

Alaska Workers' Compensation Appeals Commission

Alaska Regional Hospital and Indemnity  
Insurance Company of North America,  
Appellants,

vs.

Kade Woodell,  
Appellee.

Final Decision

Decision No. 288

June 16, 2021

AWCAC Appeal No. 20-018  
AWCB Decision No. 20-0081  
AWCB Case No. 201901025

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 20-0081, issued September 21, 2020, at Anchorage, Alaska, by southcentral panel members Jung M. Yeo, Chair, Nancy Shaw, Member for Labor, and Diane Thompson, Member for Industry.

Appearances: Krista M. Schwarting, Griffin & Smith, for appellants, Alaska Regional Hospital and Indemnity Insurance Company of North America; Kade Woodell, self-represented appellee.

Commission proceedings: Appeal filed October 2, 2020, with motion for stay; motion for stay granted November 23, 2020; briefing completed February 9, 2021; oral argument was not requested.

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

By: Deirdre D. Ford, Chair.

*1. Introduction.*

This matter is before the Alaska Workers' Compensation Appeals Commission (Commission) for the third time on the question of when and where Kade Woodell (Mr. Woodell) contracted Clostridium Difficile (C-Diff). The Alaska Workers' Compensation Board (Board) found again, in the latest decision, that Mr. Woodell contracted the disease while working for Alaska Regional Hospital, whose claims are insured by Indemnity Insurance Company of North America (herein collectively referred

to as ARH).<sup>1</sup> ARH timely appealed this decision to the Commission, asserting several errors by the Board.<sup>2</sup> ARH contended the Board erred in not permitting it to cross-examine several of Mr. Woodell's treating physicians regarding opinion letters filed in support of Mr. Woodell's claim, and the Board erred in finding the evidence presented regarding the lack of C-Diff cases in the hospital at the time Mr. Woodell asserted he contracted the disease was contradictory and unreliable.

Because the Board violated the due process rights of ARH by not allowing its right to cross-examine the opinion letters of several doctors, the Commission remands this matter to the Board for further action.

*2. Factual background and proceedings.*<sup>3</sup>

In *Woodell I*, the Board made several findings of fact which were not explicitly appealed. The issue before the Board was whether Mr. Woodell had timely filed notice of his injury. The Board found he had provided timely notice as soon as the diagnosis was confirmed, and his claim was not time-barred. In reaching this decision, the Board made several findings of fact. Specifically, the Board found that on May 5, 2017,

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<sup>1</sup> *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 20-0081 (Sept. 21, 2020) (*Woodell VII*).

<sup>2</sup> The decisions, both Board and Commission, to date are as follows:

*Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 19-0077 (July 26, 2019) (*Woodell I*); *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. App. Comm'n Order on Petition for Review in AWCAC Appeal No. 19-014 (Oct. 15, 2019) (*Woodell II*); *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 19-0122 (Nov. 27, 2019) (*Woodell III*); *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. App. Comm'n Order on Petition for Review in Appeal AWCAC Appeal No. 19-014 (Jan. 21, 2020) (*Woodell IV*); *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 20-0018 (Apr. 2, 2020) (*Woodell V*); *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 20-0060 (July 21, 2020) (*Woodell VI*); and *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 20-0081 (Sept. 21, 2020) (*Woodell VII*) (the decision at issue in this appeal).

<sup>3</sup> We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

Mr. Woodell began working as a nurse for ARH in the cardiovascular services unit.<sup>4</sup> He had irritable bowel syndrome (IBS), which causes lower abdominal pain and diarrhea approximately three times a week, but resolves with defecation. He was able to perform his work without any issue.<sup>5</sup>

The Board further determined that on September 21, 2018, Mr. Woodell worked all day with a C-Diff infected patient without “personal protective equipment,” such as a gown and gloves, due to lack of “contact precautions.” In contrast to “standard precautions,” which require handwashing and wearing gloves to deal with fecal matter, blood, or bodily contact, “contact precautions” always require wearing of a gown and gloves and handwashing with soap and water. When he returned to work the next day or shift, “contact precautions” were in place and complied with for the same patient. Mr. Woodell informed the charge nurse he had treated a patient with C-Diff without “personal protective equipment” on September 21, 2018.<sup>6</sup>

The Board then found that on September 21, 2018, Mr. Woodell developed a C-Diff infection while working for ARH.<sup>7</sup> However, the Board also found Mr. Woodell was not diagnosed with C-Diff until December 28, 2018, when Dr. John M. Gillis ordered a C-Diff pathogen study at the request of Mr. Woodell.<sup>8</sup> On December 29, 2018, Mr. Woodell tested positive for C-Diff toxin A/B.<sup>9</sup> Mr. Woodell did not believe his symptoms were due to the September 21, 2018, C-Diff exposure until he obtained the test results on December 29, 2018.<sup>10</sup> Mr. Woodell then reported the injury on January 15, 2019.<sup>11</sup>

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<sup>4</sup> *Woodell I* at 2, No. 1.

<sup>5</sup> *Id.*, No. 2.

<sup>6</sup> *Id.*, No. 3.

<sup>7</sup> *Id.*, No. 4.

<sup>8</sup> *Id.* at 4, No. 20.

<sup>9</sup> *Id.*, No. 21.

<sup>10</sup> *Id.*, No. 22.

<sup>11</sup> *Id.*, No. 24.

The Board then found that Mr. Woodell timely reported his injury as soon as he had notice of the diagnosis of C-Diff.<sup>12</sup> ARH filed a petition for review and a motion to stay the order for payment of attorney fees. In *Woodell II*, the Commission stayed the order on attorney fees, granted the petition for review, and remanded the matter to the Board for further findings of fact, specifically findings of credibility of witnesses. The Commission accepted the Board's findings of fact in *Woodell I*. The Board issued *Woodell III*, finding Ms. Miller was not credible and, thus, gave her testimony no weight.<sup>13</sup>

ARH filed another petition for review which the Commission denied in *Woodell IV*. The Commission affirmed the Board's finding that Mr. Woodell gave timely notice of his injury. The Commission accepted the Board's findings of fact that Mr. Woodell contracted C-Diff while working for ARH.<sup>14</sup>

In *Woodell VII*, the Board reiterated its previous Findings of Fact and incorporated them into the new decision. The Board specifically accepted that on September 21, 2018, Mr. Woodell worked all day with a C-Diff infected patient without "personal protective equipment," and that the next day when he learned of his potential exposure, he informed the charge nurse he had treated a patient with C-Diff without "personal protective equipment" on September 21, 2018.<sup>15</sup>

Mr. Woodell, at hearing in *Woodell VII*, attempted to raise a question as to why the Board was hearing new evidence regarding whether he had been exposed to C-Diff while working for ARH, when the Board had previously made that finding which had been accepted by the Commission on appeal.<sup>16</sup> The Hearing Chair stated, "Mr. Woodell, there's

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<sup>12</sup> *Woodell I* at 11.

<sup>13</sup> *Woodell III* at 6.

<sup>14</sup> *See, Woodell IV* at 17.

<sup>15</sup> *Woodell VII* at 4, No. 2.

<sup>16</sup> *Woodell VII*; Hr'g Tr. at 25:7 – 26:9, Aug. 20, 2020.

no need for you to reread the decisions that have been issued. We already know about all those, so you can proceed.”<sup>17</sup>

On February 5, 2019, Mr. Woodell claimed temporary total disability, attorney fees and costs, medical costs, a finding of unfair or frivolous controversion, and a penalty.<sup>18</sup>

On February 18, 2019, Mr. Woodell tested positive for C-Diff toxin gene nucleic acid amplification.<sup>19</sup>

On February 18, 2019, Dr. John Price concluded Mr. Woodell contracted C-Diff after exposure in the workplace and diagnosed his condition as a hospital-acquired infection.<sup>20</sup>

On February 27, 2019, Dr. Philip Cedeno saw Mr. Woodell and opined his August 2017 illness was unrelated to his “hospital-acquired C. diff obtained October 2018.”<sup>21</sup>

On February 28, 2019, ARH filed a request to cross-examine Dr. Price.<sup>22</sup>

On March 13, 2019, Dr. Gillis concluded Mr. Woodell contracted C-Diff infection performing his duties as a nurse with ARH.<sup>23</sup>

On March 18, 2019, ARH filed a request to cross-examine Drs. Gillis and Cedeno.<sup>24</sup>

On April 29, 2019, Mr. Woodell saw Emil J. Bardana Jr., M.D., for an employer’s medical evaluation (EME). Dr. Bardana stated he could not determine the onset of the C-Diff infection due to Mr. Woodell’s lengthy medical history, which included IBS, gastroesophageal reflux disease, pilonidal disease, acute gastroenteritis, and use of antibiotics. He was unable to select a likely time and pathogenesis of Mr. Woodell’s

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<sup>17</sup> *Woodell VII*; Hr’g Tr. at 26:17-19. The decisions in *Woodell V* and *VI* involved discovery issues which were not appealed to the Commission.

<sup>18</sup> *Woodell I* at 5, No. 28; R. 35.

<sup>19</sup> *Woodell I* at 5, No. 29; Exc. 49.

<sup>20</sup> *Woodell I* at 5, No. 30; Exc. 50.

<sup>21</sup> Exc. 93.

<sup>22</sup> R. 105.

<sup>23</sup> Exc. 94.

<sup>24</sup> R. 110.

C-Diff infection. Dr. Bardana stated Mr. Woodell has probable, but not certain, C-Diff enterocolitis as the diagnosis of C-Diff infection usually requires the use of nucleic acid amplification testing (NAAT), either alone or as part of an algorithm including enzyme immunoassay screening for glutamate dehydrogenase antigen and toxins A and B. He neither confirmed nor excluded Mr. Woodell's September 21, 2018, exposure as a possible cause for his possible C-Diff infection.<sup>25</sup>

On December 3, 2019, ARH filed a request to cross-examine Dr. Williams C. Wigington.<sup>26</sup>

On January 21, 2020, the Commission denied review and affirmed *Woodell I* and *III*.<sup>27</sup>

ARH filed additional evidence, including a letter "To whom it may concern" dated June 16, 2020. Ms. Jenny Mayo wrote:

Alaska Regional Hospital has reviewed patient records from 8/1/2018 – 9/30/2018 in order to identify which patients, if any tested positive for C Difficile. Four patients were identified as having tested positive. Alaska Regional Hospital further investigated whether Kade Woodell took part in the care of any or all of those patients and determined that Mr. Woodell did not participate in the care of any of those patients."<sup>28</sup>

On July 18, 2020, Dr. Bardana conducted a records review EME. He stated:

There is no compelling medical data which would support Mr. Woodell's belief that his work exposure contributed to the development of C. difficile enterocolitis. Ms. Mayo's memorandum . . . contradicts Mr. Woodell's belief that he was directly exposed to a patient(s) with proven C. difficile infection.

I am unaware of any other condition that Mr. Woodell links to his work exposure at Alaska Regional Hospital. . . .

There is no epidemiological or other data directly supporting Mr. Woodell's claim that his work exposures caused the onset of his C. difficile enterocolitis. . . .

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<sup>25</sup> Exc. 51 – 85.

<sup>26</sup> R. 359.

<sup>27</sup> *Woodell IV*.

<sup>28</sup> Exc. 99.

There is no way of pinpointing when Mr. Woodell initially developed his C. difficile enterocolitis nor is there any way precisely identifying the cause (mechanism) of its onset. . . .

I have no way of determining whether his C. Difficile enterocolitis is in any way related to his September 21, 2018, work exposure. . . .

I am unable to provide an alternative explanation for Mr. Woodell's complaints.

Dr. Bardana also reiterated on April 29, 2019, his opinion that without an NAAT result, Mr. Woodell's C-Diff diagnosis would be considered "indeterminate."<sup>29</sup>

In an "affidavit" dated July 31, 2020, which was not signed under the penalty of perjury or notarized, Jennifer Young, R.N., stated:

1. I am a Charge RN at Alaska Regional Hospital. In that capacity, I supervised Kade Woodell.
2. Mr. Woodell informed me that he was ill, but did not tell me that he had been diagnosed with C. Difficile enterocolitis.
3. To the best of my knowledge, Mr. Woodell did not tell me that he believed that he had been exposed to C. Difficile enterocolitis at work or that he attributed that to exposure from a specific patient(s).<sup>30</sup>

On August 11, 2020, Dr. Bardana testified in deposition "certainly antibiotic use and gastric acid suppression are two issues that came up in Mr. Woodell's history that are risk factors for the development of [C-Diff]."<sup>31</sup>

The Board found Dr. Bardana did not state antibiotic use, gastric acid suppression, or pre-existing conditions caused Mr. Woodell's C-Diff infection, nor did he offer an alternative causation of Mr. Woodell's C-Diff infection.<sup>32</sup>

Ms. Amber Garcia, ARH's clinical informaticist, "was provided with a list of people to research" by Ms. Mayo. She said, "There was [sic] four patients that were provided to me to review to see if [Mr. Woodell] was on that treatment team. There was [sic] more patients in the hospital, but Mr. Woodell was not on treatment team of those four

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<sup>29</sup> Exc. 100 – 116.

<sup>30</sup> Exc. 117 – 118.

<sup>31</sup> Dep. of Emil Bardana, M.D. at 18:3-5, Aug. 11, 2020.

<sup>32</sup> *Woodell VII* at 8, No. 41.

patients. . . . This is just in the electronic medical records. I don't know if – what patients he's come in contact with [sic] other than what I can research in the record." Ms. Garcia concluded Mr. Woodell had not been assigned to any treatment team that dealt with C-Diff positive patients, and no C-Diff patient was in the cardiovascular unit from August 1, 2018, through September 30, 2018. Ms. Garcia said Patient 1 was hospitalized from August 1 to August 31, 2018; Patient 2 from August 1 to August 31, 2018; Patient 3 from August 1 to September 5, 2018; and Patient 4 from September 1 to October 11, 2018. She did not check for other C-Diff patients that may have been in contact with Mr. Woodell. She testified, "The scope of my investigation was to review the four patients that were given me."<sup>33</sup>

Ms. Mayo, ARH's infection prevention coordinator, gave Ms. Garcia a list of four names to research. She stated that there were only four C-Diff positive patients in the entire hospital for the months of August and September 2018. However, in contrast to Ms. Garcia's testimony, Ms. Mayo said, Patient 1 was hospitalized from August 12 to September 7, 2018; Patient 2 from August 22 to August 28, 2018; Patient 3 from August 28 to September 4, 2018; and Patient 4 from September 17 to October 10, 2018. There was only one C-Diff positive patient in the surgical progressive care unit (SPCU) on September 21, 2018, and Mr. Woodell did not work in the SPCU. In addition, Ms. Mayo said a "supervisor" provided a list of thirty-three patients to whom Mr. Woodell had provided care in August and September 2018; however, none of them were C-Diff positive.<sup>34</sup> The Board stated that the author of this list that included thirty-three patients' information was not identified and did not testify.<sup>35</sup>

ARH admitted Mr. Woodell has the C-Diff diagnosis, but has continued to dispute it is related to his work at ARH.<sup>36</sup>

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<sup>33</sup> Hr'g Tr. at 65:22 – 66:15; 68:9-11; 69:21-24; 70:6-9; 70:12-21; 75:12-13.

<sup>34</sup> Hr'g Tr. at 76:17; 81:12-20; 87:10-11; 89:9; 91:7-10; 91:15-18; 91:24 – 92:3; 92:19-22.

<sup>35</sup> *Woodell VII* at 9, No. 43.

<sup>36</sup> *Id.*, No. 44.

The Board found there was no evidence supporting Mr. Woodell's claim that he is permanently and totally disabled to work.<sup>37</sup> The Board stated that the evidence presented by ARH was contradictory and, thus, was not useful.<sup>38</sup> The Board also denied ARH's request to cross-examine four doctors who had issued opinion letters in support of Mr. Woodell's claim. The Board denied the requests stating the requests were untimely or premature because the requests were not timely filed in opposition to Mr. Woodell's Affidavit of Readiness for Hearing. The Board also denied ARH's request to dismiss Mr. Woodell's claim and awarded him time loss benefits and medical costs.<sup>39</sup>

*3. Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in the light of the record as a whole.<sup>40</sup> Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>41</sup> "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."<sup>42</sup> The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.<sup>43</sup> On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.<sup>44</sup> However, the

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<sup>37</sup> *Woodell VII* at 9, No. 45.

<sup>38</sup> *Id.* at 17 – 19.

<sup>39</sup> *Id.* at 16, 21 – 22.

<sup>40</sup> AS 23.30.128(b).

<sup>41</sup> *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

<sup>42</sup> *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984)).

<sup>43</sup> AS 23.30.122.

<sup>44</sup> AS 23.30.128(b).

Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine credibility of witnesses.<sup>45</sup>

Discovery disputes are reviewed for abuse of discretion.<sup>46</sup> An abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.<sup>47</sup> Furthermore, the Commission's decision must be based on the record before the Board, the briefs of the parties, and oral argument before the Commission. The Commission does not accept or review new evidence.<sup>48</sup>

#### *4. Discussion.*

ARH appealed from *Woodell VII*, issued on September 21, 2020. ARH asserts the Board made several significant errors in reaching its conclusion that ARH had not rebutted the presumption of compensability, and awarding Mr. Woodell benefits related to C-Diff which the Board found he contracted while working for ARH in 2018. The Board denied ARH's requests to cross-examine several treating doctors regarding their opinion letters created in support of Mr. Woodell's claim for workers' compensation benefits, asserting the requests were untimely or premature according to 8 AAC 45.052(c)(2). The Board also allowed admission of an opinion letter from Dr. Price submitted by Mr. Woodell the day before hearing, contending it merely reiterated his previous opinion and was admissible and not subject to cross-examination. The Board further found that certain evidence of ARH was hearsay and, thus, inadmissible because it was not covered by a hearsay exception. The Board found the rest of ARH's evidence to be uncertain, inconclusive, and without foundation. As such, the Board found this evidence was insufficient to rebut the presumption of compensability.

Mr. Woodell asserts the Board correctly awarded him benefits and pointed out that the Board had previously made a finding of fact that his C-Diff was contracted from his

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<sup>45</sup> AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013) (*Sosa de Rosario*).

<sup>46</sup> *State v. Carpenter*, 171 P.3d 41 (Alaska 2007); *Landers v. Municipality of Anchorage*, 915 P.2d 614 (Alaska 1996).

<sup>47</sup> *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

<sup>48</sup> AS 23.30.128(a).

work at ARH, and that the Commission had accepted that finding of fact. In *Woodell I*, the Board found that on September 21, 2018, Mr. Woodell worked all day with a C-Diff infected patient without “personal protective equipment.” The Board, in that decision, further found that Mr. Woodell was exposed to C-diff while working at ARH.

In its first petition for review to the Commission, ARH only challenged the finding that Mr. Woodell had given timely notice to ARH of his exposure to C-Diff. ARH did not challenge the Board’s findings that Mr. Woodell contracted C-Diff while working at ARH. The Commission accepted the Board’s findings of fact, which it must do if the findings are supported by substantial evidence in the record as a whole. On remand, the Commission asked the Board to make a credibility finding regarding the testimony of Ms. Miller. This the Board did in *Woodell III* when it found Ms. Miller not credible. The Board’s credibility findings are binding on the Commission and may not be set aside.<sup>49</sup> In *Woodell IV*, the Commission denied ARH’s petition for review and affirmed *Woodell I* and *Woodell III*.

Mr. Woodell tried to raise at the hearing in *Woodell VII* the question that the Board had already made a finding that his C-Diff diagnosis was related to his work at ARH. Mr. Woodell questioned why the Board was hearing new evidence regarding this issue, since the Board had already found he contracted C-Diff while working at ARH and that finding had been accepted by the Commission on appeal.<sup>50</sup> The Hearing Chair stated, “Mr. Woodell, there’s no need for you to reread the decisions that have been issued. We already know about all those, so you can proceed.”<sup>51</sup> At the hearing on August 20, 2020, the Board did not allow him to continue in this argument and did not accept this questioning as a potential *res judicata*/collateral estoppel or law of the case argument.<sup>52</sup>

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<sup>49</sup> *Sosa de Rosario*, 297 P.3d 139.

<sup>50</sup> *Woodell VII*; Hr’g Tr. at 25:7 – 26:9.

<sup>51</sup> *Woodell VII*; Hr’g Tr. at 26:17-19. The decisions in *Woodell V* and *VI* involved discovery issues which were not appealed to the Commission.

<sup>52</sup> Hr’g Tr. at 25:7 – 26:9; 27:24.

In *Woodell VII*, ARH presented a more complete defense to the possibility that Mr. Woodell contracted C-Diff while working for ARH. This evidence could have and should have been presented at the first hearing in this matter, since it pertains directly to the issue of notice of exposure to C-Diff as well as to the causation of his C-Diff exposure. ARH's argument at the most recent hearing was that Mr. Woodell could not have been exposed to C-Diff at work because there was no patient in the hospital with C-Diff on the date he asserted he was exposed. Although ARH categorized this as a question of causation, the Board, in *Woodell I*, already had made that finding of fact when it stated that Mr. Woodell was exposed to C-Diff while working at ARH on September 21, 2018, in determining his notice of injury was timely.<sup>53</sup>

*a. Did the Board previously find Mr. Woodell contracted C-Diff while working at ARH and is this finding law of the case?*

The doctrine of "law of the case" "generally 'prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case' unless there are 'exceptional circumstances' presenting 'clear error constituting a manifest injustice.'"<sup>54</sup> In *Beal v. Beal*, the Alaska Supreme Court (Court) stated that "successive appeals should narrow the issues in a case, not expand them."<sup>55</sup> The Court continued to say "law of the case doctrine, which is 'grounded in the principle of stare decisis' and 'akin to the doctrine of res judicata,' generally 'prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case.'"<sup>56</sup> "The law of the case doctrine applies not only to issues explicitly addressed and decided in a prior appeal but also to issues 'directly involved with or "necessarily inhering"' in a prior appellate decision as well as issues that could have been part of a prior appeal but were not."<sup>57</sup> The Court added the doctrine is one of "economy and of obedience to the judicial hierarchy" and includes

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<sup>53</sup> *Woodell I* at 2, Nos. 3-4.

<sup>54</sup> *Moody v. Lodge*, 433 P.3d 1173, 1178 (Alaska 2018).

<sup>55</sup> *Beal v. Beal*, 209 P.3d 1012, 1016 (Alaska 2009) (citations omitted) (*Beal*).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1017 (citations omitted).

such policy reasons as "(1) avoidance of indefinite litigations; (2) consistency of results in the same litigation; (3) essential fairness between the parties; and (4) judicial efficiency."<sup>58</sup>

Here, the parties in *Woodell I, II, and III* were focused on whether Mr. Woodell had given timely notice of his injury. However, many of the same facts or evidence are necessary to determine whether he gave timely notice of his injury and whether his work at the hospital was the source of his C-Diff diagnosis. In *Woodell I*, ARH presented evidence through Ms. Miller that she had reviewed patients' charts and found no evidence of any patient within the care of Mr. Woodell who had C-Diff.<sup>59</sup> On remand, Ms. Miller explained her process, but did not produce the charts nor did she attempt to contact the charge nurse to whom Mr. Woodell testified he told of his exposure. The Board did not give any weight to her testimony.<sup>60</sup>

It appears that the law of the case doctrine might apply to the Board's finding that Mr. Woodell contracted C-Diff while working for the hospital. However, neither party raised the issue on appeal nor did either party brief this issue. Therefore, while Mr. Woodell did attempt to raise the issue at hearing, and the doctrine of law of the case would appear to be applicable, thus, entitling him to the benefits awarded by the Board, the Commission, nonetheless, does not base its decision on this issue.

*b. Is there substantial evidence in the record to support the Board's decision that Mr. Woodell contracted C-Diff while working at ARH?*

ARH asserts the Board erred in finding its evidence uncertain and confusing and erred in finding that it had not rebutted the presumption of compensability. The Alaska Workers' Compensation Act (Act) provides that it is presumed "in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter; [and] (2) sufficient notice of the claim has been given. . . ."<sup>61</sup> The analysis

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<sup>58</sup> *Beal* at 1017 (citations omitted).

<sup>59</sup> *Woodell I* at 6, No. 37.

<sup>60</sup> *Woodell III* at 5 – 6.

<sup>61</sup> AS 23.30.120(a).

of this presumption is a three-step process.<sup>62</sup> At the first step, an injured worker must provide evidence of the connection between his injury and the employment. Only minimal relevant evidence is required.<sup>63</sup> Mr. Woodell provided that connection with his credible testimony that he treated a patient without protective gear that he later understood to have C-Diff, and that he had reported this exposure to his charge nurse.

At this second step, the employer must provide substantial evidence in contradiction of the employee's assertion.<sup>64</sup> Credibility is not examined at this step.<sup>65</sup> Whether evidence is substantial is a legal question and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>66</sup> However, the "weighing of testimony does not take place at the rebuttal stage. Rather, the Court has stated that the weight to be accorded the doctor's testimony must take place after a determination of whether the presumption has been overcome."<sup>67</sup> At this stage, if the "medical evidence offered to rebut the presumption is uncertain or inconclusive, the presumption of compensability is not overcome. This does not mean, however, the experts must be unanimous about causation."<sup>68</sup> It is not the cumulative evidence that is being addressed, as the Board did, at this stage, but rather, whether a piece of the proffered evidence is substantial evidence which standing alone rebuts the presumption.

The evidence referenced in *Bouse* as not overcoming the presumption was a single medical report or testimony. The Court specifically stated, "the substance of a particular physician's testimony must not be in doubt if the Board is to rely upon it to overcome the

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<sup>62</sup> *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1240 (Alaska 2007).

<sup>63</sup> *See, Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987).

<sup>64</sup> *See, Tolbert v. Alascom, Inc.*, 973 P.2d 603 (Alaska 1999) (*Tolbert*).

<sup>65</sup> *Resler v. Universal Servs., Inc.*, 778 P.2d 1146 (Alaska 1969).

<sup>66</sup> *Tolbert*.

<sup>67</sup> *Id.*

<sup>68</sup> *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 235 (Alaska 1997) (*Bouse*).

presumption.”<sup>69</sup> Moreover, the Court also stated the experts need not be unanimous in their statements about causation.<sup>70</sup> The Board erred here in looking at the combined testimony of Ms. Mayo and Ms. Garcia when looking to see if ARH had rebutted the presumption. Rather, the Board should have considered either Ms. Mayo’s or Ms. Garcia’s evidence, standing alone, to decide if it constituted substantial evidence. Either person’s testimony standing alone was unequivocal that there was no C-Diff in the hospital, especially in the cardiovascular unit, at the time Mr. Woodell was working and alleged his exposure. Each person’s report standing alone constitutes substantial evidence sufficient to rebut the presumption of compensability because each unequivocally stated there was no patient in the hospital in the Cardiovascular unit on the day in question. Mr. Woodell has been adamant that he worked and was exposed in the Cardiovascular unit and he has been firm on the date of exposure, September 21, 2018. The evidence is not weighed at this stage nor is credibility determined. Moreover, rebuttal of the presumption only shifts the burden of production. It does not shift the burden of persuasion. Whether the evidence is persuasive and/or credible is weighed at the third stage in determining whether a claim is compensable. The Board, here, got ahead of itself.

The Court, in *Huit*, stated that the presumption could be rebutted if the employer presented evidence which “directly eliminated any reasonable possibility that employment was a factor in causing the disability.”<sup>71</sup> The Court noted that “an opinion establishing that a cause is not a substantial factor of the disability rebuts the presumption . . . because something cannot be ‘the substantial cause’ of a disability if it is not a cause at all.”<sup>72</sup>

Here, Ms. Mayo provided a letter stating that the hospital had reviewed “patient records from 8/1/2018 – 9/30/2018 in order to identify which patients, if any, tested positive for C Difficile.”<sup>73</sup> The letter continued that four patients were identified, but

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<sup>69</sup> *Bouse*, 932 P.2d 235.

<sup>70</sup> *Id.*

<sup>71</sup> *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 917 (Alaska 2016) (*Huit*).

<sup>72</sup> *Id.* at 919.

<sup>73</sup> *Woodell VII* at 7, No. 36.

Mr. Woodell had not participated in the care of any of them.<sup>74</sup> Ms. Mayo testified at hearing that she gave Ms. Garcia the names of these four patients to research.<sup>75</sup> Ms. Garcia testified at hearing that she is the hospital's clinical informaticist, and working from a list provided to her by Ms. Mayo, she confirmed that Mr. Woodell "was not on the treatment team of those four patients."<sup>76</sup> Either or both of the testimony of these two people constitute substantial evidence to rebut the presumption of compensability because their testimony ruled out any exposure to Mr. Woodell. As stated above, neither credibility nor weight to be given this evidence is determined at this point in the analysis. "[W]eighing of testimony does not take place at the rebuttal stage. Rather, the weight to be accorded [the evidence] must take place after a determination of whether the presumption has been overcome."<sup>77</sup> The Board erred in weighing the evidence at the rebuttal stage. Thus, the Board erred in finding that ARH had not rebutted the presumption of compensability.

However, this is not the end of the review. At the third step, the presumption drops out and the employee must prove his claim by a preponderance of the evidence. It is at this stage that credibility is decided, and the evidence weighed. The employee must "induce a belief" in the Board's mind that the asserted facts are probably true.<sup>78</sup> The Board's analysis of the facts in its wrongful finding that the presumption had not been rebutted nonetheless is, however, sufficient to enable the Commission to review it to determine whether at the third step of the analysis the conclusion is supported by substantial evidence in the record as a whole.

The Board looked at the testimony of both Ms. Garcia and Ms. Mayo. Ms. Garcia stated she found that Mr. Woodell had not been assigned to any treatment team that cared for a C-Diff positive patient from August 1, 2018, to September 30, 2018. She

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<sup>74</sup> *Woodell VII* at 7, No. 36.

<sup>75</sup> *Id.* at 9, No. 43.

<sup>76</sup> *Id.*, No. 42.

<sup>77</sup> *Bouse*, 932 P.2d at 235.

<sup>78</sup> *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

looked at four patients whose names were given to her by Ms. Mayo and did not research whether there might have been other C-Diff patients in the hospital at that time. She identified the hospitalization dates as:

Patient 1: August 1 to August 31, 2018

Patient 2: August 1 to August 31, 2018

Patient 3: August 1 to September 5, 2018

Patient 4: September 1 to October 11, 2018.

The Board also looked at the testimony of Ms. Mayo who identified that only four C-Diff patients were in the hospital in August and September. She identified the date of hospitalization as follows:

Patient 1: August 12 to September 7, 2018

Patient 2: August 22 to August 28, 2018

Patient 3: August 28 to September 4, 2018

Patient 4: September 17 to October 10, 2018.

The Board found the discrepancies in dates between the two to be significant and “uncertain and inconclusive.”<sup>79</sup> Because the dates created confusion, the Board did not rely on the information in reaching its decision to award benefits to Mr. Woodell. This would also seem to be an implicit finding of a lack of credibility in the testimony of these two people since they did not seem to be evaluating and researching the same information. Ms. Mayo did testify that the discrepancy was due to the use of the date of hospitalization versus the date of diagnosis. The Board chose to discount this testimony. The Board also took exception to Ms. Mayo’s use of a supervisor provided list of thirty-three patients to whom Mr. Woodell provided care in August and September 2018, but did not identify the supervisor nor provide any information regarding “in what capacity he or she conducted the research; or from where the information was obtained.”<sup>80</sup> This led the Board to find the information without a proper foundation and, thus, insufficient

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<sup>79</sup> *Woodell VII* at 17.

<sup>80</sup> *Id.* at 18.

to support a finding of fact. Again, the Board seems to be making an implicit credibility finding.

Likewise, the Board did not accept the report of Dr. Bardana, ARH's EME physician, finding his opinion to be uncertain, inconclusive, and not substantial evidence. More importantly, Dr. Bardana was unable to find an alternative explanation for Mr. Woodell's contracting C-Diff. The Court, in *Huit*, stated the employer must provide substantial evidence "that would exclude work-related factors as a substantial cause of the disability, or directly eliminated any reasonable possibility that employment was a factor in causing the disability."<sup>81</sup> Dr. Bardana discounted work exposure based on Ms. Mayo's letter which the Board found uncertain and inconclusive. Dr. Bardana was also unable to find an alternative explanation for the exposure.<sup>82</sup> In fact, Dr. Bardana stated, "I am unable to provide an alternative explanation for Mr. Woodell's complaints."<sup>83</sup> The Board, again, implicitly found his testimony and report not credible, finding it inconclusive and uncertain.

The Commission must accept the credibility findings of the Board. Since the Board implicitly found Ms. Mayo, Ms. Garcia, and Dr. Bardana not credible, the Commission must affirm the Board's award of benefits to Mr. Woodell. The Board has consistently found Mr. Woodell to be credible.

*c. Did the Board err in denying ARH the right to cross-examine treating doctors regarding their opinion letters?*

ARH contends the Board erred when it denied ARH's requests for cross-examination as being either too early or too late under 8 AAC 45.052. ARH objected to the Board admitting several opinion letters, including one served the day before the hearing, over its previously filed requests for cross-examination. ARH relies on another regulation that states:

Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference,

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<sup>81</sup> *Huit*, 372 P.3d at 917.

<sup>82</sup> *Woodell VII* at 18.

<sup>83</sup> *Id.* at 19.

affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.053; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

(g) A request for cross-examination filed under (f) of this section must (1) specifically the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.<sup>84</sup>

ARH contends the documents to which it objects are not medical records which may be accepted by the Board, in spite of a request for cross-examination, under a hearsay objection because medical records are business records kept in the ordinary course of the doctor's practice. However, the documents to which ARH made the requests for cross-examination here were not medical records kept in the ordinary course of business. Rather, these documents are opinion letters issued specifically for the litigation of Mr. Woodell's claim. As such, they fall under 8 AAC 45.120 and are not the medical records referenced in 8 AAC 45.052.

The Board relied on its regulation requiring a party to submit requests for cross-examination within ten days of an Affidavit of Readiness for Hearing being filed. Specifically, the regulation states:

Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

(1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries that have been filed, the party must file with the board, and serve upon all parties, a request for cross-examination, together with the affidavit of readiness for hearing and an updated medical summary and

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<sup>84</sup> 8 AAC 45.120(f) and (g).

copies of the medical reports listed on the medical summary, if required under this section.

(2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days of the service of the affidavit of readiness for hearing. . . .<sup>85</sup>

ARH requested prior to the hearing and prior to the Affidavit of Readiness for Hearing the right to cross-examine the following:

2/27/2019, "to whom it may concern" letter of Philip Cedeno, M.D.<sup>86</sup>

3/13/2019, "to whom it may concern" letter of John Gillis, M.D.<sup>87</sup>

12/3/2019, letter of Dr. Wigington.

2/18/2019, note of Dr. Price.<sup>88</sup>

The Court, in *Employers Commercial Union Insurance Group v. Schoen* stated, "the statutory right to cross-examination is absolute and applicable to the Board."<sup>89</sup> In *Frazier v. H. C. Price/CIRI Construction JV*, the Court noted that cross-examination may be required only when the written medical report is hearsay.<sup>90</sup> In *Liimata v. Vest*, the Court upheld the exclusion of a letter from a medical doctor that was not a medical record. The proponent for admission of the letter failed to show that the doctor routinely, as part of his practice, prepared and sent such letters.<sup>91</sup> The items which ARH objected to admission over its request for cross-examination are all hearsay as they are opinions written to support Mr. Woodell's workers' compensation claim and not medical reports

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<sup>85</sup> 8 AAC 45.052(c)

<sup>86</sup> Exc. 93.

<sup>87</sup> Exc. 94.

<sup>88</sup> Exc. 50.

<sup>89</sup> *Emp'rs Commercial Union Ins. Group v. Schoen*, 519 P.2d 819, 824 (Alaska 1974).

<sup>90</sup> *Frazier v. H. C. Price/CIRI Constr. JV*, 794 P.2d 103, 106 (Alaska 1990) (*Frazier*).

<sup>91</sup> *Liimata v. Vest*, 45 P.3d 310, 318 (Alaska 2002).

kept in the ordinary course of business. Medical records generally generated in the practice of medicine are admissible over a request to cross-examine the authors because they are records kept in the ordinary course of business and, as such, are an exception to the hearsay rules. Records kept in the ordinary course of business are considered to be credible and competent.<sup>92</sup>

The Court has stated that it reviews “an agency’s interpretation of its own regulation using the reasonable basis standard and its application of that regulation to the facts of a case for abuse of discretion.”<sup>93</sup> However, here we have two regulations as set out above dealing with requests for cross-examination. One refers specifically to medical reports which may be admitted in spite of a request for cross-examination precisely because they are kept in the ordinary course of business and may be admitted as a hearsay exception. The other regulation pertains to documents whose credibility and competence may be challenged through cross-examination. The regulation at 8 AAC 45.120 governs the right to cross-examine these authors.

Furthermore, it is a violation of ARH’s due process rights not to have allowed ARH the right to cross-examine Drs. Cedeno, Gillis, Wigington, and Price regarding their opinions and the basis for those opinions. Therefore, the matter must be remanded to the Board to afford ARH the right to cross-examine these doctors.

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<sup>92</sup> See, e.g., *Frazier*, 794 P.2d 105.

<sup>93</sup> *Weaver v. ASRC Fed. Holding Co.*, 464 P.3d 1242, 1257 (Alaska 2020).

5. *Conclusion.*

The Board decision is REMANDED to afford ARH its due process rights to cross-examine the authors of the opinion letters admitted by the Board.

Date: 16 June 2021 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

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. 288, issued in the matter of *Alaska Regional Hospital and Indemnity Insurance Company of North America v. Kade Woodell*, AWCAC Appeal No. 20-018, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 16, 2021.

Date: June 18, 2021



*Signed*

K. Morrison, Appeals Commission Clerk