Alaska Workers' Compensation Appeals Commission

Beverly J. Sumpter, Appellant, vs. Fairbanks North Star Borough School District, Appellee.	Final Decision Decision No. 265 August 26, 2019 AWCAC Appeal No. 18-017 AWCB Decision Nos. 18-0083, 18-0092 AWCB Case No. 201400344

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0083, issued at Fairbanks, Alaska, on August 15, 2018, by northern panel members Kelly McNabb, Chair, Lake Williams, Member for Labor, and Togi Letuligasenoa, Member for Industry; and, Final Decision and Order on Modification No. 18-0092, issued at Fairbanks, Alaska, on September 12, 2018, by northern panel members Kelly McNabb, Chair, Lake Williams, Member for Labor, and Togi Letuligasenoa, Member for Industry.

Appearances: James M. Hackett, Law Office of James M. Hackett, for appellant, Beverly J. Sumpter; Wendy M. Dau, Assistant Borough Attorney, Fairbanks North Star Borough, for appellee, Fairbanks North Star Borough School District.

Commission proceedings: Appeal filed October 8, 2018; briefing completed March 26, 2019; oral argument held on June 7, 2019.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Beverly J. Sumpter filed a worker's compensation claim against Fairbanks North Star Borough School District (FNSBSD) and requested a Second Independent Medical

Evaluation (SIME).[1] The Alaska Workers' Compensation Board (Board) heard the SIME issue in Fairbanks, Alaska, on the written record on October 20, 2016, and issued its opinion on October 31, 2016.[2]

The Board heard Ms. Sumpter's claim for benefits on June 21, 2018, and denied her claim, finding her work injury was not the substantial cause of her disability or need for medical treatment.[3] Ms. Sumpter filed a petition for modification and reconsideration which the Board heard on the written record on September 12, 2018.[4] The Board modified two findings of fact, omitted one sentence from its original decision, and took no action on the petition for reconsideration.[5]

Ms. Sumpter timely appealed both decisions to the Alaska Workers' Compensation Appeals Commission (Commission) on October 8, 2018.[6] On December 27, 2018, she asked to supplement her points on appeal, and moved to supplement or clarify her grounds on appeal on January 3, 2019.[7] The Commission granted, in part, her first Motion to Supplement Grounds for Appeal, denied her second Motion to Clarify/ Supplement Grounds for Appeal, and denied FNSBSD's Motion to Strike Substantive

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[1] *Sumpter v. FNSB School District and Fairbanks North Star Borough*, Alaska Workers' Comp. Bd. Dec. No. 16-0100 (Oct. 31, 2016)(*Sumpter I*); the Commission notes that the captions by the Board vary from FSNB School District to Fairbanks North Star Borough School District. The Commission has chosen the caption of Fairbanks North Star Borough School District, abbreviated to FNSBSD in this decision.

[2] *Id.*

[3] *Sumpter v. FNSB School District*, Alaska Workers' Comp. Bd. Dec. No. 18-0083 at 30 (Aug. 15, 2018)(*Sumpter II*).

[4] *Sumpter v. Fairbanks North Star Borough School District*, Alaska Workers' Comp. Bd. Dec. No. 18-0092 (Sept. 12, 2018)(*Sumpter III*).

[5] *Id.* at 4-5.

[6] *Sumpter I* determined that a Second Independent Medical Evaluation would assist the Board and ordered one. This decision is not part of this appeal.

[7] *Sumpter v. Fairbanks North Star Borough School District*, AWCAC Appeal No. 18-017, Order on Appellant's Motions to Supplement/Clarify Grounds for Appeal and Order on Appellee's Motion to Strike Substantive Argument (Jan. 16, 2019)(*Sumpter IV*).

Argument.[8] The Commission heard oral argument on June 7, 2019, and now affirms the Board's decision as supported by substantial evidence in the record as a whole.

2. *Factual background and proceedings.*[9]

Ms. Sumpter has a history of back pain, including cervical pain, starting in 1998, when she was involved in a motor vehicle accident. At that time, she reported no immediate symptoms, but about an hour later when driving home, she turned her head to talk to her friend and her head got stuck. Ms. Sumpter subsequently treated with Peter Marshall, M.D., in North Pole, Alaska, who, according to Ms. Sumpter, noted that she had a lot of degeneration.[10]

In 2007, Ms. Sumpter reported suffering from neck pain when she woke up in pain.[11] On November 13, 2007, Ms. Sumpter saw W. J. Harrison, M.D., for neck pain and tingling down the right arm for two months' duration, with associated migraine headaches. X-rays demonstrated cervical kyphosis and degenerative disc disease at C5-6 and C6-7 and Dr. Harrison prescribed chiropractic treatments.[12] Ms. Sumpter next saw Dr. Harrison on December 14, 2007. He indicated her symptomology had improved with the chiropractic treatments, but her symptoms had not completely resolved.[13]

On March 27, 2008, Ms. Sumpter again saw Dr. Harrison, complaining of neck pain, stiffness, tightness, and muscle tension across the upper back, and pain, numbness, and tingling in her right upper extremity from shoulder to elbow. She reported waking up in pain on March 20, 2008. Dr. Harrison continued to prescribe chiropractic treatment.[14] His report noted she reported a history of arthritis, but she later denied this

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8 *Sumpter IV.*

9 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.

10 *Sumpter II* at 2, No. 1; Exc. 051.

11 *Id.*, No. 3.

12 *Id.* at 3, No. 4; Exc. 486.

13 *Id.*, No. 5; R. 1727.

14 *Id.*, No. 6; R. 1728.

saying she reported a history of arthritis in the spine to Dr. Harrison which should have been in her family history, not her personal history.[15]

On December 22, 2009, Ms. Sumpter saw PA-C Michael Pomeroy for persistent neck pain, as well as numbness in the arms. Ms. Sumpter denied any specific history of trauma. X-rays demonstrated advanced degenerative changes in the mid-cervical spine. He noted that Ms. Sumpter was a long-term smoker, and ordered an MRI. After the MRI was performed, he discussed it with Ms. Sumpter along with the possibility of referral for a surgical evaluation.[16]

James Tate, M.D., saw Ms. Sumpter on January 19, 2010, for a neurological consultation, and opined degenerative changes and disc bulging were present, but no urgent lesion. He prescribed a series of cervical epidural blocks which Ms. Sumpter underwent in early 2010.[17] On February 12, 2010, Ms. Sumpter began treatment with Scott Conover, PA-C, who noted the epidural injections were benefitting Ms. Sumpter.[18]

Paul L. Jensen, M.D., saw Ms. Sumpter on June 10, 2010, on referral from PA-C Pomeroy, and indicated the epidurals had improved her pain, but she still reported severe weakness in both arms, and her gait was unsteady.[19] Dr. Jensen reviewed a December 2009 MRI and felt Ms. Sumpter had advanced C5-6 and C6-7 spondylosis, with severe stenosis and significant foraminal stenosis at C5-6 and C6-7. He also thought Ms. Sumpter demonstrated a clinical myeloradiculopathy, and he recommended a two-level anterior cervical decompression and fusion at C5-6 and C6-7.[20] He ordered an updated MRI on August 26, 2011, and, then, opined Ms. Sumpter should have a three-level anterior cervical decompression and fusion at C4-5, C5-6, and C6-7. Dr. Jensen found progressive spinal cord deformity at C4-5 over the past 2 years, along with severe

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15 *Sumpter II* at 3, No. 7; R. 1728; Hr'g Tr. at 158:13-18, June 21, 2018.

16 *Id.*, No. 8; Exc. 488-89; R. 1676-77.

17 *Id.*, No. 9; R. 1847-50; R. 1851.

18 *Id.*, No. 10; R. 1855-56.

19 R. 1680.

20 R. 1681.

mechanical symptoms, as well as myelopathic-type symptoms.[21] On September 26, 2011, Ms. Sumpter underwent the anterior cervical decompression and fusion at C4-5, C5-6, and C6-7.[22]

Ms. Sumpter next saw PA-C Jan DeNapoli on October 7, 2011, whose chart note reads:

> [Ms. Sumpter] states that her pre-op symptoms are improving, she has some soreness in her muscles and some right arm residual decreased strength but overall is doing quite well. She is already aware that she is improving significantly. She no longer has the aching, sore, dead feeling in her arms. She is taking meds as needed but does not need a refill yet. . . . She has no other complaints today and feels she's doing quite well already. . . . She is a half pack per day cigarette smoker.[23]

On December 22, 2011, Ms. Sumpter saw PA-C DeNapoli, whose chart note states:

> [Ms. Sumpter's] pre-op symptoms are resolved. She has some soreness in her muscles but overall is doing quite well. She had right shoulder surgery about 3 weeks ago and is doing well post op from that as well. She no longer has the aching, sore, dead feeling in her arms. She is taking meds as needed, but does not need a refill. She has no other complaints today and feels she's doing quite well. She would like to try something to help with the spasms such as massage therapy. . . . She is a half pack per day cigarette smoker.[24]

Ms. Sumpter did not use the massage therapy prescription.[25]

Ms. Sumpter, Ms. Sumpter's husband, Patrick Sumpter, and Ms. Sumpter's sister, Linda Bullington, testified at hearing that Ms. Sumpter was back to her normal self after the fusion, and they deemed the fusion to be a success. As evidence of her improvement, both Ms. Sumpter and her husband testified about extensive work she did on the deck for their home in the summer of 2013.[26]

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21 *Sumpter II* at 3-4, No. 11; R. 1615-16; Exc. 495-496.

22 *Id.* at 4, No. 12; Exc. 501-02.

23 *Id.*, No. 13; R. 1625.

24 *Id.*, No. 15; R. 1626-27.

25 *Id.*, No. 16; Hr'g Tr. at 106:9-16.

26 *Id.* at 4-5, No. 17; Hr'g Tr. at 175:5 – 176:15; 86:5-13; 58:7 – 59:22.

On April 13, 2013, Ms. Sumpter saw PA-C Scott Conover, whose chart note states:

> [Ms. Sumpter] is now requesting . . . care for multiple joint pains including her neck [s/p surgery for cervical fusion, right shoulder pain s/p surgery] bilat shoulder pain knee pain / back pain, with significant life stresses.[27]

PA-C Conover ordered laboratory tests in response to her joint complaints.[28] FNSBSD referred to this chart note as evidence Ms. Sumpter was having pain in her neck after her 2011 surgery.[29] Ms. Sumpter testified she was having pain in all of her joints equally and this pain subsided after about a week.[30]

Prior to Ms. Sumpter's 2011 fusion, Ms. Sumpter's work history included cleaning buildings at Eielson Air Force Base for nine months, cooking for Dinner Date, and caring for an elderly woman. Ms. Sumpter also primarily cared for her three children, one with epilepsy, because her husband worked out of town.[31]

On November 4, 2013, Ms. Sumpter began work for FNSBSD as an Intensive Resource Teacher Aide. One of the qualifications for the applicant was the ability to lift a minimum of 50 pounds safely and regularly.[32] On November 18, 2013, Ms. Sumpter underwent a physical examination with U.S. Health Works for FNSBSD. She listed the following surgical procedures: "10/13 varicose vein removal; 7/13 cyst removal lt flank; 9/11 c-spine 3 level fusion; 12/11 shoulder surgery, and 10/09 hysterectomy."[33] Dr. Raymond testified this physical examination was not intended to establish fitness for duty. It was an annual or bi-annual requirement that employees perform a physical assessment to establish whether they are safe to work around children and generally safe to do the job required of them. In these exams, the examiner feels pressured because they do not want to impact the person's employability with this exam. This is not the

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27 *Sumpter II* at 5, No. 18; Exc. 503.

28 R. 2793.

29 *Sumpter II* at 5, No. 19.

30 *Id.*, No. 20; Hr'g Tr. at 107:21 – 108:5.

31 *Id.*, No. 21.

32 *Id.*, No. 22; Exc. 005-06.

33 *Id.*, No. 23; Exc. 018.

best exam for determining fitness for duty because it does not determine if one were capable of lifting 50 lbs.[34]

On December 18, 2013, Ms. Sumpter was working for FNSBSD when she reported a "strain on neck developed after lifting student in wheelchair to adjust his seating position."[35] She testified the injury occurred when she was standing in front of the student and scooted him forward by his belt loops.[36] On this occasion, she felt a momentary, sharp pain in her neck.[37] This happened at 1:55 p.m.[38] She did not think took much of it because it went away quickly. It felt more like a Charlie horse. In her deposition, Ms. Sumpter said she felt an immediate jolt of 10 out of 10 pain for two seconds and then it was gone.[39] A few hours later she was sore. She had soreness, headaches, and tenderness and the pain developed continually, getting worse on Christmas Eve.[40]

On the day of the injury, Ms. Sumpter stated she contacted her husband, Patrick Sumpter, who was working out of town and told him she hurt herself while lifting a student at school.[41] She said it was like an "electrical shock."[42] He testified that when he got home, she was holding her head differently, was not turning her neck, was stiff, and was not carrying herself the same.[43] Ms. Sumpter returned to work the next day,

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34 Hr'g Tr. at 200:9-15; 200:25 – 201:17; 202:11-16.

35 *Sumpter II* at 5, No. 25; Exc. 515.

36 Beverly Sumpter Dep., Feb. 3, 2016, at 31:15-20; 32:1-6.

37 Hr'g Tr. at 118:1-8.

38 Hr'g Tr. at 155:17-21.

39 Sumpter Dep. at 31:25 – 33:2; 34:1-4.

40 *Sumpter II* at 6, No. 26; Sumpter Dep. at 33:1-8.

41 Sumpter Dep. at 38:21-22; Hr'g Tr. at 55:5-8.

42 Sumpter Dep. at 33:12-13.

43 *Sumpter II* at 6, No. 27; Hr'g Tr. at 55:9-16.

working both December 19 and 20, 2013.[44] She originally listed December 19, 2013, as the date of injury, but later corrected it to December 18, 2013.[45]

On December 23, 2013, Ms. Sumpter saw Donna Strigle, PA-C, regarding smoking cessation, anxiety, and high blood pressure. PA-C Strigle prescribed Ambien, Trazodone, Wellbutrin, and Ziac. Ms. Sumpter did not mention the neck injury.[46] The record of Ms. Sumpter's December 23, 2013, visit to PA-C Strigle was not received by FNSBSD until late 2017 when Ms. Sumpter filed it with the Board. This was, therefore, received after the employer medical examination (EME), SIME, and depositions. The Board found the EME and SIME doctors were deprived of the opportunity of opining on the relevance or importance of this record.[47] Ms. Sumpter testified she set up the December 23, 2013, appointment with PA-C Strigle two weeks in advance because her doctor was retiring and she needed to establish a relationship with a new doctor so she could receive a refill on her prescriptions. She was there only to get her medications refilled which she explained was why she did not mention her injury.[48]

On December 23, 2013, the same day as the PA-C Strigle appointment, Ms. Sumpter saw Deborah Kitelinger, the mother of the student she was lifting, at Sears Department Store. Ms. Sumpter told her that she had hurt herself lifting her son. As evidence of this conversation, Ms. Sumpter attached a copy of her Sears receipt for that day.[49] At hearing, the designee twice attempted to call Ms. Kitelinger, but the call was unsuccessful.[50]

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[44] *Sumpter II* at 6, No. 28; Sumpter Dep. at 39:8-15; 40:3-7; 40:22-25; 41:2-7.;

[45] *Id.*, No. 29; Exc. 038.

[46] *Id.*, No. 31; Exc. 504.

[47] *Id.*, No. 32.

[48] *Id.*, No. 33; Hr'g Tr. at 123:13-20.

[49] *Id.* at 7, No. 34; Hr'g Tr. at 121:6-24.

[50] *Id.*, No. 35.

At some point in mid-late December, Ms. Sumpter contacted her sister, Linda Bullington, and told her she injured her neck while making a maneuver with a student. She felt a "pop or jolt" and she was worried about it. Since it was close to Christmas break, she hoped her neck would settle down over the Christmas break.[51] Ms. Sumpter described a sharp, shooting pain.[52] However, Ms. Sumpter said her sister was mistaken that she used the words "pop or jolt" to describe the incident.[53]

Ms. Sumpter and her husband testified she could not get out of bed on December 24, 2013. She rolled over and slid off the bed and had to hold her head up with her hands. Ms. Sumpter's husband had to take over all the cooking on Christmas because she could not do it.[54]

On December 27, 2013, Ms. Sumpter saw Grayson Westfall, M.D., at Tanana Valley Clinic's (TVC) 1st Care, who listed back pain for one week but stable although with persistent recurrence. She also described neck pain at work with symptoms aggravated by extension, flexion, rolling over in bed, and twisting. Ms. Sumpter reported she thought she injured her neck lifting a student at work. Under history, the report noted she was a current, every day smoker. Under Assessment/Plan:

> The pt suffered neck pain on 12/19/13. It happened right after work, so it is difficult for me to say whether this is a work related injury or not. Her xray shows solid anterior fusion C4-C7 with disc spacers and anterior fusion hardware in good position. No acute cervical spine injury. Moderate neuroforaminal narrowing C2-C3 through C6-C7 levels is more apparent on the left side. I have recommended referral to an Occupational Medicine physician to help us follow the injury as well as determine whether this was work related or not, but I cannot make that determination for her today. Ice the neck. Start phys therapy. Start Naprosyn x 2 weeks. Norco for severe pain, and flexeril for spasm. . . .[55]

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51 *Sumpter II* at 7, No. 36; Hr'g Tr. at 87:14-18; 87:25 – 88:6.

52 *Id.*; Hr'g Tr. at 94:10-12; 147:19-20.

53 *Id.*, No. 37; Hr'g Tr. at 180:25 – 181:9; 181:22-24.

54 *Id.*, No. 38; Hr'g Tr. at 60:22-25; 61:5-14; 61:19-23; Sumpter Dep. at 33:4-8.

55 *Sumpter II* at 7-8, No. 39; Exc. 20-24.

On December 31, 2013, Ms. Sumpter followed up with Matthew W. Raymond, D.O., at TVC's 1st Care. Dr. Raymond noted she presented for neck pain which she attributed to repositioning a quadriplegic student in his wheelchair on December 19, 2013. After work she noticed a headache at the base of the occiput and later her neck became stiff and sore. It reached a point where she could not get out of bed without rolling onto her knees. She was given Norco and Naprosyn on December 27, 2013, and the C-spine film was negative for acute injury. She reported to the nurse that she was feeling better than before. He noted she will certainly have future exacerbations of the neck pain. He discussed whether this was an appropriate job for her given her neck problems and whether the school district could accommodate a 12# weight lift/carry restriction indefinitely. He also noted that there was a question of work-relatedness, since the pain came on at home after work. In his opinion, this job exceeded her baseline functional capacity with her neck fusion. He added this was not a work-related injury, but an exacerbation of a pre-existing condition, which she could expect to have with any strenuous activity at home or work.[56]

Ms. Sumpter never followed up with Dr. Raymond.[57] Ms. Sumpter contended Dr. Raymond's chart note that she had Tramadol at home for neck pain was inaccurate. She was prescribed Tramadol in March 2011 and did not use it up. She had some minor surgeries in 2013 before the injury, involving a cyst removal and removal of varicose veins and was prescribed pain medication for those surgeries. She asserted this was the pain medication Dr. Raymond was referencing.[58]

Dr. Raymond testified as follows: He got the history regarding Tramadol from Ms. Sumpter. She did not tell him she felt immediate pain from moving the student. If she had said that he would have included that because it relates to causality. Causality in a case like this is one of the toughest things to determine. He felt this was more of an

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[56] *Sumpter II* at 8, No. 40; Exc. 028-031 (with handwritten change in date of injury from 19 December 2013 to 18 December 2013).

[57] *Id.* at 9, No. 41.

[58] *Id.*, No. 42; Hr'g Tr. at 99:18 – 100:7; 101:6-15; 102:12-14.

exacerbation of her baseline medical condition which can happen anytime. Other activities that involve some kind of significant musculoskeletal effort could bring on a similar scenario. The mechanism for injury could be felt in the cervical spine, particularly if you have some preexisting condition that makes you prone to injury. He found this injury was not work-related because there was no temporal relationship between the on-set of the symptoms and the reported activity at school. There were hours of feeling okay and a gap of time between the lift and when she started to experience neck pain. Considering the prior surgery and her significant degenerative disc disease, this was an exacerbation and could have happened whether or not she was at work. The pre-existing condition was the substantial cause for the need for treatment on December 31, 2013, although the possibility of work-relatedness could not be excluded. It was possible to have a musculoskeletal injury from a lift like this; however, the facts that he took into consideration included the lapse in time between the lift and the symptoms. If there was an acute injury, he expected her to feel it at the time of the lift, but she told him the onset of pain happened later. Ms. Sumpter is going to experience intermittent neck pain from lots of activities for the rest of her life and this is why she has Tramadol at home. The surgery and the degenerative disc disease are the pre-existing conditions. He was not sure if she had pain right away; he did know she had pain afterward, and the rest would be speculation. He was focused on the pre-existing condition and the mechanism of injury, which is usually felt more in the back. The primary contributor was the presence of disc disease and her surgery. She was supposed to follow-up in two weeks and she did not come back, so he just thought it was a "speed bump" and the type of neck pain she will experience. She has a terrible neck and she is going to have a lifetime of neck pain. He gave her a twelve-pound lifting and pulling restriction and if she continued to have problems, he would recommend a permanent restriction. His chart notes stated she was given Tramadol for neck pain, and his opinion would change if he found out this

Tramadol was for other procedures, but she told him she had Tramadol at home for neck pain.[59]

FNSBSD contended the significance of the prescription for Tramadol is that it demonstrated she had neck pain following the fusion.[60]

Ms. Sumpter testified that at her December 31, 2013, appointment, Dr. Raymond asked her who her employer was and she responded that it was the school district. He said he knew the claims adjuster there, Bev Shuttleworth, and said she was a very nice lady and he did not think it was fair that the school district has to pay for something that he believed was going to inevitably happen to her sooner or later. Dr. Raymond also indicated he did not believe she should have been in that line of work after her fusion surgery.[61]

Dr. Raymond testified he knows Bev Shuttleworth and has worked with her for several years and has great respect for her. It is possible he made a comment that FNSBSD should not have to pay for the injury, but he did not record it and did not recall. He did not put much stock in whether a worker believes the injury is work-related. He also stated he believed the Borough should be accountable for any work-related injuries.[62] Ms. Sumpter contended Dr. Raymond's comments show he is biased against finding a work injury.[63] The Board did not make a finding regarding this allegation.

Ms. Sumpter did not make an appointment with her surgeon, Dr. Jensen, because she believed he was working in Anchorage and was only coming to Fairbanks once in a while. She originally attempted to make an appointment with PA-C DeNapoli on

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[59] *Sumpter II*, at 9-10, No. 43; Hr'g Tr. at 207:5-11; 208:23 – 209:14; 209:17-25; 212:15-25; 213:1-15; 225:1-13; 230:11-16; 229:15-19; 231:7-24; 223:12-18; 231:7-9; 232:22-25; 233:1-7; 234:13-16; 236:2-17; 238:3-12; 235:10-21; 239:15-24; 240:22-25; 245:4-13.

[60] *Id.* at 10, No. 44.

[61] *Id.*, No. 45; Hr'g Tr. at 133:16 – 134:7; 136:14-19.

[62] *Id.*, No. 46; Hr'g Tr. at 215:23 – 216:5-6; 219:14-20; 216:11-12; 216:23-24.

[63] *Id.*, No. 47.

December 27, 2013, instead of being treated at 1st Care, but PA-C DeNapoli was out of town during the 2013 holidays and January 2, 2014, was the earliest appointment she could get. PA-C DeNapoli confirmed she was out of town during the 2013 holidays.[64]

On January 2, 2014, Ms. Sumpter treated with PA-C DeNapoli for her neck pain. The chart note states:

> [Ms. Sumpter] is seen today as a self referral for a complaint of neck pain. She was working 12/19/2013 lifting a paraplegic male who weighs 70 pounds, from his wheelchair. Pain began instantly at the base of her skull and spread down her neck on both sides. She states that pain is very similar to the pain she had before surgery except she has no upper extremity symptoms. She has not tried any conservative treatment yet and would like to do that if possible. She had a 3 level fusion in September 2011 with Dr. Jensen and right shoulder surgery about 3 months after that. She has to lift this 70# boy daily for the past 2 months at her job and is having difficulty with it. Since surgery she states she's done fairly well, aching often but no other symptoms. She states that her pain is constant. . . . She states the pain primarily shot up the occiput area but that area is a bit better. Now the right side of her neck is cramping quite often and sometimes she has difficulty getting out of bed but has some improvement with time. . . . She . . . would like to wait before having an MRI or follow-up visit. She would like to be referred to Home Town Physical Therapy.[65]

PA-C DeNapoli testified she did not review the chart notes of Drs. Westfall or Raymond and relied only on what Ms. Sumpter told her, along with her own prior history with Ms. Sumpter.[66]

The EME report by Charles N. Brooks, M.D., and the SIME report by physician Jon H. Scarpino, M.D., both noted that PA-C DeNapoli's January 2, 2014, chart note was the first time Ms. Sumpter stated her pain occurred instantaneously. FNSBSD contended this is important because the visit with PA-C DeNapoli was immediately after Dr. Raymond stated he did not find her symptoms work-related.[67]

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[64] *Sumpter II* at 10, No. 48; Exc. 038; Hr'g Tr. at 30:20-21; 129:9-15; 129:19-24.

[65] *Id.* at 10-11, No. 49; Exc. 034-037.

[66] *Id.* at 11, No. 50; Hr'g Tr. at 11:6-11; 32:12-25.

[67] *Id.*, No. 51.

On January 8, 2014, Ms. Sumpter informed FNSBSD that Jonathan S. Carlile, D.C., would be her attending physician.[68] On January 9, 2014, Ms. Sumpter resigned from her position with FNSBSD.[69] On January 14, 2014, Ms. Sumpter began treating with Dr. Carlile, who noted in his case history, "[Ms. Sumpter] was involved in a work related incident on Wednesday, December 18, 2013 at 3:42:00 PM. . . . Patient was lifting a paraplegic. As she lifted the child [Ms. Sumpter] felt pain in her neck. [Ms. Sumpter] stated that a headache pursued. Her body was bent over the front. As she picked the child up and over the chair bar, the pain came on suddenly." Dr. Carlile stated Ms. Sumpter said her current neck condition was a direct result of a work-related incident.[70]

FNSBSD contended December 18, 2013, was a half-day for students, so it would not have been possible for the work incident to occur at 3:42 p.m. Additionally, Dr. Carlile noted, "according to the patient, she has not had any surgical procedures . . . [yet] she stated she was hospitalized for neck operation. . . ."[71]

On January 30, 2014, Ms. Sumpter again saw Dr. Carlile for continuing chiropractic care and he noted, "patient conditions are now resolved: lower back, upper back and neck." He completed a "Fitness for Duty" form that said Ms. Sumpter could return to work with no restrictions.[72] Ms. Sumpter denied telling Dr. Carlile she felt good on this day.[73] FNSBSD argued Ms. Sumpter was not entitled to permanent total disability (PTD) benefits because her own designated treating physician released her to work with no restrictions.[74]

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68 *Sumpter II* at 11, No. 52; Exc. 038.

69 *Id.*, No. 53.

70 *Id.*, No. 54; Exc. 517-18.

71 *Id.*, No. 55.

72 *Id.* at 11-12, No. 56; Exc. 519; Exc. 520.

73 *Id.* at 12, No. 57; Hr'g Tr. at 172:22 – 173:6.

74 *Id.*, No. 58.

In March 2014, Ms. Sumpter went to Maui with her husband, and her sister, Linda Bullington, and her husband, a vacation planned before the injury. Ms. Sumpter's sister stated Ms. Sumpter was very stiff from the flight. She noticed how much pain Ms. Sumpter was in on the road trip to Hana and Ms. Sumpter had to hold her head to get through it. It was painful to watch her. When Ms. Bullington saw her sister, she observed very restrictive movement in her sister's neck and her sister could not do anything for very long without having excruciating pain.[75]

On July 22, 2014, FNSBSD denied all time loss benefits and all treatment not provided or directed by the designated treating physician.[76]

On September 19, 2014, Ms. Sumpter began treating with Milton J. Wright, D.O., who performed osteopathic manipulative therapy. Ms. Sumpter described chronic and fairly controlled symptoms that she related to a lifting injury one year prior.[77]

On October 24, 2014, Ms. Sumpter claimed temporary total disability (TTD), PTD (when rated), medical costs, transportation costs, review of reemployment benefit decision as to eligibility, compensation rate, penalty, interest, and unfair or frivolous controversion. For description of the injury, Ms. Sumpter stated, "I was re-adjusting a student in his wheelchair by standing in front of him, lifting him by his belt loops." For part of body injured, Ms. Sumpter wrote, "neck/c-spine, shoulders" and checked the right and left boxes. For nature of injury, Ms. Sumpter wrote, "I have preexisting injuries to my neck and had a 3 level fusion operation in 2011. Also pre-existing injuries to my right shoulder, surgery in 2011 also. When lifting the student I reinjured/aggravated my neck and shoulders."[78]

On November 11, 2014, Ms. Sumpter again sought chiropractic treatment with Dr. Carlile, who prescribed chiropractic treatments once a week.[79] On November 18,

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75 *Sumpter II* at 12, No. 59; Hr'g Tr. at 88:14-19; 92:11-18; 90:10-13.

76 *Id.*, No. 61.

77 Exc. 521-22; R. 1572-78.

78 *Sumpter II* at 12, No. 63; Exc. 041-42.

79 *Id.*, No. 64; R. 1443.

2014, Ms. Sumpter saw Dr. Wright, who noted minimal improvement with osteopathic manipulative therapy and prescribed a trial of Medrol Dosepak.[80] On December 5, 2014, Ms. Sumpter again saw Dr. Wright, who noted improved neck pain.[81]

On December 10, 2014, Ms. Sumpter attended an EME with Dr. Brooks. In a written "History Questionnaire" for the EME, Ms. Sumpter described the following:

> I was adjusting my 70 lb student in his wheelchair by standing in front of him with my rt knee between his legs and lifted him by his belt loops to raise him and shift his body over. . . . Sharp pain at the base of my skull that quickly subsided. Approx 10-15 mins later [I] began having headache at back of head. Was also very tender to the touch.

Dr. Brooks opined Ms. Sumpter's degenerative and stenotic changes in her cervical spine, and not the reported work injury, were the substantial cause of her need for medical treatment. He opined that, assuming Ms. Sumpter had an exacerbation of her chronic intermittent headache and neck pain due to occupational activities on December 19, 2013, it would have caused a temporary worsening, probably resolved in one to several days and prior to the next or more significant exacerbation that occurred on December 24, 2013. Dr. Brooks also opined that no further treatment was reasonable and necessary for any effect of Ms. Sumpter's job. He did not feel Ms. Sumpter had sustained any permanent impairment due to her occupational activities on December 19, 2013. Dr. Brooks found she had a pre-existing impairment secondary to a multilevel spine fusion, which he estimated to be a 15 percent whole person PPI rating.[82]

Dr. Brooks testified as follows: In reviewing Ms. Sumpter's records, the thing that stuck out the most were historical inconsistencies as to what happened on the date of injury, December 19, 2013, which was changed to December 18, 2013. He agreed with Ms. Sumpter that she is a bad historian and is unreliable. He looks for consistency, but not necessarily identical histories, as a patient's history should be consistent from one chart note to another, from one provider to another, and that was not the case here. He

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80 *Sumpter II* at 13, No. 65; R. 1552-57.

81 *Id.*, No. 66; R. 1547-51.

82 *Id.*, No. 67; Exc. 043-74.

noted there was no indication in the December 23, 2013, visit to PA-C Strigle about the injury. If someone was injured on December 18, 2013, and was progressively getting worse, you would expect them to report it at a doctor's appointment five days later. He labeled this as "History Zero." "History 1" was for Dr. Westfall and Dr. Raymond. He labeled them as "History A" and "History B" because there were some variations in those. Both of them discussed later symptoms, but not immediate symptoms. Dr. Westfall recorded "thereafter" she felt neck pain. Dr. Raymond stated "after school" she felt a headache and soreness. The story then changed when she saw PA-C DeNapoli on January 2, 2014, and she described the symptoms as coming on immediately after the lift. He referred to this as "History 3." Dr. Jensen recorded she lifted under the arms, and felt immediate symptoms including a snap and pop in her neck. Richard H. Cobden, M.D., recorded immediate symptom onset, lifting the patient by his arms and shoulders, and pain in the upper back radiating down her left arm. Drs. Jensen and Cobden were "History 4." People that tell the truth, tell the same story over and over again. Medical providers don't always record exactly what was told to them. They get it right probably 90-95%, but errors do creep into records. But it is difficult to conclude that a reliable historian would end up with such discrepancies in the record. A change in the history could be based on memory. He was not there to say whether Ms. Sumpter was credible or not. The histories are unreliable. Memory fades with time. The initial histories are most likely accurate. After that, a person's memories often change to their expectations and their desires. And it's not necessarily lying, it's just human nature that people recall what they want to believe. He gave greater credence to the initial histories – December 23, 2013, no symptoms reported, December 27, 2013, no immediate symptoms, December 31, 2013, symptoms came on after. Then a claim is filed and the history changed on January 2, 2014. He called PA-C DeNapoli a naïve historian because she did not read the records of PA-C Strigle or those of Drs. Westfall and Raymond and did not know about the inconsistencies in the story provided to her and the three prior providers. He called it the parrot phenomena. Rather than taking the time to acquire and review a set of records, the provider simply reiterates whatever his or her patient says and it is accepted as fact. If he was going to make casual conclusions, he would

want to have a reasonable comprehensive set of evidence. If you are going to make medical/legal conclusions, you want to be well informed. He diagnosed: chronic intermittent headaches which began on November 2, 2007, which he believed were cervogenic and referred from the neck, cervical sprain strain due to the June 1998 motor vehicle collision, degenerative disc disease and degenerative arthritis in the cervical spine due to genetics and aging, and accelerated by chronic smoking, and multi-level disc herniations in the cervical spine at every level from C3-4 to C7-T1, including disc bulges at each level and disc protrusion at C3-4 and C6-7, and multi-level cervical, spinal stenosis, and narrowing of the central canal, at every level from C3-4 to C7-T1 due to degenerative changes. The motor vehicle collision contributed indirectly. She was in a bad position to get hit in the motor vehicle collision, she was leaning forward, and this probably resulted in accelerated degeneration of the cervical spine. Smoking causes narrowing of blood vessels, diminished blood supply to tissues including the spinal discs, which already have marginal blood supply, and leads to accelerated disc degeneration. He opined there was no work injury. He stated this with a reasonable degree of medical probability. He believed Dr. Scarpino said it best and agreed with his report. If she were to sustain an injury as she described the event, he would expect it to be lumbar. The mechanism of repositioning a child in a wheelchair is not likely to cause a neck injury. Not every symptom indicates an injury. If there was a strain, it would have been minimal and would have resolved in a few days, a week. If you have a significant injury, you usually have immediate symptoms. Whatever she did sleeping the night of December 23-24, 2013, is far more significant than any injury on December 18, 2013. This is not the first time she has had these problems; these were the same symptoms as pre-surgery in 2007. Bad things can happen when you are sleeping. It would be silly to call it an injury. People often get their neck in an awkward position, flexed, extended, rotated, when sleeping, and if you already have a narrow spinal canal, that awkward positioning results in compression of the spinal cord and/or nerve roots and its painful when you wake up. He recommended she sleep in a soft cervical collar. Normally it is not a good idea to wear it during the day because it results in stiffness and weakness in the muscles, but when sleeping it is a good idea to have something that keeps the neck in a relatively

neutral position to prevent flare-ups. If you fuse a motion segment in the spine, the adjacent, mobile segments, have to pick up slack, motion is no longer shared equally, and those other segments degenerate faster. What she was experiencing was normal for a post 3-level fusion patient. These operations are not very good at relieving pain. Accelerated degeneration occurs above and below the fusion. Degenerative and arthritic processes do not get better over time. He gave her a 15 percent PPI rating due to the pre-existing pathology and surgery. She is partially disabled, but she could do sedentary work. She might need to be at a job where she could do intermittent positional changes. He was skeptical about whether she could do medium work and definitely would not recommend heavy work. In April 2013, she was complaining of pain in her neck and all her joints. His understanding was that an occupational injury must be as great as, or greater than, any other cause in order to be the substantial cause. Possible causes include the degenerative and stenotic disease in her cervical spine, lifting, sleeping wrong on December 23-24, 2013, and residuals of the 1998 motor vehicle collision. The substantial cause of her condition is pre-existing degenerative and stenotic changes in her cervical spine. He believed sleeping funny was the substantial cause of the need for treatment. The fact she did not seek treatment immediately matters. A degenerative disc is more likely to bulge, protrude, and herniate. Ms. Sumpter should not have been hired for the job because it exceeded her capabilities and he would not have approved her for this job. He considered the three-level fusion a success because it eliminated her upper extremity symptoms. The fact that she woke up in pain was evidence she was sleeping in an awkward position and had pain from that.[83]

On December 20, 2014, Ms. Sumpter was reevaluated at Laser Precision Spine Clinic with Kim B. Wright. M.D. He indicated Ms. Sumpter's symptoms were worse at that

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[83] *Sumpter II* at 13-16, No. 69; Hr'g Tr. at 250:23 – 251:20; 253:11-16; 253:20 – 255:19-20; 255:22 – 256:3; 257:11 – 258:5; 258:10-15; 258:22 – 259:5; 259:10-13; 260:2-3; 260:24 – 261:3; 261:6-20; 264:3-11; 265:4-9; 265:12-18; 269:12-24; 270:3-4; 270:16 – 271:3; 272:4-11; 272:15-16; 273:15-21; 274:13 – 275:4; 275:11-22; 276:3-15; 277:7-21; 278:6-8; 278:20-21; 279:1-5; 279:11 – 280:2; 281:13-16; 284:2-6; 284:16 – 285:9; 285:23-24.

point than they had been a year earlier when she was evaluated. He recommended further plain x-rays with flexion-extension views to check the integrity of the fusion, and to evaluate for instability, as well as an MRI of the cervical spine.[84]

On January 15, 2015, and January 29, 2015, Ms. Sumpter treated with Dr. Jensen, who had previously performed her fusion surgery. Ms. Sumpter indicated she was helping with a student transfer. She had one leg forward and lifted the student from under the arms, at which time she felt a snap and heard a pop in her neck, followed by continuous basal neck pain and ascending spasms, as well as burning pain in the right trapezius. A CT scan was performed. Dr. Jensen opined the symptoms were coming from a junctional spondylosis at C7-T1. Dr. Jensen recommended a nerve root injection and possible fusion surgery.[85]

EME Dr. Brooks and SIME Dr. Scarpino both noted Ms. Sumpter gave Dr. Jensen a different history and the words "snap" and "pop" were now used.[86] Ms. Sumpter subsequently asked Dr. Jensen to correct his January 15, 2015, chart note because she denied ever using the words "snap" or "pop."[87]

On February 17, 2015, and February 20, 2015, Ms. Sumpter treated with pain management specialist, Robert F. Valentz, M.D. She complained of cramping, spasms, and radiation of pain into her right arm stopping at the elbow. He carried out a right C-8 selective nerve root block under fluoroscopic guidance.[88] On March 12, 2015, Dr. Jensen indicated the selective nerve root block had been of benefit, but the symptoms had returned, indicating that she got, at most, about 23 days of improvement in pain.[89]

On May 15, 2015, Ms. Sumpter saw Dr. Wright for a second surgical opinion. He indicated Ms. Sumpter would be better treated if she underwent further surgery with a

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84 *Sumpter II* at 16, No. 70; R. 1444-46.

85 *Id.*, No. 72; R. 1451-52; R. 1455-56.

86 *Id.*, No. 73.

87 *Id.*, No. 74; Hr'g Tr. at 180:11-21.

88 *Id.* No. 75; R. 1598-99; R. 1602.

89 *Id.* at 17, No. 76; R. 1632.

decompression and fusion at C3-4, as well as at C7-T1. He noted she was developing significant adjacent-level degeneration with kyphosis and cord compression at C3-4, and that this level actually looked more pathologic on the MRI studies than the C7-T1 level. She would undoubtedly not be pain free, due to the fact she had significant arthropathy in the more proximal cervical spine.[90]

On May 21, 2015, Dr. Wright filled out a physician's statement for the State of Alaska, Division of Retirement and Benefits, for Ms. Sumpter. He described the nature of injury as "cervical degenerative disc disease, post cervical fusion, upper extremity neuropathy." He listed the probable cause of the injury as "lifting student 4x/day stress c-spine." He did not expect improvement and did not anticipate Ms. Sumpter would return to her pre-injury state.[91]

On June 1, 2015, Dr. Jensen also filled out a Physician Statement for the Public Employees' Retirement System (PERS) for Ms. Sumpter. He described the nature of injury as "injured lifting handicap patient." He listed the probable cause of the injury as "cervical strain." He recommended extending the fusion and noted Ms. Sumpter would not improve without surgery. He also stated that Ms. Sumpter could not go back to heavy lifting.[92]

Ms. Sumpter subsequently received PERS occupational disability benefits based on Drs. Wright's and Jensen's physician statements on her behalf to the State of Alaska, Division of Retirement and Benefits. Ms. Sumpter contended this fact should be considered. FNSBSD moved to exclude this evidence, or in the alternative, to cross-examine the authors of certain documents regarding the projection of Ms. Sumpter's benefits, the application for benefits, and "benefit information." Ms. Sumpter conceded at hearing that occupational benefits are awarded based on a different standard than applied in this case. The parties agreed to move forward with the hearing and witnesses were not called by FNSBSD in relation to the documents. The Board found the fact

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90 *Sumpter II* at 17, No. 77; R. 1661-1663.

91 *Id.*, No. 78; Exc. 077.

92 *Id.*, No. 79; Exc. 078.

Ms. Sumpter is receiving occupational benefits to be relevant, but not very probative because a different legal standard is applied. Therefore, the Board did not give much weight to this evidence.[93]

On June 10, 2015, Dr. Jensen wrote the following letter:

> This letter is intended to reiterate the fact that I believe the work-related injury that [Ms. Sumpter] sustained December 19, 2013 is the substantial cause to [Ms. Sumpter's] present need for medical treatment of the C7-T1 cervical level. I believe the December 19, 2013 injury is also the substantial cause for the advanced spondylosis at C7-T1 manifest by moderate to moderately severe bilateral foramina disc-osteophyte complexes.
>
> Although [Ms. Sumpter] had previous surgery at the level above the present symptomatic C7-T1 level, I believe the patient's injury from December of 2013 is the substantial factor for her present symptomatology and resultant need for treatment.
>
> Again I reiterate [Ms. Sumpter] will benefit from extending the previous fusion to include C7-T1. I would expect [Ms. Sumpter] to have full recovery over the course of 4-6 months following the procedure and to allow her to return to gainful employment.[94]

On February 3, 2016, Ms. Sumpter was deposed. She stated she took care of an elderly woman in 2013 prior to working for FNSBSD. A couple of months prior to hearing, while preparing for the case, she looked up this woman's name and realized she did this work in 2011 prior to her fusion surgery and not in 2013, as she stated in her February 3, 2016, deposition. She realized this was bad memory and that she is a bad historian. She found the elderly person's obituary, and realized she had also misspelled her name in the deposition.[95]

On October 24, 2016, Ms. Sumpter treated with Dr. Jensen, who said Ms. Sumpter was having some episodic sensory disturbances in the right upper extremity involving the little finger and loss of hand strength. Dr. Jensen opined that if further surgery were needed, this would include removal of the hardware from the previous surgery and

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93 *Sumpter II* at 17-18, No. 80.

94 *Id.* at 18, No. 81; R. 1517; Exc. 079.

95 *Id.*, No. 82; Hr'g Tr. at 109:21 – 112:11.

extension of the fusion to C7-T1. Ms. Sumpter wanted to monitor her condition and return to him on an as-needed basis.[96]

On July 5, 2017, Ms. Sumpter attended the SIME with Dr. Scarpino. He reviewed 750 pages of medical records. He noted a change in the reported mechanism of injury when Ms. Sumpter began to treat with PA-C DeNapoli from January 2, 2014, in the immediacy of her symptoms. He also noted a different mechanism of injury reported to Dr. Jensen on January 15, 2015. Dr. Scarpino reviewed all of the imaging studies and opined:

> The current cause of [Ms. Sumpter's] disability is adjacent-level cervical degenerative disc disease following her previous surgery for multilevel spinal stenosis with clinical diagnosis of radiculomyelopathy.
>
> Initially, by history, she may have had a mild upper back muscular strain that might have required supportive treatment in the form of medication, time, and possibly brief physical therapy. However, with treatment, this would not have been expected to exceed 6 weeks.
>
> . . . .
>
> [M]echanically, the act of lifting a 70-pound child in partial deadlift type would not be expected to impact the cervical musculature or the cervical spine structures themselves, and at most, could cause a slight strain of the upper back muscles and spinal erectors, as well as possibly the gluteals, hamstrings, and adductors.
>
> This would have been an extremely mild injury that would have required treatment for, at most, 6 weeks' time.
>
> [Ms. Sumpter] has a significant underlying problem with adjacent-level disc degeneration above and below the fusion, with elements of spinal stenosis above and possibly radicular irritation at the C7-T1 level below.
>
> This condition was not aggravated or accelerated by the subject injury, which by mechanism was, at most, a simple cervical strain. Treatment for the upper back strain should not have exceeded 6 weeks, at most, and could have consisted of medical management of the pain with an appropriate short course of physical therapy as indicated.
>
> The current symptomatology is related to her pre-existing condition and not related to the subject incident of December 19, 2013.
>
> . . . .

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[96] *Sumpter II* at 18, No. 83; Exc. 080-81.

> The 12/19/13 injury did not produce a temporary or permanent change in the pre-existing condition.
>
> The mechanism of injury is not consistent with injury to the cervical spine.[97]

On September 18, 2017, Ms. Sumpter saw Dr. Cobden for a PPI rating. The chart notes state, "[Ms. Sumpter] attempted to lift a 70 pound patient from a wheelchair by pulling on his arms and shoulder" with "sudden immediate pain in the upper back radiating mostly down the left arm. . . ." Dr. Cobden gave Ms. Sumpter a one percent whole person impairment rating for her upper extremity. He noted all of her cervical findings were pre-existing to the injury of December 19, 2013, and she was not precluded from going back to work.[98]

Ms. Sumpter denied telling Dr. Cobden she lifted the student by his arms and shoulders. He was retiring at the time and had her meet him in the emergency room because he no longer had an office. She thought he was very distracted. She called twice to try to have this record corrected and did not get a response.[99]

On October 25, 2017, Ms. Sumpter treated with PA-C DeNapoli for neck pain. The chart note states:

> [Ms. Sumpter] appears to have significant exacerbation of her chronic neck pain since her injury 12/18/2013. This injury appears to have also caused advanced spondylosis at the C7-T1 level below her previous fusion. Her imaging shows moderate to moderately severe bilateral foraminal disc-osteophyte complexes at this level. While she is hesitant to have further surgery at this time, she is aware that at some point it might become necessary for her to extend her fusion. She would need a new neurosurgical consult at that time, should her symptoms worsen. Until she is able to do something to gain control of her pain and symptoms, she appears unable to return to gainful employment. I do not feel she should return to the job she was doing at the time of her injury but if she can gain control of her pain, she may be retrained to perform another, less physically demanding job.[100]

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97 *Sumpter II* at 18-19, No. 84; R. 2631-2711.

98 *Id.* at 20, No. 87; R, 1951-52.

99 *Id.*, No. 88; Hr'g Tr. at 183:9-15; 184:9-12.

100 *Id.*, No. 89; R. 1869-72.

PA-C DeNapoli opined Ms. Sumpter definitely sustained a new injury. Ms. Sumpter was more like she was before her fusion surgery and was in a significant amount of pain, had difficulty moving her neck, and had spasms in her neck and some issues in her right arm. She believed she was in a good position to say the injury is new because she knew Ms. Sumpter before and after her fusion surgery and knew she had healed. In PA-C DeNapoli's opinion, the new injury was the substantial reason why Ms. Sumpter was seeking medical care. She was aware Ms. Sumpter was involved in a 1998 motor vehicle accident and suffered some whiplash injury. This accident did not change any of her opinions because mild to moderate whiplash injuries typically resolve on their own. The work injury was the cause of her current need for treatment. It is not 100 percent the cause, but it is a majority of it. The previous problems with her neck were a contributing factor, but she did not have the amount of problems she has now before the work injury. She was going along fine with occasional pain. This new injury made it impossible for her to work and it caused some pain in her arms, she had to have injections, and had a lot more treatments because of it and she was still not okay. Ms. Sumpter's previous condition actually made it a little more likely that this injury became more significant because she had a lot more issues with the levels above and below that fusion. But without that, she still could have had the same lifting injury, so it is pretty difficult to determine. Would she have been as debilitated after the work injury if she did not have the previous fusion? She did not know. She recommended a facet block to determine if a rhizotomy would help her. Worst case scenario, Ms. Sumpter needed a fusion at that C7-T1 level. Smoking does increase degeneration. She was aware she has been called a "historically naive medical care provider" by EME Dr. Brooks and disagreed with that statement. She probably knew Ms. Sumpter medically better than any of the medical providers that performed the independent medical exams. She spends a lot of time with her patients and opened her own practice so that she can do so.[101]

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[101] *Sumpter II* at 20-21, No. 90; Hr'g Tr. at 7:14-24; 8:6-12; 10:18 – 11:21; 14:3-8; 15:4-11; 17:3-7; 39:15 – 40:24; 44:23-25.

On March 22, 2018, Dr. Scarpino was deposed. At the deposition, Dr. Scarpino referred to a set of photographs, including one of a partial deadlift. In Ms. Sumpter's closing brief, she moved to strike Dr. Scarpino's opinion of a minor work injury pursuant to the board's gate-keeper function under Evidence Rule 703 because at his deposition, Dr. Scarpino brought photographs of a weightlifter and used them as reference when discussing body mechanics. Ms. Sumpter contended a photograph of a well-conditioned weightlifter, whose body and spine are supported while resting on a wooden board, performing weight-lifting exercises, should not be used to support an opinion Ms. Sumpter did not receive a significant work-injury, when lifting/repositioning a 70 pound quadriplegic student with no back or spine support of any kind.[102] Also at Dr. Scarpino's March 22, 2018, deposition, he testified Ms. Sumpter's pain was not cervical in origin and referred to a pain drawing she did during the SIME which indicated most of the pain was at the base of the neck and in the shoulders.[103]

Ms. Sumpter denied telling Dr. Scarpino she was not having neck pain. Her pain fluctuates. When she drew on the pain chart, she was indicating aching in the back of her neck and in her shoulders.[104]

FNSBSD contended Ms. Sumpter suffered a recurrence of pre-existing neck pain with associated symptoms, which recurred in the same way she experienced onset of symptoms prior to the claimed December 18, 2013, event: onset of pain with no apparent injury event. The initial treatment records indicated Ms. Sumpter originally reported her pain developed sometime after the claimed work injury, and that approximately a week later she woke up unable to move her neck. This was consistent with her pre-existing history. After her initial treatment and a determination that no work injury occurred, Ms. Sumpter presented to a different provider and then claimed she had pain immediately at the time of the claimed work injury. FNSBSD contended that even if Ms. Sumpter did

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[102] *Sumpter II* at 21-22, No. 92; John H. Scarpino, M.D., Dep, Mar. 22, 2018, at 74:17 – 76:11; R. 1204-73.

[103] *Id.* at 22, No. 93; Scarpino Dep. at 93:14-25.

[104] *Id.*, No. 94; Hr'g Tr. at 145:9 – 146:6.

feel pain immediately, she would have merely experienced a strain or sprain type injury that would have resolved in six weeks. FNSBSD paid benefits to Ms. Sumpter during this time period. However, all other treatment and requested benefits are for Ms. Sumpter's pre-existing condition. FNSBSD pointed to the inconsistencies and timing of Ms. Sumpter's reports to providers after her alleged injury.[105]

Ms. Sumpter admitted, "I'm a bad historian." This affects the histories she gave to her doctors and their opinions must be viewed critically. The EME and SIME physicians agreed human memory is more reliable in time to the event being recounted. It was only at the fourth doctor's visit after the work injury that Ms. Sumpter began to state the symptoms were immediate and it should be deemed a work injury.[106]

Ms. Sumpter contended FNSBSD did not overcome the presumption of compensability with the opinions of Drs. Brooks and Scarpino. She asserted Dr. Brooks' testimony that Ms. Sumpter slept wrong did not rebut the presumption because he did not ask her if she "slept wrong" and he has no evidence that she "slept wrong." Dr. Scarpino's testimony is equally speculative because he said "he can't tell" why Ms. Sumpter experienced increased pain symptoms on December 24, 2013. Ms. Sumpter contended Dr. Raymond was biased against finding work-relatedness and his biased opinions "fatally infected" Dr. Scarpino's opinions because Dr. Scarpino testified at deposition he considers reports from the initial doctors to be most important. Ms. Sumpter contended her position exceeded her physical capacities. Ms. Sumpter was pain-free after her fusion surgery and before her work injury. Ms. Sumpter did not dispute FNSBSD paid her TTD benefits for about three months in the total amount of $3,359.16.[107]

The Board found Ms. Sumpter admitted she is not a good historian and this impacted her credibility. Ms. Sumpter was incorrect about the date of her injury. She disagreed with a substantial amount of her medical records, even when the providers

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105 *Sumpter II* at 22, No. 95.

106 *Id.*, No. 96.

107 *Id.* at 22-23, No. 97.

noted they received the disputed history directly from Ms. Sumpter. The immediacy of pain, the type of pain, and the way the injury occurred also changed over time.[108]

All other witnesses were credible. However, their facts and opinions are based on what they learned from Ms. Sumpter, who admittedly is not a good historian.[109]

After the Board issued *Sumpter II*, holding Ms. Sumpter's work injury was not the substantial cause of her disability or need for treatment,[110] she timely moved for reconsideration and modification of certain factual findings.[111]

Ms. Sumpter asked for factual finding 27 to be modified. The Board agreed to the following modification:

> On December 18, 2013, [Ms. Sumpter] contacted her husband, Patrick Sumpter, who was working out of town and told him she had been lifting the student at school and hurt herself. She said it was like an "electrical shock." When he got home on December 19, 2013, she was holding her head differently and was not turning her neck, she was stiff and was not carrying herself the same.[112]

Ms. Sumpter also requested that factual finding 56 be modified. The Board agreed to modify factual finding 56 as follows:

> On January 30, 2014, [Ms. Sumpter] had been continuing chiropractic care and treatment with Dr. Carlile, who noted, "Pt conditions are now resolved: lower back, upper back and neck." Dr. Carlile also noted, "Based upon the results so far, the patient's current prognosis is fair because the patient is responding with mixed results to conservative chiropractic therapy." He completed a "Fitness for Duty" form and checked the box that said [Ms. Sumpter] could return to work with no restrictions, but marked off certain restrictions below, which included being restricted to frequently lifting 11-20 pounds.[113]

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108 *Sumpter II* at 23, No. 98.

109 *Id.*, No. 99.

110 *Sumpter II.*

111 *Sumpter III.*

112 *Id.* at 2, No. 5.

113 *Id.* at 3, No. 8.

Ms. Sumpter also contended factual finding 58 should be modified because she asserted her release to return to work contained some restrictions, contrary to the assertions of FNSBSD.[114] However, the Board determined factual finding 58 accurately represented FNSBSD's contention.[115]

The Board also found that, based on the modification of factual finding 56, *Sumpter II*'s analysis would be modified. The Board decided to omit the sentence:

> Even if there was a finding that the work injury was the substantial cause of [Ms. Sumpter's] disability and need for medical treatment, it is unclear what benefits [Ms. Sumpter] would be entitled to, as her designated treating physician, Dr. Carlile, has released her to work with no restrictions and the PPI ratings she has received were based on the pre-existing condition.[116]

Ms. Sumpter timely appealed both *Sumpter II* and *Sumpter III* to the Commission.

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.[117] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[118] The Board's findings of credibility are binding on the Commission because the Board "has the sole power to determine the credibility of a witness."[119] Such a determination by the Board is conclusive "even if the evidence is conflicting or susceptible to contrary conclusions."[120]

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114 *Sumpter III* at 3, No. 10.

115 *Id.*, No. 11.

116 *Id.*, No. 12.

117 AS 23.30.128(b).

118 AS 23.30.128(b).

119 AS 23.30.128(b); AS 23.30.122.

120 *Id.*

4. Discussion.

Ms. Sumpter appeals from two Board decisions in her claim for benefits.[121] She asserts the Board erred in its credibility findings, relied on ambiguous and contradictory medical evidence, ignored important lay testimony, did not discuss the effect of an increase in symptoms following a work injury, ignored or failed to consider important relevant medical evidence, and disregarded probative records including an independent medical evaluation from her application for occupation retirement benefits from PERS.

a. The Board was correct in not applying the formal rules of evidence.

Ms. Sumpter contends the Board failed to apply Alaska Rules of Evidence to the testimony of the Board's SIME physician, Dr. Scarpino. Specifically, Ms. Sumpter claims the Board erred in denying her "Rule 703 gate-keeper objection to Dr. Scarpino's second stage opinion."[122] She contends his opinion "is not based on facts or data 'of a type reasonably relied upon by independent medical experts in forming opinions or inferences upon the subject.'"[123] She expressly objected to Dr. Scarpino's descriptions of her work incident and his personal knowledge of weightlifting techniques and stresses along with his lack of her actual job description in reaching his conclusions.

The Alaska Workers' Compensation Act (Act) provides at AS 23.30.135(a) that "the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter."[124] The Board's regulations also reiterate that "[t]echnical rules relating to evidence and witnesses do not apply in board proceedings. . . ."[125] The Act further provides "[t]he board may make its investigation or

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121 *Sumpter II* and *Sumpter III.*

122 Appellant Br. at 11.

123 *Id.* at 11-12.

124 AS 23.30.135(a).

125 8 AAC 45.120(e).

inquiry or conduct its hearings in the manner by which it may best ascertain the rights of the parties."[126] Therefore, the Board was not obligated to follow Evidence Rule 703.

b. Ms. Sumpter's actual job description was not a critical factor in her work injury.

Ms. Sumpter contends her actual job description should have been given to the SIME physician prior to his evaluation of her, and the failure to give him this job description is a fatal flaw in his analysis. However, this argument ignores the fact that whether Ms. Sumpter should have been employed in her position due to the physical requirements of the job is irrelevant to whether she had a bona fide work injury. Alaska workers' compensation benefits are due to an injured worker irrespective of fault.[127] Alaska worker's compensation benefits are due to any employee who is injured as long as the injury arises out of and in the course of employment and the Board has weighed "the relative contribution of different causes of the disability . . . or the need for medical treatment" to determine if "the employment is the substantial cause of the disability . . . or need for medical treatment."[128]

However, if Ms. Sumpter had felt her actual job description was a necessary item for the SIME physician to consider, she should have asked the Board to include it in the medical records provided to Dr. Scarpino. Moreover, once his report was issued, Ms. Sumpter had the opportunity through interrogatories to provide the job description to Dr. Scarpino and ask him if the actual job description changed his opinions. She did not do so. Dr. Scarpino was also deposed and she had an opportunity at that time to provide him with the job description. If the job description were critical to his examination of her and his opinion regarding her need for medical treatment, Ms. Sumpter had several opportunities to have him consider the importance of the job description.

Moreover, several doctors (Drs. Westfall, Raymond, Brooks, and Scarpino) agreed Ms. Sumpter did not have the physical capacity to lift 50 pounds on a regular basis as

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126 AS 23.30.135(a).

127 AS 23.30.045(b).

128 AS 23.30.395(24); AS 23.30.010(a).

described in the work duties. Whether she could do the job is, as noted above, not relevant to whether she sustained an injury sufficient to be the substantial cause of her need for medical treatment. What was important to Dr. Scarpino (and the other doctors) was the mechanics of the work injury and whether it was the substantial cause of her need for medical treatment. The Board did not err in relying on Dr. Scarpino's SIME report and testimony regardless of whether he had her actual job description.

c. The finding by PERS that Ms. Sumpter was entitled to benefits does not control the Board in determining whether she had a compensable injury.

Ms. Sumpter contends the Board erred in not accepting the finding of disability by PERS as conclusive proof of a work injury under the Act. However, the tests are not the same and a finding of disability for PERS' purposes does not control the Board; it may be evidence, but it is not controlling. Under the Act, the Board is charged with evaluation of "the relative contribution of different causes" and then determining which, among the differing causes, is the "substantial cause of the disability . . . or need for medical treatment."[129] Likewise, the process used by the Social Security Administration to determine chronic pain and disability is not controlling on the Board. Both decisions may be evidence, but the tests are different and, thus, cannot control the Board's findings.

Ms. Sumpter further contends that the independent evaluation by Mark S. Kaplan, M.D., performed for her PERS occupational disability application pursuant to AS 39.35.890, was a more appropriate description of her condition and injury.[130] Dr. Kaplan's report stated he believed her work injury was the "proximate cause" of her current disability.[131] The test applicable for evaluating a PERS application is whether employment is "a substantial factor in causing the disability."[132]

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129 AS 23.30.010(a).

130 Appellant Br. at 13, n. 85.

131 Exc. 258.

132 *See, State, Pub. Emps. Ret. Bd. v. Cacioppo*, 813 P. 2d 679, 683 (Alaska 1991).

However, this is not the standard for determining if an injury is compensable under the Act. The Act requires that the work injury be the substantial cause of the disability or need for medical treatment.[133] Dr. Kaplan did not address whether the work injury was the substantial cause of her disability or need for medical treatment.

Although the Board did not specifically address Dr. Kaplan's report, it did find that her receipt of benefits through PERS was not probative to whether she sustained a work injury necessitating benefits. The Board made this determination because the standard for PERS is different from the standard for worker's compensation benefits. Ms. Sumpter conceded at hearing that the standards were different.[134] The Board stated "the fact [Ms. Sumpter] is receiving occupational benefits is relevant, but not very probative because a different legal standard is applied, so not much weight is given to this evidence."[135] Furthermore, the Board accepted the PERS evidence, but noted FNSBSD requested the right to cross-examine the evidence. Witnesses relevant to the PERS award of benefits were not called.[136] Therefore, the Board could not have relied on Dr. Kaplan's report in reaching its conclusions.

Similarly, Ms. Sumpter argues the standards used by the Social Security Administration to assess a claim for debilitating pain should have been used by the Board in evaluating her claim for PTD based on chronic debilitating pain arising from her work with the school district. However, the process used by a federal tribunal is not the process used by the Board in evaluating a claim. AS 23.30.010(a) controls whether a work injury is compensable. "[T]he board must evaluate the relative contribution of different causes of disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable . . . if, in relation to other causes, the employment is the substantial

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133 AS 23.30.010(a).

134 *Sumpter II* at 17-18, No. 80.

135 *Id.*

136 *Id.*

cause of the disability . . . or need for medical treatment."[137] This is the test the Board properly applied here.

d. No doctor diagnosed Ms. Sumpter as a malingerer.

Ms. Sumpter asserts the Board erred by not making findings of fact as to whether Ms. Sumpter was malingering and, if so, the malingering was the basis of her pain complaints. However, no physician ever diagnosed her as malingering and, therefore, there was no reason for the Board to make a specific finding regarding whether Ms. Sumpter was malingering.

Further, the doctors relied on by the Board, especially Dr. Brooks and Dr. Scarpino, agreed she had ongoing pain. The dispute was over whether the work injury or her pre-existing degenerative disc disease accelerated by her prior fusion was the substantial cause of her need for a second fusion at levels above and below the prior fusion. The Board agreed her pre-existing condition, and not the work injury, was the substantial cause of the need for medical treatment. Malingering was not an issue.

e. Contrary to Ms. Sumpter's assertion, the Board's credibility findings are binding on the Commission.

Ms. Sumpter contends the Board's credibility findings should be reviewed using the abuse of discretion standard. The Commission does not have discretion to review the Board's credibility findings. The Act requires the Commission to accept the findings by the Board as to the credibility of witnesses.[138] "The board has the sole power to determine the credibility of a witness."[139]

The Alaska Supreme Court (Court) has held that the Commission is bound by this statute.[140] The Act states "[t]he 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

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137 AS 23.30.010(a).

138 AS 23.30.122; AS 23.30.128(b).

139 AS 23.30.122.

140 *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013) (*Sosa de Rosario*).

conflicting or susceptible to contrary conclusions."[141] The Legislature mandated that the Commission accept the Board's credibility findings. "The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission."[142]

The Court stated, "[w]e construe AS 23.30.128(b) to mean that the Commission must follow the Board's credibility determination. 'Bind' means '[t]o impose one or more legal duties on (a person or institution). . . .' The Commission was thus required to accept the Board's credibility determinations. . . ."[143] The Court rebuked the Commission because it had not deferred to the Board's credibility findings.

Ms. Sumpter admitted to being a bad historian. She changed her account of the work injury several times. She was able to return to work without any apparent complaints or difficulties the two days (December 19 and 20, 2013) after the injury. Then she had the next two weeks off. It was not until December 24, 2013, when she woke up in pain, that she started having more consistent pain.

The Board found Ms. Sumpter disputed the records of several doctors claiming they each had been mistaken about what she told them: Dr. Harrison made a mistake about her arthritis; Dr. Raymond made a mistake about her prescription for Tramadol; PA-C Conover was mistaken about her neck pain as part of her complaints of joint pain after her 2011 surgery; she did not mention her neck pain to PA-C Strigle on December 23, 2013, because she was seeking other medications for high blood pressure and anxiety; her sister was mistaken when she said she felt a pop or jolt at the time of lifting the student; Dr. Westfall was wrong when he said he was unable to attribute her neck pain to the work incident on December 27, 2013; Dr. Raymond's statement her neck had improved by December 31, 2013, was due to his bias against work injuries; Dr. Carlile's statement her condition was now resolved on January 14, 2014, was in error because she did not tell him she felt better; and Dr. Jensen's report that she felt a pop

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141 AS 23.30.122.

142 AS 23.30.128(b).

143 *Sosa de Rosario*, 297 P.3d at 146.

after lifting the student was wrong and she called his office several times asking that the statement be changed.

The Board discounted the testimony of PA-C DeNapoli because she did not see Ms. Sumpter until after the December 24, 2013, awakening in pain, she relied on the changing description from Ms. Sumpter about the development of her pain on December 18, 2013, she did not review any of the contemporary medical reports, and she relied on her own knowledge of Ms. Sumpter prior to the cervical fusion in 2011. Since the Board found Ms. Sumpter herself not credible regarding her description of pain prior to the work injury and regarding her varying descriptions as to how her pain developed, the Board was clearly within its authority to discount PA-C DeNapoli's opinions.

Ms. Sumpter also asserts the Board erred in not applying Alaska Rule of Evidence 703 in making its credibility findings. Since the technical rules of evidence do not apply to the Board, there was no error in not following Rule 703.[144] Ms. Sumpter complained that Dr. Scarpino did not rely on facts or data that might reasonably be relied upon by experts in forming opinions as required by Rule 703. Specifically, she complained he did not have her job description when he evaluated her (discussed above).

Dr. Scarpino is an expert in orthopedics and his qualifications were not disputed. Moreover, he testified to his expertise in the field of weightlifting and utilized examples of weight training for lifting to analyze the kind of maneuver Ms. Sumpter would have performed in lifting her student. Furthermore, her job description is not relevant to whether she was injured in the course of her employment. Even if she should not have been performing the job she was doing, if her work or the injury were the substantial cause of her need for medical treatment or time loss, her claim would be compensable. The Board's reliance on Dr. Scarpino was not error.

The Board's credibility findings are binding on the Commission. The Board is affirmed regarding its credibility findings.

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[144] AS 23.30.135(a).

f. The Board found the SIME report sufficient to rebut the presumption of compensability.

Ms. Sumpter contends Dr. Scarpino's report is not substantial evidence to rebut the presumption of compensability. The amount of evidence sufficient to rebut the presumption of compensability is reviewed in isolation.[145] The expert opinion must find that work is not the substantial cause of the need for medical treatment or work did not cause the need from medical treatment.[146] The credibility of the EME physician or SIME physician is not reviewed at the point of determining if the medical record is sufficient to rebut the presumption of credibility.[147] How much weight to afford the opinion is not considered at the stage where the Board decides if the proffered opinion rebutted the presumption of compensability.[148]

In reviewing whether there is substantial evidence to rebut the presumption of compensability, the Board must see if there is substantial evidence providing an alternative explanation which excludes work-related factors or directly eliminates any reasonable possibility that employment was the substantial cause of the disability.[149] "An employer has always been able to rebut the presumption by presenting the opinion of a qualified expert who testifies that in his or her opinion, the claimant's work was probably not a substantial cause of the disability."[150] The weight to be given a particular opinion is determined when the employee must prove her claim by a preponderance of the evidence.[151]

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145 *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 689 (Alaska 2000).

146 *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 919 (Alaska 2016).

147 *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 787 (Alaska 2007) (*Smith*).

148 *Safeway, Inc. v. Mackey*, 965 P.2d 22, 27 (Alaska 1998).

149 *Smith*, 172 P.3d at 788.

150 *Id.*

151 *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994) (*Norcon, Inc.*).

Here, the Board found Ms. Sumpter raised the presumption of compensability through her testimony and that of PA-C DeNapoli and Dr. Jensen. This evidence was sufficient and FNSBSD did not challenge that the presumption was raised. The Board then looked at the evidence offered to rebut the presumption. Dr. Raymond, who saw Ms. Sumpter within days of the injury, stated that in his opinion the substantial cause of her ongoing pain was her pre-existing condition and not the work incident. The basis for his analysis included the length of time between the lifting incident and the onset of symptoms (lack of contemporaneous reporting), the fact she had Tramadol at home, the prior surgery, and amount of degenerative disc disease.[152]

His opinion was bolstered by the EME report and the SIME report. Dr. Brooks opined that Ms. Sumpter at most sustained a temporary strain which resolved within days.[153] Moreover, the mechanics of the lifting incident would not have impacted the cervical spine. The SIME report by Dr. Scarpino also pointed to her pre-existing condition as the substantial cause of her need for ongoing medical treatment stating "the current cause of [Ms. Sumpter's] disability is adjacent-level degenerative disc disease following her previous surgery for multilevel spinal stenosis with clinical diagnosis of radiculomyelopathy."[154] He also felt she might have had a strain or sprain which resolved quickly and affirmed the mechanics of the injury were not consistent with injury to the cervical spine.[155]

Each of these opinions alone, or in combination, were sufficient to rebut the presumption of compensability. Each doctor was an expert testifying within the parameters of their medical specialty. While Ms. Sumpter objected to the weightlifting photographs which Dr. Scarpino used to illustrate his findings, the photographs were not the basis for his opinion, but demonstrative tools. Dr. Brooks is an orthopedic surgeon.[156]

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152 *Sumpter II* at 9, No. 43.

153 *Id.* at 13, No. 67.

154 *Id.* at 18-19, No. 84.

155 *Id.*

156 Hr'g Tr. at 247:4-14.

Dr. Scarpino is also an orthopedic surgeon.[157] Dr. Raymond's practice is occupational medicine and Ms. Sumpter was referred to him by Dr. Westfall.[158] Each of these physicians' reports is the kind of medical record the Board may rely on in determining whether the presumption of compensability has been rebutted.[159] Each doctor stated work was not the substantial cause of Ms. Sumpter's condition and further stated her pre-existing condition was the substantial cause. The Board's finding that FNSBSD rebutted the presumption is supported by the record before the Board.

g. Substantial evidence in the record supports the Board decision.

Ms. Sumpter contends the Board erred in finding that she did not prove her claim by a preponderance of the evidence because the Board inappropriately discounted or ignored lay testimony, which she asserts rebutted the reports of the EME and SIME physicians. The question is whether the substantial evidence in the record as a whole supports the Board's decision.

First, contrary to Ms. Sumpter's contention, the Board did consider the proffered lay testimony of Mr. Sumpter (her husband) and Ms. Bullington, Ms. Sumpter's sister. The problem is that the Board found Ms. Sumpter is not a credible witness. Having found Ms. Sumpter to be a poor historian and not credible regarding the work injury and its subsequent symptoms, the Board discounted the testimony of her husband and sister to the extent they relied on Ms. Sumpter's reports. The Board's finding of her lack of credibility is binding on the Commission. The Board made sufficient findings regarding her lack of credibility by looking at her recitation as to how the work injury occurred and the events following the lifting incident, among other things. This determination of credibility is the sole province of the Board.[160]

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157 Exc. 554-55.

158 Hr'g Tr. at 194:4-7; R. 218-19.

159 *Norcon, Inc.*, 880 P.2d 1051, 1054.

160 AS 23.30.122.

In reaching the conclusion that Ms. Sumpter did not prove her claim by a preponderance of the evidence, the Board chose to rely on the evidence from Drs. Raymond, Brooks, and Scarpino.

Ms. Sumpter objected to the testimony of Dr. Scarpino because she asserts he did not have sufficient information due to the lack of a job description to evaluate the lifting of the student by Ms. Sumpter, and could not know the amount of stress on her cervical spine. Therefore, according to her, his opinion could not constitute substantial evidence. However, Dr. Scarpino was entitled to rely on his knowledge of weightlifting to determine that the mechanics of the lifting of the student by Ms. Sumpter, based on her descriptions of the lifting motions, did not cause nor exacerbate her pre-existing neck condition.[161] Dr. Scarpino discussed at some length the body mechanics involved in lifting the student as described by Ms. Sumpter. Based on his extensive knowledge of weightlifting and body mechanics, he opined that the lifting as described by her would have impacted her shoulders and low back, but not her cervical spine. She was seeking medical treatment for the cervical spine which he opined was needed due to her prior fusion and ongoing degeneration and not to the lifting of the student.

Dr. Scarpino agreed that her pre-existing degenerative disc disease could be made symptomatic by an injury. However, his opinion was that the alleged injury did not make the pre-existing condition symptomatic because the work injury resolved after a few days. It was the waking with pain on December 24, 2013, which made her pre-existing condition symptomatic. He attributed her need for the additional cervical fusion to deterioration from the prior fusion. Dr. Scarpino reviewed all the medical evidence, examined Ms. Sumpter, and applied the proper legal standard by weighing all relative medical causes in reaching his conclusion that her pre-existing condition was the substantial cause of her disability and need for medical treatment.

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[161] *See, Pralle v. Milwicz*, 324 P.3d 286, 293 (Alaska 2014) (the examining doctor "was allowed to consider the likely mechanical forces of the accident as it was described by the parties involved, to the extent it helped him evaluate [the] injuries.")

Dr. Brooks also testified that the need for the additional fusion was due to the "degenerative and stenotic changes in her cervical spine that are going to continue to gradually worsen as she ages."[162] He indicated in his EME report that her degenerative and stenotic changes in her cervical spine, and not the work injury, were the substantial cause of her need for medical treatment.[163] The work incident was at most a temporary aggravation that resolved.[164] Dr. Brooks also testified at hearing that when evaluating someone he looks for consistency in the person's reports of injury. He found Ms. Sumpter to be a bad historian and pointed to the changes in her description of how the injury occurred.[165] He pointed to her appointment with PA-C Strigle on December 23, 2013, in which she made no mention of cervical pain. He expected her to report increasing pain, if she had such, just 5 days after the work incident.[166] He also relied on the histories of Drs. Westfall and Raymond, who recorded her reports of no immediate symptoms, but later a headache and soreness.[167]

Both Drs. Westfall and Raymond also stated they were unable to find the work injury to be the substantial cause of Ms. Sumpter's disability and need for medical treatment. Dr. Westfall saw Ms. Sumpter on December 27, 2013, and Dr. Raymond saw her on December 31, 2013. Both doctors saw Ms. Sumpter close to the date of injury (which date changed from December 19, 2013, to December 18, 2013).

In addition to the testimony and reports of Drs. Brooks, Scarpino, Westfall, and Raymond, Ms. Sumpter's designated treating physician, Dr. Carlile, on January 30, 2014, stated her condition had resolved, and he released her to return to work without restriction. Further, Dr. Cobden, who rated her for PPI on September 18, 2017, stated

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162 Hr'g Tr. at 273:9-13.

163 *Sumpter II* at 13, No. 67.

164 *Id.*

165 *Id.* at 13-14, No. 69.

166 *Id.*

167 *Id.*

the PPI was due to her pre-existing condition and not the December 2013 work incident.[168]

The Board relied on Drs. Brooks and Scarpino in finding that FNSBSD rebutted the presumption of compensability. Evidence sufficient for rebutting the presumption of compensability is also sufficient to support a denial of benefits.[169]

Ms. Sumpter asserts the more probative medical opinions were those of PA-C DeNapoli, Dr. Jensen, Dr. Kaplan, and Dr. Wright. The Board found PA-C DeNapoli less credible because she based her opinion on what Ms. Sumpter told her about the work injury. The Board found this reliance troubling because Ms. Sumpter changed her story several times. Further, the symptoms with which Ms. Sumpter presented to PA-C DeNapoli were similar to her pre-fusion symptoms in 2011, which arose when she woke up in pain. The Board stated this pain is the kind pain Dr. Brooks and Dr. Scarpino expected her to have from the pre-existing degeneration and fusion. The Board's finding that PA-C DeNapoli is less credible than other treatment providers is the Board's decision to make.

The Board also gave less weight to the opinion of Dr. Jensen because he did not weigh all the relative causes in determining what was the substantial cause of Ms. Sumpter's current disability. He also based his opinion on a different history than that which Ms. Sumpter had given other doctors. Again, the Board has the sole province to make this kind of credibility determination and it is binding on the Commission.

Both Drs. Wright and Kaplan gave opinions in support of Ms. Sumpter's application to PERS for occupational disability benefits. The Board rightly afforded their opinions less deference because they did not use the standard required by the Act, i.e., whether the work injury was the substantial cause of the disability, nor did they weigh all relative causes. Ms. Sumpter agreed at hearing that the standard for receipt of benefits is different for PERS benefits than for workers' compensation benefits. Moreover, the Board's finding to give these reports less weight is binding on the Commission.

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168 *Sumpter II* at 20, No. 87.

169 *Smith*, 172 P.3d at 793; *Cowen v. Wal-Mart*, 93 P.3d 420, 426 (Alaska 2004)

Furthermore, the Court has stated that the Board has the authority to weigh conflicting medical evidence and to decide upon which medical evidence to rely.[170]

The Board chose to rely on the EME physician and the SIME physician, both reports and testimony, as bolstered by the contemporaneous reports of Drs. Westfall and Raymond. This is the Board's obligation and prerogative. Even though conflicting medical opinions were presented to the Board, the Board chose which medical opinions it found to be the most persuasive. There is substantial evidence in the record as a whole to support the Board's findings that Ms. Sumpter did not prove her claim for benefits by a preponderance of the evidence.

5. Conclusion.

The Board's decision is AFFIRMED.

Date: *26 August 2019* Alaska Workers' Compensation Appeals Commission

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

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

[170] *Sosa de Rosario*, 297 P.3d 139, 148.

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. 265, issued in the matter of *Beverly J. Sumpter vs. Fairbanks North Star Borough School District*, AWCAC Appeal No. 18-017, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 26, 2019.

Date: *August 29, 2019*

Signed

K. Morrison, Appeals Commission Clerk