jennifer Fletcher fell at work on July 19, 2013, while working as a waitress at Pike's in Fairbanks. When she sought medical treatment on July 26, 2013, PA-C Ptacek assessed pain in Ms. Fletcher's right shoulder joint, right upper arm joint, right forearm joint, bilateral lower leg joint, and bilateral ankle joint. Ms. Fletcher was released from work for one week. She continued to treat for various body pains and was prescribed PT and Tramadol. Ms. Fletcher returned to work as a substitute teacher, first in Fairbanks and then in Wisconsin, where she moved in October 2013. She filed a claim on January 25, 2016, seeking TTD benefits from August 8, 2013, to present, penalty, interest, and a finding of an unfair and frivolous controversion. She amended her claim on April 26, 2016, for medical benefits and transportation costs. On July 1, 2019, Ms. Fletcher amended her claim to add TPD, PPI, compensation rate adjustment, and "filing costs." These issues were heard by the Board on February 10, 2022, in Fairbanks. Ms. Fletcher appeared telephonically as did her physical therapist, Ms. Pape. The record included the depositions of the EME physician, Dr. Swanson, the SIME physician, Dr. Zwerin, and Ms. Fletcher. The Board, in its decision issued on May 20, 2022, denied all the benefits Ms. Fletcher sought in her July 1, 2019, amended claim. Ms. Fletcher appealed,

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<sup>119</sup> AS 23.30.122.

<sup>120</sup> AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013) (*Sosa de Rosario*).

<sup>121</sup> AS 23.30.128(b).

<sup>122</sup> *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

contending the Board made numerous factual and other errors, including its acceptance and reliance on the report of Dr. Swanson. She asserts the Board's decision must be reversed and remanded for correct and further factual findings.

In her opening brief, Ms. Fletcher raised several points and issues which were not considered by the Board in reaching its decision in *Fletcher V*, and so are not considered by the Commission in its review of *Fletcher V*. Among the issues she discussed, she provided information related to an earlier workers' compensation injury arising in 1996 which ultimately settled, and information related to medical treatment between 2008 to 2012 for different body parts. None of this information was considered by the Board in addressing the 2013 work injury, nor was any of this information relevant to her claim for benefits for the 2013 work injury. The Commission, likewise, has not considered this information. She further discussed some unpaid medical bills from a prior work injury. This claim is not part of the 2013 work injury and was not addressed by the Board in *Fletcher V*. Ms. Fletcher also discussed some discovery disputes, including the scope of medical releases Pike's wanted her to sign. These issues were addressed by the Board in *Fletcher I, II, III, and IV*. None of these decisions were appealed to the Commission, nor were these decisions revisited by the Board in *Fletcher V*. These decisions were not considered nor addressed by the Commission in this appeal.

Pike's, on the other hand, contends the Board's decision is correct and should be affirmed. Pike's notes that the Board made numerous credibility findings in support of its decision and these findings are binding on the Commission. Moreover, Pike's states the Board's decision is supported by substantial evidence in the record as a whole, as it is the Board's prerogative to decide upon which doctors and what opinions it will rely in reaching its decision. Furthermore, Pike's asserts there are no further benefits due to Ms. Fletcher as it has paid her all the TTD and TPD to which she might be entitled as she is medically stable, and these benefits may not be paid after the date of medical stability. As the Board noted, Ms. Fletcher has presented no PPI rating nor a doctor's report indicating she may have a PPI rating as a result of this injury. As for future medical care, none is indicated by the doctors on whom the Board relied. Further, Ms. Fletcher's physical therapist, Ms. Pape, stated to the Board she does not bill insurance and has never

prepared a written treatment plan for Ms. Fletcher. The lack of a written treatment plan for multiple treatments of a similar nature furnished within 14 days of the start of treatment means that neither the employee nor the employer may be required to pay for the treatment.<sup>123</sup> Thus, Ms. Fletcher is not entitled to payment for her PT treatments from Ms. Pape.

*a. Credibility.*

In her opening brief, Ms. Fletcher discusses at length the mechanics of her fall while working for Pike's. She contends that the EME physician, Dr. Swanson, and the SIME physician, Dr. Zwerin, did not understand the severity of the fall and its lasting impact on her. Thus, she contends, the Board erred in giving more weight to their opinions than to those of her treating medical providers. Ms. Fletcher also disputes the conclusions Dr. Johnson reached in 2013. She further asserted that PA-C Ptacek incorrectly wrote a prescription for PT for only her right knee and her right ankle when she needed therapy for her whole body. She states that her pain diagrams all included a bracket showing pain from her right shoulder to her right foot, even if the medial reports do not specifically include any description of pain in those areas. These diagrams, she asserts, should have been given more weight and consideration both by the treating providers and the EME and SIME physicians. Ms. Fletcher also contends that Dr. Swanson was not a properly qualified expert because he spoke about her use of Tramadol and indicated she might be addicted, a diagnosis she asserts is beyond the scope of his credentials. Therefore, the Board incorrectly relied on his opinion.

Pike's accepted that Ms. Fletcher fell while working for Pike's and paid significant medical and time loss benefits to her for the injuries associated with the fall. Thus, causation is not an issue. The issue for the EME and SIME physicians, and ultimately for the Board, was whether the 2013 work injury is the substantial cause for any current medical attention Ms. Fletcher may need. Pike's asserts the Board made both implicit and explicit findings of credibility and that both findings are exclusively the Board's to make. The Board decided which doctors' testimony and reports should be given the most

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<sup>123</sup> AS 23.30.095(c).

weight and further found both Ms. Fletcher and Ms. Pape were not credible. The Board then found that the medicals records based on Ms. Fletcher's reports of injury and pain were not credible. The Board explicitly gave more weight to the opinions of Drs. Swanson and Zwerin, in part because they had access to her full medical history and records, unlike Ms. Fletcher's treating providers who had relied solely on her reports of pain.

The determination of credibility is left to the discretion of the Board.

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.<sup>124</sup>

Further, the jurisdiction of the Commission provides that the Board's findings of credibility are binding on the Commission.

The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.<sup>125</sup>

In *Sosa de Rosario*, the Alaska Supreme Court (Court) held that the Commission is required to accept the Board's findings of credibility pursuant to the statute.<sup>126</sup> The Court has also held that the weight to be given to medical evidence is the Board's decision to make.<sup>127</sup> In *Walmart Associates, Inc. v. Kolb*, the Commission held that the Board's

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<sup>124</sup> AS 23.30.122.

<sup>125</sup> AS 23.30.128(b).

<sup>126</sup> *Sosa de Rosario*, 297 P.3d 139, 147 (Alaska 2013).

<sup>127</sup> *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

credibility findings and weight to be accorded to medical evidence may not be overturned or reversed on appeal.<sup>128</sup>

The Board made several explicit statements regarding Ms. Fletcher's lack of credibility. The Board pointed to Ms. Fletcher's "lack of candor" in her deposition regarding her receipt of unemployment benefits.<sup>129</sup> The Board also looked to Ms. Fletcher's representations to Dr. Swanson that she could not remember aspects of her medical history and could not remember whether she had been in any automobile accidents. The Board considered her refusal to answer questions, including how much she smoked prior to stopping, her lack of recall regarding sports injuries, her inability to state how many hours per week she worked at Pike's, her inability to remember the name of her current supervisor at Teachers on Call, her lack of remembrance of a prior workers' compensation injury, and her claim that the Board's regulations were not available on the Board's website, as all instances supporting the Board's finding the she was not credible.<sup>130</sup> Moreover, the Board found she could not be believed regarding her use of Tramadol.<sup>131</sup> "[Ms. Fletcher'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. . . . This conclusion necessarily raises concerns regarding representations [Ms. Fletcher] made to her medical providers as well."<sup>132</sup> These findings that Ms. Fletcher was not a credible witness are binding on the Commission and cannot be set aside, contrary to Ms. Fletcher's contention and request.

Likewise, the weight the Board chooses to give to the medical evidence is for the Board to decide.<sup>133</sup> Here, the Board chose to give the most weight to the medical opinions

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<sup>128</sup> *Walmart Assocs., Inc. v. Kolb*, Alaska Workers' Comp. App. Comm'n Dec. No. 237 (Aug. 1, 2017).

<sup>129</sup> *Fletcher V* at 42.

<sup>130</sup> *Id.* at 40-41.

<sup>131</sup> *Id.* at 41.

<sup>132</sup> *Id.* at 42.

<sup>133</sup> *See, e.g., Morrison v. Alaska Interstate Construction, Inc.*, 440 P.3d 224, 239 (Alaska 2019); *Traugott v. ARCTEC Alaska*, 465 P.3d 499, 514 (Alaska 2020).

of Drs. Swanson and Zwerin. The Board based this decision on the fact that Dr. Zwerin is an impartial doctor chosen by the Board, and that both Drs. Swanson and Zwerin had access to Ms. Fletcher's full medical record. These doctors, unlike her treating medical providers, did not base their diagnoses and decisions on her incredible statements to them, but rather on their independent review of her medical records and their evaluations and examinations of her. The weight the Board gives to the medical reports is the Board's decision to make, and this is not a decision the Commission can overturn. The Board's decision on which doctors to rely on in reaching its conclusions is affirmed.

*b. Presumption of compensability.*

The Alaska Workers' Compensation Act (Act) provides that a claim is presumed to be compensable unless there is substantial evidence that it is not work-related. AS 23.30.120 the Act provides:

(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;
- (2) sufficient notice of the claim has been given;
- (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
- (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

(b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.<sup>134</sup>

At AS 23.30.010, the Act discusses how the presumption may be rebutted.

(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee 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 death or the need for medical treatment arose out of

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<sup>134</sup> AS 23.30.120.

and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or 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 death or 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 death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.<sup>135</sup>

The Board, in reaching its conclusion that Ms. Fletcher is not entitled to any additional benefits, either medical or time loss, due to the 2013 work injury, based this conclusion on its analysis of the presumption of compensability. The initial step in the presumption of compensability analysis is whether Ms. Fletcher raised the presumption that her ongoing disabilities were the results of the 2013 work injury through the report of a documented and accepted work injury. Ms. Fletcher met this step through her own testimony and the independent medical records documenting the injury.<sup>136</sup>

Once the presumption was established, Pike's needed to rebut this presumption with substantial evidence that the 2013 work injury was not the substantial cause of her ongoing medical treatments.<sup>137</sup> Pike's relied on the medical opinion of Dr. Swanson, its EME physician, that at the time of his evaluation Ms. Fletcher was medically stable (July 14, 2014) and she no longer needed any additional PT (except for a couple of sessions to provide her with home exercises). Any additional PT was neither reasonable nor necessary. At this stage of the evaluation, the credibility of his report and testimony is not reviewed, but rather his report is viewed in isolation.<sup>138</sup> Questions regarding credibility are deferred to the third step of the analysis, i.e., whether there is substantial

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<sup>135</sup> AS 23.30.010(a).

<sup>136</sup> See, e.g., *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987).

<sup>137</sup> See, *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).

<sup>138</sup> *Id.* at 1055.

evidence that the work injury is the substantial cause of the need for ongoing medical care. The Board found that the EME report of Dr. Swanson met the requirement of substantial evidence to rebut the presumption.

Once the employer overcomes the presumption of compensability with substantial evidence, the employee must then prove her claim by a preponderance of the evidence. The Board found that Ms. Fletcher failed to prove her claim for both medical and time loss benefits by a preponderance of the evidence. The Board that found Ms. Fletcher was not credible and, therefore, her medical records did not support her claim for ongoing medical treatment resulting from the 2013 work injury. The Board, in reaching this determination, looked at her lack of cooperation with the EME physician, Dr. Swanson, including her refusal to answer questions regarding prior surgeries, prior hospitalizations, and medications other than Tramadol and Flexeril. She also told Dr. Swanson she did not recall whether she had ever been in an auto accident, had any prior sports injury, suffered fractures, or even had a prior workers' compensation claim. The Board found that her representation to Dr. Swanson that she could not recall a sports injury was clearly insincere since she acknowledged to the SIME physician, Dr. Zwerin, that she had undergone a left knee arthroscopy in 1984 for a soccer injury. She also told Dr. Swanson she could not guess how many hours per week she worked for Pike's, but three years later at her deposition, she testified her work for Pike's was a full-time 40-hour a week job. She also told Dr. Swanson she could not recall any prior workers' compensation claims, which the Board found to be "patently unbelievable in light of the medical record in this case, which contains a May 7, 2008 chart note from Dr. Hardin that mentions [Ms. Fletcher] being 'mentally worn out from her ongoing pain' in a prior workers' compensation case that lasted over 11 years. . . ." <sup>139</sup> The Board identified numerous incidents where Ms. Fletcher had been less than forthcoming. Ms. Fletcher also relied on her November 11, 2018, declaration which the Board found was not a sworn statement, but the Board did consider it, observing that her usage of Tramadol in her statement did not comport with the repeated prescriptions for Tramadol in 2014.

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<sup>139</sup> *Fletcher V* at 40.

In addition, the Board found that Ms. Fletcher did not prove her claim for ongoing time loss benefits by a preponderance of the evidence.<sup>140</sup> First, the Board noted that Ms. Fletcher received, by her own reluctant testimony, unemployment benefits, apparently during October and November 2013 and from January to April 2014.<sup>141</sup> She presented no evidence she had advised Pike's she was receiving unemployment benefits following the work injury and, by statute, she is precluded from TTD during any week in which she received unemployment benefits. Further, Ms. Fletcher did not show that she was entitled to disability benefits. She is not totally disabled because she returned to her usual and customary work as a substitute teacher both in Alaska and in Wisconsin. She was unable to demonstrate a loss of earnings capacity. TTD is not payable after the date of medical stability. "Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability."<sup>142</sup>

Neither is an injured worker entitled to TPD benefits after the date of medical stability.<sup>143</sup> TPD may not be paid after the date of medical stability which Dr. Swanson identified as the date of his evaluation (July 14, 2014). Moreover, Ms. Fletcher submitted no evidence of a loss of earnings capacity, she returned to work in her usual and customary employment, and she was medically stable in July 2014. She did not prove by a preponderance of the evidence that she is entitled to either TTD or TPD.

*c. Medical stability and palliative care.*

As stated above, the date of medical stability is important for determining entitlement to time loss benefits as well as medical benefits. Medical stability is defined at AS 23.30.395(28) as

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

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<sup>140</sup> See, AS 23.30.187, "Compensation is not payable to an employee under . . . 23.30.185 [TTD] for a week in which employee receives unemployment benefits."

<sup>141</sup> *Fletcher V* at 41.

<sup>142</sup> AS 23.30.185.

<sup>143</sup> See, AS 23.30.200(a).

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. . . .<sup>144</sup>

Ms. Fletcher first sought medical treatment related to the work injury on July 26, 2013, when she was evaluated by PA-C Ptacek on behalf of Dr. Johnson. Pain, stiffness, and swelling were noted, but there were no gross deformities, swelling, or ecchymosis in her right shoulder; the shoulder was tender on palpation. She had full range of motion in flexion and abduction and good shoulder strength. Her bilateral knees showed no gross deformities, swelling, or ecchymosis; however, there was mild tenderness to palpation bilaterally. Bilateral knees showed no gross deformity, swelling, or ecchymosis. PA-C Ptacek diagnosed right shoulder joint pain, right upper arm and right forearm joint pain, bilateral lower leg joint pain, and bilateral ankle joint pain. She agreed that Ms. Fletcher should have a period of rest with anti-inflammatories and took her off work for one week. Ms. Fletcher began PT and she returned to work as a substitute teacher and to her part-time job with JoAnn Fabrics until she moved to Wisconsin in October 2013.

Ms. Fletcher began treatment with PA-C Ferris in December 2013 to whom she reported ongoing pain in her knees and ankles, but no specific problems with her right shoulder or arm which she could use without difficulty. Ms. Fletcher was prescribed Tramadol and advised she could work full time with one hour standing, followed by thirty minutes of rest. Ms. Fletcher began PT with Ms. Pape in January 2014. In March 2014, Ms. Fletcher reported to PA-C Ferris she had no new or different symptoms. She did report some improvement since the day of the injury, but she was not back to normal. PA-C Ferris, on May 29, 2014, continued to find Ms. Fletcher not medically stable, but with no new symptoms or changes in condition. Ms. Fletcher would be medically stable when her pain decreased and she improved her functionality. However, PA-C Ferris's chart notes record no objective improvement, and her opinion does not comport with the

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<sup>144</sup> AS 23.30.395(28).

Alaska statutory definition for medical stability which is no objectively measurable improvement for a period of 45 days.<sup>145</sup>

Dr. Swanson found Ms. Fletcher medically stable from the work injury when he examined her in July 2014. At this point in time, Ms. Fletcher had had no objectively measurable improvement from the effects of the injury in over 45 days. “[M]edical 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.”<sup>146</sup> Dr. Swanson noted that PA-C Ferris’s notes repeatedly stated, “physical examination unchanged” and she continued to be prescribed Tramadol and PT. Dr. Swanson’s diagnoses included possible left ankle sprain, possible dependence on narcotics, and subjective complaints outweighing objective abnormalities. She was one year post injury, and a year of PT should have been sufficient. Additional PT was neither reasonable nor necessary according to Dr. Swanson. Although the Board noted gaps in its PT records, at hearing Ms. Fletcher agreed that 239 PT visits seemed right. The Board gave great weight to Dr. Swanson’s report and deposition testimony. The Board found that Dr. Swanson, unlike Ms. Fletcher’s treating doctors, had access to her entire medical record and also examined her in closer time proximity to the work injury.<sup>147</sup>

Ms. Fletcher began to complain about right shoulder pain in June 2016, following “some consistent lawn care.”<sup>148</sup> This was the first complaint about shoulder pain since December 2013 when she reported no specific problems with her right shoulder and arm and could use them without difficulty. Nonetheless, she led Dr. Alba to believe in “the chronicity from 2013 to the present” of right shoulder pain for which he was recommending surgery.<sup>149</sup> This description was one of the bases for the Board’s finding that Ms. Fletcher was not credible in her reporting of job-related pain to her treating

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<sup>145</sup> *Fletcher V* at 46.

<sup>146</sup> AS 23.30.395(28).

<sup>147</sup> *Fletcher V* at 45.

<sup>148</sup> *Fletcher V* at 15, No. 50.

<sup>149</sup> *Id.* at 19, No. 58.

doctors. Therefore, the Board found the need for shoulder surgery not related to the work injury in 2013. The Board afforded Dr. Alba's opinion little weight because he did not review her entire medical record and relied on her incredible reports to him of ongoing and continuous pain in her right shoulder.<sup>150</sup>

Dr. Zwerin, the SIME physician, an independent doctor selected from the Board's list of specialists, agreed that Ms. Fletcher was medically stable when he evaluated her on July 14, 2021. He agreed with Dr. Swanson that she did not need additional medical treatment as a result of the 2013 work injury, and attributed her ongoing complaints to aging and work with the school district in Wisconsin. He differed only in that he would allow two years of PT. He also reviewed several job descriptions and opined she could return to work in several of the occupations. She had no PPI. The Board found his report to be "highly professional," "well organized, comprehensive and includes . . . [evidence] which demonstrates his findings."<sup>151</sup> The Board gave great weight to his reports in part because he was a "neutral examiner" and he made a comprehensive review of her medical records.<sup>152</sup> This is a finding which the Commission must accept. Moreover, this finding is supported by substantial evidence in the record as a whole.

Ms. Fletcher is not entitled to additional PT because it is palliative care, which must be reasonable and necessary.<sup>153</sup>

AS 23.30.095(o) states that palliative care must be reasonable and necessary.

Notwithstanding (a) of this section, an 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

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<sup>150</sup> *Id.* at 43.

<sup>151</sup> *Id.* at 21-22, Nos. 69, 70.

<sup>152</sup> *Id.* at 45.

<sup>153</sup> Palliative care is defined as "medical care or treatment rendered to reduce or moderate temporarily the intensity of pain cause by an otherwise stable medical condition. . . ." AS 23.30.395(29).

physician that the palliative care meets the requirements of this subsection. A claim for palliative care is subject to the requirements of (c) — (n) of this section. If a claim for palliative care is controverted by the employer, the board may require an evaluation under (k) of this section regarding the disputed palliative care. A claim for palliative care may be heard by the board under AS 23.30.110.<sup>154</sup>

AS 23.30.395(29) defines “palliative care” as:

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. . . .

Moreover, if an injured worker is entitled to continuing care or treatment, the provider must present a plan detailing the treatment. AS 23.30.095(c) provides:

(c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee. When a claim is made for a course of treatment requiring continuing and multiple treatments of a similar nature, in addition to the notice, the physician or health care provider shall furnish a written treatment plan if the course of treatment will require more frequent outpatient visits than the standard treatment frequency for the nature and degree of the injury and the type of treatments. The treatment plan shall be furnished to the employee and the employer within 14 days after treatment begins. The treatment plan must include objectives, modalities, frequency of treatments, and reasons for the frequency of treatments. If the treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for treatments that exceed the frequency standard. The board shall adopt regulations establishing standards for frequency of treatment.<sup>155</sup>

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<sup>154</sup> AS 23.30.095(o).

<sup>155</sup> AS 23.30.095(c).

As Ms. Pape testified at hearing, she has not produced a treatment plan and she does not bill insurance. Therefore, there is no clear and convincing evidence that ongoing PT, at least with Ms. Pape, is reasonable and necessary. Moreover, the Board found her testimony not credible because she relied on Ms. Fletcher's statements about the nature and length of her physical problems which all were the result of the work injury. The Board found Ms. Fletcher's statements not credible. The Commission must abide by that finding by the Board.

Even if Ms. Fletcher had been successful in her claim, there are no benefits due and owing to her. She has been medically stable since July 2014 according to Dr. Swanson, which finding the Board accepted. Therefore, she is not entitled to either TTD or TPD after July 2014. She has returned to work as a substitute schoolteacher, one of her jobs at the time of her work injury, so she is not entitled to reemployment benefits. Both the EME and SIME physicians stated she has no PPI from her work injury. Ms. Fletcher did not produce a medical record indicating she had a PPI, and she did not produce a record of any PPI rating. Since her physical therapist testified she does not bill insurers and does not prepare treatment plans, Ms. Fletcher is not entitled to additional PT.

*d. Compensation rate and other issues.*

Among other issues, Ms. Fletcher states the Board did not properly consider is the establishment of her correct compensation rate for payment of TTD and TPD. Ms. Fletcher asked the Board to make sure her compensation rate was correct.<sup>156</sup> Ms. Fletcher herself does not appear to have provided any documentation to support a rate other than the one Pike's developed utilizing what information it had about her earnings from all occupations during the calendar year preceding the injury.<sup>157</sup> The compensation rate for an injured worker is established by determining the employee's spendable weekly wage, which is the employee's gross weekly earnings minus payroll tax

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<sup>156</sup> *Fletcher V* at 48.

<sup>157</sup> *See*, AS 23.30.220(a)(6).

deductions.<sup>158</sup> Here, Pike's provided information on her earnings while working for Pike's. However, Ms. Fletcher also worked for JoAnn Fabrics and for the Fairbanks school system. Thus, pursuant to AS 23.30.220(7), her earnings from all employers must be considered. Ms. Fletcher is the person who could have, and should have, provided this information.

The Board utilized the figures Pike's submitted and also Ms. Fletcher's Social Security earnings statement for gross earnings in 2012. The Board concluded Pike's calculations were accurate and denied Ms. Fletcher's claim seeking a compensation rate adjustment. Ms. Fletcher did not provide any other earnings information, and the Board's assessment is supported by substantial evidence in the record as a whole.

Ms. Fletcher also sought a finding of unfair and frivolous controversion against Pike's for a January 28, 2014, controversion with two bases for the controversion. First, Pike's contended Ms. Fletcher had been released to light duty work and Pike's had light duty work available for her, and secondly, Ms. Fletcher had moved to Wisconsin and, thus, voluntarily removed herself from the labor market.

For a controversion not to be frivolous and unfair, an employer must have in its possession sufficient evidence in support of the controversion that, if the claimant did not produce evidence in opposition, the Board would find that the claimant was not entitled to benefits.<sup>159</sup> If the employer does not have sufficient evidence, then the controversion was in bad faith and a penalty is owed. Where, as here, there are two grounds for the controversion, if one is legally sufficient, even if the other is not, then the controversion is not in bad faith.<sup>160</sup> Ms. Fletcher contends that Pike's could not have taken her back to work because the season had ended and there was no work available. Therefore, she asserts that this part of the controversion was not legally valid, and she is owed a penalty. The Board discussed that while this ground may not have been supported by factual evidence and, thus, frivolous, nonetheless the Board found that the controversion as a

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<sup>158</sup> AS 23.30.220(a).

<sup>159</sup> *See, Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

<sup>160</sup> *See, e.g., Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264 (Alaska 1974).

whole was not frivolous because the second basis of the controversion, *i.e.* that Ms. Fletcher had moved to Wisconsin and thereby removed herself from the labor market in Alaska, was valid. Thus, the controversion was valid on one of the two grounds, making the controversion valid and not unfair or frivolous. The Board held that no penalty was due to Ms. Fletcher. The evidence in the record supports the Board's finding.

Ms. Fletcher also contended Pike's did not timely file a report of her work injury. "Within 10 days from the date the employer has knowledge of an injury . . . the employer shall file with the division a report setting out" the name of the employer, the name of the employee, the nature of the injury, and the time of the injury.<sup>161</sup> On July 19, 2013, Pike's completed a Report of Injury, which was also signed by Ms. Fletcher on the same day.<sup>162</sup> The Board found that the date stamp on Pike's July 19, 2013, Report of Injury indicated it was received by the Division in Juneau on July 29, 2013.<sup>163</sup> The date the report was received is ten days from the date of the injury. The Board held the report was timely filed, even if it was not sent to the adjuster for the employer at the same time. Ms. Fletcher was in error that the report was not timely filed.

*5. Conclusion and order.*

The Board's decision in *Fletcher V* is AFFIRMED.

Date: 12 June 2023 Alaska Workers' Compensation Appeals Commission



*Signed*

Michael J. Notar, Appeals Commissioner

*Signed*

S. T. Hagedorn, Appeals Commissioner

*Signed*

Deirdre D. Ford, Chair

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<sup>161</sup> AS 23.30.070(a).

<sup>162</sup> R. 2504.

<sup>163</sup> *Fletcher V* at 5, No. 3.

### APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts  
303 K Street  
Anchorage, AK 99501-2084  
Telephone: 907-264-0612

### RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 303 issued in the matter of *Jennifer Fletcher v. Pike's on the River, Inc. and Republic Indemnity Company of America*, AWCAC Appeal No. 22-008, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 12, 2023.

Date: June 15, 2023



*Signed*

K. Morrison, Appeals Commission Clerk