Alaska Workers' Compensation Appeals Commission

Kade Woodell, Appellant, vs. Alaska Regional Hospital and Indemnity Insurance Company of North America, Appellees.	Final Decision Decision No. 302 April 19, 2023 AWCAC Appeal No. 22-012 AWCB Decision No. 22-0051 AWCB Case No. 201901025

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 22-0051, issued at Anchorage, Alaska, on July 14, 2022, by southcentral panel members Judith A. DeMarsh, Chair, Bronson Frye, Member for Labor, and Michael Dennis, Member for Industry.

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

Commission proceedings: Appeal filed September 9, 2022; briefing completed February 22, 2023; oral argument held on March 17, 2023.

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

By: Deirdre D. Ford, Chair.

1. Introduction.

Appellant, Kade Woodell, claims that he was injured while working as a nurse in the cardiovascular services unit (CVSU) for Alaska Regional Hospital, insured by Indemnity Insurance Company of North America (collectively referred to as ARH), by contracting Clostridium Difficile (C. diff) from working with a C. diff positive patient on September 21, 2018, for whom no "contact precautions" were in place. There have been a total of ten decisions and orders issued by both the Alaska Workers' Compensation

Board (Board) and the Alaska Workers' Compensation Appeals Commission (Commission) regarding Mr. Woodell's claim.[1]

2. Factual background and proceedings.[2]

On May 5, 2017, Mr. Woodell began working as a nurse for ARH in the CVSU. He cleaned, bathed, medicated, administered intravenous fluids, changed gowns and diapers, provided meals, and moved patients.

Mr. Woodell has a long history of irritable bowel syndrome (IBS). On May 9, 2016, John G. Price, M.D., evaluated Mr. Woodell for headache and abdominal pain. Mr. Woodell reported having abdominal pain and belching, which was relieved by vomiting. He had taken the proton pump inhibitor (PP inhibitor) [a gastric acid suppressant] for two weeks, but that had not helped. His symptoms seemed to occur for a week at a time and then he would be fine.[3] He was able, however, to work without any issue.[4]

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[1] 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 Motion for Stay and Order on Petition for Review, 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, 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*); *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 20-0081 (Sept. 21, 2020) (*Woodell VII*); *Alaska Reg'l Hosp. v. Woodell*, Alaska Workers' Comp. App. Comm'n Dec. No. 288 (June 16, 2021)(*Woodell VIII*); *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 22-0019 (Mar. 16, 2022)(*Woodell IX*); and *Woodell v. Alaska Reg'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 22-0051 (July 14, 2022)(*Woodell X*). *Woodell X* is the decision at issue in this appeal.

[2] 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.

[3] R. 2294-96.

[4] June 27, 2019, Hr'g Tr. at 18:10 – 20:12.

On September 21, 2018, Mr. Woodell testified, he 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. Mr. Woodell informed the charge nurse he had treated a patient with C. diff without "personal protective equipment" on September 21, 2018. When he returned to work the next day or shift, he understood "contact precautions" were in place for the same patient.[5]

At the August 20, 2020, hearing, Mr. Woodell testified he was not aware if contact precautions were placed on the patient he cared for on September 21, 2018, the same patient from whom he believes he contracted C. diff. He testified he was not involved with the care of that patient subsequently and it would have been the other nurse's duty to ensure it was documented. His knowledge this patient was infected with C. diff and precautions needed to be placed was based on the discussion he overheard between the patient's physician and the nurse caring for the patient that day.[6]

From September 26, 2018, through October 15, 2018, Mr. Woodell traveled throughout Germany, France, Austria, and Switzerland. Mr. Woodell began experiencing epigastric pain, in addition to other symptoms such as upper and lower abdominal pain, nausea, vomiting, and diarrhea. He thought it was another episode of IBS. Mr. Woodell sought help in a local pharmacy and was given some medication. Upon return, he called in sick to work.[7]

On October 18, 2018, Mr. Woodell went to the emergency room due to epigastric pain. A computerized tomography scan of his abdomen and pelvis showed no

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[5] Kade Woodell Dep., Apr. 17, 2019, at 26:4 – 27:15, 28:22 – 31:12; June 27, 2019, Hr'g Tr. at 19:4-19.

[6] Aug. 20, 2020, Hr'g Tr. at 40:6 – 42:20.

[7] Woodell Dep. at 33:2 – 34:17; Aug. 20, 2020, Hr'g Tr. at 57:16-21; *Woodell I* at 3, No. 6.

abnormalities.[8] On October 18, 2018, John Gillis, M.D., saw Mr. Woodell and prescribed a PP inhibitor for Mr. Woodell's epigastric pain.[9] At the end of October 2018, Mr. Woodell briefly returned to work, but soon took leave due to his symptoms.[10]

On November 1, 2018, a radiographic and fluoroscopic examination of Mr. Woodell's upper gastrointestinal (GI) tract revealed no abnormalities.[11] On November 2, 2018, Eric R. Tompkins, M.D., saw Mr. Woodell and ordered a colonoscopy, parasite test, hepatobiliary scan, and abdominal ultrasound imaging.[12] The ultrasound imaging of Mr. Woodell's abdomen showed no abnormalities of gallbladder, kidneys, or pancreas.[13] On November 7, 2018, a hepatobiliary scan of Mr. Woodell showed no abnormalities.[14] On November 9, 2018, Dr. Tompkins conducted a colonoscopy and upper GI endoscopy on Mr. Woodell and found no abnormalities.[15]

Dr. Tompkins recommended a cholecystectomy based on Mr. Woodell's exhaustive test results, although it was not certain whether Mr. Woodell's pain was related to his gallbladder.[16] On November 18, 2018, a test of Mr. Woodell's stool samples did not detect presence of ova or parasite.[17]

On December 4, 2018, Mahdu Prasad, M.D., conducted a cholecystectomy on Mr. Woodell and removed the gallbladder which turned out to be normal. His condition

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8 R. 2234-77.

9 R. 2287-89.

10 June 27, 2019, Hr'g Tr. at 21:11-15, 46:17 – 47:3.

11 R. 1964.

12 R. 2221-24.

13 R. 1971.

14 R. 1967.

15 R. 1972-73.

16 R. 1974.

17 R. 1968.

did not improve.[18] On December 28, 2018, Dr. Gillis ordered a C. diff pathogen study at the request of Mr. Woodell.[19] Mr. Woodell tested positive for C. diff toxin A/B.[20]

On January 25, 2019, Mr. Woodell tested negative for C. diff toxin gene nucleic acid amplification.[21] On February 18, 2019, Mr. Woodell tested positive for C. diff toxin gene nucleic acid amplification.[22] On February 18, 2019, Dr. Price opined Mr. Woodell contracted C. diff after exposure in the workplace and diagnosed his condition as a hospital-acquired infection.[23] On February 19, 2019, Mr. Woodell's stool test for C. diff toxins A+B, EIA, was positive.[24]

On March 13, 2019, Dr. Gillis stated Mr. Woodell contracted a C. diff infection while performing his duties as a nurse with ARH.[25] On April 2, 2019, gastroenterologist Allan P. Weston, M.D., evaluated Mr. Woodell for his recurrent C. diff. Mr. Woodell reported he was found to have C. diff in January 2019. He had been treated with the antibiotics Vancomycin, Flagyl, and Dificid. He reported he had a prior esophagogastroduodenoscopy and colonoscopy in Alaska, and was told they were normal, although one polyp was removed. Dr. Weston noted Mr. Woodell had a camera capsule on February 21, 2019, in which the mucosa was found to be normal to the cecum. Dr. Weston's impressions were C. diff, IBS with diarrhea, and weight loss. Dr. Weston prescribed the GI medicine IBgard.[26] Dr. Weston performed a fecal microbiota transplantation (FMT) in Mr. Woodell's colon on April 8, 2019.[27] On April 9, 2019,

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[18] R. 2064-66, 2298-2333.

[19] Woodell Dep. at 45:10-13.

[20] R. 1978.

[21] R. 2010.

[22] R. 2004.

[23] R. 1980.

[24] R. 1996-2004.

[25] R. 1983.

[26] R. 2506-07.

[27] R. 2502-04.

Mr. Woodell's colon mucosal biopsies were reported as benign, without significant histopathology observed.[28]

On April 29, 2019, Mr. Woodell saw Emil J. Bardana, Jr., M.D., Internal Medicine, for an employer's medical evaluation (EME). Dr. Bardana stated he could not determine the commencement 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 C. diff infection. He neither confirmed nor excluded Mr. Woodell's September 21, 2018, exposure as a possible cause for his C. diff infection.[29]

On July 2, 2019, Mr. Woodell underwent a colonoscopy and FMT for treatment of recurrent C. diff diarrhea. The entire examined colon appeared normal. The donor stool was instilled in the cecum. No specimens were collected.[30] On September 21, 2019, Mr. Woodell's stool tested positive for C. diff toxin A+B.[31]

On September 30, 2019, Mr. Woodell followed up with William Chad Wigington, D.O., whose impressions were persistent C. diff infection vs. C. diff colonization with post-infectious IBS. Dr. Wigington recommended another FMT with biopsies to evaluate for inflammation.[32]

On November 8, 2019, Mr. Woodell underwent a colonoscopy and FMT using the commercial donor stool product from OpenBiome. The entire examined colon appeared normal on direct and retroflexion views. Biopsies were taken for histology. The donor stool was instilled in the cecum. The examined portion of the ileum was also normal.[33]

ARH reviewed patients' charts while investigating Mr. Woodell's September 21, 2018, exposure. It could not identify a patient with C. diff that Mr. Woodell had cared

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[28] R. 2505.

[29] R. 2298-2333.

[30] R. 2447-48.

[31] R. 2390.

[32] R. 2426-39.

[33] R. 2410-19.

for or any patient in the CVSU that had C. diff during the time Mr. Woodell's alleged exposure.[34] In a "To whom it may concern" letter dated June 16, 2020, 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."[35]

On July 18, 2020, Dr. Bardana submitted a supplementary EME report after having the opportunity to review more of Mr. Woodell's medical records, including the June 1, 2019, record of a positive C. diff toxin polymerase chain reaction (PCR) test and a September 30, 2019, positive test for C. diff toxin A+B. To his list of diagnoses developed in the May 13, 2019, EME report, Dr. Bardana added the development of probable C. diff enterocolitis diagnosed with stool positive toxin A+B on December 29, 2018. Dr. Bardana opined there was no compelling medical data which would support Mr. Woodell's belief his work exposure contributed to the development of C. diff enterocolitis. Dr. Bardana noted Ms. Mayo's letter indicated Mr. Woodell had not assisted with any of the four patients diagnosed with C. diff between August 1, 2018, and September 30, 2018. Mr. Woodell claimed he reported his exposure to his shift supervisor, but there was no verification of this in the medical records. There was no epidemiological or other data directly supporting Mr. Woodell's claim his work exposure caused the onset of his C. diff enterocolitis. None of Mr. Woodell's preexisting conditions of IBS, GERD, acute gastroenteritis in 2017, or removal of a colonic sessile polyp were the substantial cause of Mr. Woodell's C. diff enterocolitis. Dr. Bardana opined there were a number of likely alternatives that could have participated in causing Mr. Woodell's infection, namely antibiotics given for his 2017 pneumonia, and acid-reducing medications for his GERD. Contact with an asymptomatic carrier at the hospitals where Mr. Woodell had worked in Arkansas or Alaska were much less likely causes of his infection. Dr. Bardana again

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[34] June 27, 2019, Hr'g Tr. at 54:4-16.

[35] R. 0621.

recommended consultation with a gastroenterologist, ideally with a specific interest in C. diff enterocolitis.[36] Dr. Bardana stated:

> There is no compelling medical data which would support Mr. Woodell's belief that his work exposures 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.
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> I am unaware of any other condition that Mr. Woodell links to his work exposures 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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> 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. . . .
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> 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."[37]

In a statement dated July 31, 2020, Jennifer Young, R.N., stated:

> 1. I am a Charge RN at Alaska Regional Hospital. In that capacity, I supervised Kade Woodell.
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> 2. Mr. Woodell informed me that he was ill, but did not tell me that he had been diagnosed with C. Difficile enterocolitis.
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> 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).[38]

On August 11, 2020, Dr. Bardana testified that the key symptoms of C. diff can mimic other conditions such as non-C. diff gastroenteritis or IBS. Celiac disease is another condition that may have some of the same symptoms. Mr. Woodell told Dr. Bardana he had a prior diagnosis of pilonidal disease with subsequent infections of the pilonidal cysts, and that he had problems with IBS since either 2008 or 2014. He also had a history of anxiety and depression and he was on medication for those. Dr. Bardana reviewed the results of the colonoscopies done in July 2019 and November 2019, both of which were

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[36] R. 2459-75.

[37] R. 2459-75.

[38] R. 0653-54.

normal. The biopsies done during the colonoscopies were also normal. There was a disparity between Mr. Woodell's very significant symptomatology and the negative colonoscopies, with no recorded fevers in the medical records other than Mr. Woodell's complaints thereof, and no significant rise in the white blood cell counts. Dr. Bardana was unable to find any evidence of fever, elevated white counts, or any pathological findings documented either by colonoscopy or by histopathology of biopsies taken during the colonoscopies. Mr. Woodell's antibiotic use with the 2017 pneumonia and the gastric acid suppressant Protonix he was given for the esophagitis are well known to precipitate C. diff infection.[39]

Dr. Bardana testified that without Ms. Mayo's memorandum stating Mr. Woodell had not participated in the care of any of the four patients with C. diff in the hospital from August 1, 2018, to September 30, 2018, he still would not be able to determine when Mr. Woodell developed the infection. This is because there were other elements of his care in 2017 that could have caused this, including antibiotic use and the gastroenteritis that developed. Having Ms. Mayo's memorandum caused him to question the importance of Mr. Woodell's description versus Ms. Mayo's findings. When questioned about Dr. Gillis' March 13, 2019, four-line memorandum stating it was entirely likely Mr. Woodell had contracted the diagnosed C. diff infection from his job as a nurse with ARH as he daily came in contact with various bodily fluids from various patients, Dr. Bardana stated Dr. Gillis did not give any rationale, he just says that is his speculation. In terms of a definite diagnosis and where it was caused, he himself could not come to a conclusion. That was Dr. Gillis' opinion, but he did not have to agree with it.[40]

Dr. Bardana testified "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 this disease."[41] The Board found Dr. Bardana did not state antibiotic use, gastric acid

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39 Emil Bardana, M.D., Dep., Aug. 11, 2020, at 7:20 – 8:16, 10:20 – 11:9, 11:17-20, 14:8 – 15:5, 16:11 – 17:16, 18:1-18.

40 Bardana Dep. at 50:17 – 52:10, 64:5 – 65:4.

41 Bardana Dep. at 18:3-5.

suppression, or pre-existing conditions caused Mr. Woodell's C. diff infection. The Board also stated Dr. Bardana did not offer an alternative causation of Mr. Woodell's C. diff infection.[42]

At the August 20, 2020, hearing, Mr. Woodell testified he was not aware if contact precautions were placed on the patient he cared for on September 21, 2018, the same patient from whom he believes he contracted C. diff. He testified he was not involved with the care of that patient subsequently and it would have been the other nurse's duty to ensure it was documented. His knowledge this patient was infected with C. diff and precautions needed to be placed was based on the discussion he overheard between the patient's physician and the nurse caring for the patient that day.[43]

On November 19, 2020, Mr. Woodell followed up with Dr. Wigington, who noted Mr. Woodell had a history of recurrent C. diff colitis, but he had had two recent stools that were negative for C. diff. Biopsies were negative for IBD. Past stool studies were negative for calprotectin and other infectious etiologies. Mr. Woodell expressed fears about going back to work as a nurse and contracting C. diff again. He requested a letter regarding his disability and ability to work in the near future. Dr. Wigington's impressions were a history of recent C. diff, now negative, but with persistent diarrhea. He stated the differential diagnoses included post-infectious IBS, small bowel IBD, celiac, post-cholecystectomy diarrhea, malabsorption, and joint pain that might be related to an inflammatory process. Dr. Wigington prescribed the medication cholestyramine for possible bile acid reflux and diarrhea.[44] On December 11, 2020, the laboratory test results were all within normal limits or negative. These included (1) the transglutaminase IGA antibody, a test for celiac disease; (2) celiac disease antibodies; and (3) the C-reactive protein, a test for inflammation.[45]

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[42] *Woodell VII* at 8, No. 41.

[43] Aug. 20, 2020, Hr'g Tr. at 40:6 – 42:20.

[44] R. 2806-07.

[45] 2799-805.

On February 15, 2021, Mr. Woodell followed up with Dr. Wigington and reported the medication cholestryramine had helped his reflux and also helped his diarrhea some. He was down to about six bowel movements a day. Mr. Woodell stated he was having some joint pain and was worried it might be associated with his diarrhea. Dr. Wigington noted Mr. Woodell had a colonoscopy in November 2019 that had normal biopsies, a negative celiac panel, negative stool studies, negative IBD panel, and negative stool calprotectin.[46] Fecal calprotectin is a very sensitive marker for inflammation in the GI tract and useful for the differentiation of IBD from IBS.[47]

From May 12, 2021, through August 9, 2021, Mr. Woodell treated with chiropractor Ryan Carlson, D.C. for back and cervical pain. On May 17, 2021, Dr. Carlson opined there was degenerative arthritis in the cervical spine.[48]

On September 10, 2021, Mr. Woodell submitted 1) Dr. Carlson's September 1, 2021, opinion letter prepared for litigation, in which he opined Mr. Woodell's mid-back pain was due to the severe dehydration Mr. Woodell remembered having after he worked as a registered nurse in Alaska. Dr. Carlson stated he could not definitely say this was the cause for Mr. Woodell's degeneration in his spine, but dehydration can cause the disc spaces between the spine to compress, causing pain; and 2) Dr. Price's September 9, 2021, opinion letter prepared for litigation, in which he opined Mr. Woodell continued to complain of GI symptoms due to his recent C. diff infection. He further opined as a result of the C. diff infection and diarrhea, he was recently diagnosed with degenerative arthritis and subluxations by Dr. Carlson.[49]

On October 29, 2021, Venkatachala Mohan, M.D., Internist and Gastroenterologist, performed an EME records review. He diagnosed Mr. Woodell with IBS with diarrhea, a history of bile acid diarrhea secondary to cholecystectomy, and a past history of C. diff carrier state. He opined Mr. Woodell's September 21, 2018, work injury was not the

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46 R. 2780-81.

47 www.ncbi.nlm.nih.gov; *Woodell X* at 14, No. 45.

48 R. 2611-55.

49 R. 2534-38.

substantial cause of his current condition. Dr. Mohan noted Mr. Woodell had a long history of chronic IBS with diarrhea. None of the treatments Mr. Woodell received for C. diff made any difference in his symptoms. Also, his endoscopy and colonoscopy evaluations showed no mucosal abnormality, and subsequent colonoscopies have been normal. As Mr. Woodell had no clinical evidence of mucosal damage of C. diff, his C. diff was probably in a chronic carrier state. Dr. Mohan stated Mr. Woodell's main problem is chronic IBS with diarrhea, evidenced by numerous normal colonoscopies and endoscopies and the tests for inflammatory markers have been negative. Dr. Mohan stated this is classic IBS. Therefore, the reported September 21, 2018, work injury suggesting C. diff as a cause of his symptoms was not medically supported by the clinical evidence. He opined Mr. Woodell did not have any restrictions to resuming and performing the job of a nurse he had at the time of his reported work injury from a GI standpoint, and there were no restrictions from a GI standpoint. Dr. Mohan also stated neither C. diff, nor chronic IBS with diarrhea, nor post-cholecystectomy bile acid diarrhea could cause degenerative orthopedic or hemorrhoidal problems. He also stated a doctor's opinion the C. diff infection caused degenerative arthritis and hemorrhoids was not supported by any accepted medical authority.[50]

On November 1, 2021, Darin J. Davidson, M.D., Orthopedic Surgeon, performed an EME records review focused on whether Mr. Woodell's C. diff caused Mr. Woodell's orthopedic diagnoses of right knee meniscal tear and plica syndrome, left knee pain, neck pain, or back pain. Dr. Davidson opined none of the above conditions could be attributed to a C. diff infection on a more probable than not basis. A C. diff infection could not be considered the substantial cause of Mr. Woodell's orthopedic conditions. There was no objective evidence the C. diff infection caused or aggravated the above orthopedic conditions. Dr. Davidson performed a thorough medical literature review and found no objective evidence to support Mr. Woodell's orthopedic conditions were caused by his C. diff enterocolitis. Dr. Davidson opined the September 21, 2018, work injury is not the

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[50] R. 2557-74.

substantial cause of Mr. Woodell's right and left knee musculoskeletal conditions, neck pain, or back pain.[51]

Dr. Davidson testified he conducted a record review of Mr. Woodell's case, and he reviewed approximately 400 pages of medical records and felt he had adequate information to arrive at conclusions and diagnoses pertaining to the orthopedic or the musculoskeletal components of the case. The first time there was discussion of musculoskeletal symptoms was on June 2, 2020, when Mr. Woodell reported to Dr. Price he was having bilateral knee pain. Subsequently, on September 1, 2021, Mr. Woodell underwent surgery on his right knee, and it was noted he might need surgery on his left knee as well. Neck and back pain were also listed. Dr. Davidson testified he could not attribute a C. diff infection to be a substantial factor or a substantial cause in the development of a meniscal tear or plica syndrome. After researching medical literature, orthopedic literature, and orthopedic textbooks, he was unable to find any information to link a C. diff infection to any of Mr. Woodell's orthopedic diagnoses. Dr. Davidson testified persistent diarrhea due to C. diff or IBS would not cause disk degeneration. He was able to rule out the work and the reported C. diff exposure as the substantial cause of Mr. Woodell's orthopedic musculoskeletal conditions, disability or need for medical treatment.[52]

Dr. Mohan testified by deposition taken on December 28, 2021, that Mr. Woodell's diagnosis was IBS with diarrhea, a history of bile acid diarrhea secondary to gallbladder removal, and a history of C. diff carrier state. Since there was no evidence of any mucosal damage to the inside of Mr. Woodell's intestines, it is presumed to be a C. diff carrier state. Mucosal damage to the colon is determined by endoscopic visualization and taking random biopsies of the colon, which has been done three times on Mr. Woodell, all by different providers and read by different pathologists. All have been reported as normal. Therefore, the underlying diagnosis when the endoscopic evaluation is completely normal

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[51] R. 2541-56.

[52] Dr. Darin J. Davidson Dep., Dec. 27, 2021, at 7:7-24, 8:12 – 10:1, 14:25 – 15:18, 20:2 – 21:7, 19:12-17, 23:19 – 24:1.

is IBS. Dr. Mohan explained IBS is a very chronic condition, a remitting and relapsing condition, of which the most common symptoms are lower GI abdominal pain, discomfort, cramping, and diarrhea.[53] Dr. Mohan testified Mr. Woodell's symptoms as reflected in his medical records were consistent with IBS. His gut issues had been up and down and he had been in treatment for many, many years for IBS. Dr. Mohan ruled out any reported work exposure as the cause of his current condition. The allegation was that he acquired C. diff at work, but he is colonized with C. diff, which can be acquired almost anywhere in the world. Dr. Mohan could not pinpoint a place or a time frame for when Mr. Woodell acquired C. diff. The colonoscopies, endoscopies, and biopsies show the C. diff had not caused any damage, which is why it is called colonization.

Dr. Mohan testified doctors want patients to understand IBS is a durable diagnosis and to tell other doctors they have it. Otherwise, there are a lot of unnecessary procedures and operations done. IBS cannot be seen on any type of imaging. There have been lots and lots of research done on this. IBS is a constellation of symptoms and the current definition falls under the Rome criteria, which were designed to allow doctors to recognize this as soon as possible because this will prevent them from over testing, operating, and doing unnecessary procedures and unnecessary things. The Rome IV criteria were promulgated by all of the societies, internal medicine, family practice, and gastroenterology. IBS is a constellation of symptoms without any objective evidence. Mr. Woodell's IBS preexisted the reported work exposure of September 21, 2018. Dr. Mohan ruled out any work exposure as the cause of Mr. Woodell's current condition, disability, and need for medical treatment. He stated he could not tell where Mr. Woodell got the C. diff or when he got it. However, the C. diff has not caused any damage, which is why it is called colonization. Mr. Woodell's physicians failed to distinguish between diarrhea related to C. diff and diarrhea related to IBS.[54]

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[53] Venkatachala Mohan, M.D., Dep., Dec. 28, 2021, at 6:2 – 7:13, 8:15 – 9:1.

[54] Mohan Dep., Dec. 28, 2021, at 6:12-16, 19:21 – 20:2, 14:18 – 15:22, 16:10 – 17:9, 19:14 – 21:2, 35:6-9.

Dr. Mohan testified, based on his experience and the medical literature, there was nothing that connected Mr. Woodell's gut condition and an orthopedic condition. There was no connection between chronic IBS and any degenerative orthopedic condition.[55] On February 12, 2022, Dr. Mohan's deposition was continued to allow Mr. Woodell to complete his cross-examination. Based on his review of Mr. Woodell's exhaustive medical records, there was no evidence of enterocolitis due to C. diff in his small or large intestine.[56] Mr. Woodell had a colonoscopy in 2018, showing no mucosal damage and the symptoms were continuing in 2019. Mr. Woodell had more colonoscopies, again showing no mucosal damage. This is classic for a carrier state.[57]

Ms. Mayo, infection prevention coordinator at ARH, testified at the hearing on May 18, 2022, that she reviewed how the hospital was doing with equipment cleaning, compliance with infection control guidelines for central lines and foley catheters, and isolation. She clarified whether a patient is colonized with C. diff or infected with C. diff, infection control is concerned about both situations. If a patient admitted to the hospital is known to have colonization or infection with C. diff, infection control would find out about that with stool testing if the patient has diarrhea. There is a redundant system to notify employees about the situation.[58] Mr. Woodell worked on the CVSU on the fourth floor. He was not assigned to any other floor during September 2018. Ms. Mayo checked Mr. Woodell's timecard for the ten days around the time Mr. Woodell claimed he had been exposed to C. diff and determined he did not work on any other floor aside from CVSU, except for two hours he served as a sitter with a patient in another room. This patient was not symptomatic with C. diff. Employees swipe their badges on the unit, which tracks where they work within the hospital. If they are assigned to another unit, they will swipe their badge into an electronic system as they leave their current unit and swipe it again as they enter the second unit. ARH is also able to review a patient's care team to see

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[55] Mohan Dep., Dec. 28, 2021, at 32:8-14, 33:16-20.

[56] Mohan Dep., Feb. 12, 2022, at 102:11-19.

[57] Mohan Dep., Feb. 12, 2022, at 121:9 – 122:11.

[58] May 18, 2022, Hr'g Tr. at 33:9 – 37:6.

which nurses were assigned to which patients. They can review a patient's chart to track which nurses wrote in the patient's chart. The hospital had a comprehensive log of where Mr. Woodell worked in the hospital based on the electronic system.[59]

Ms. Mayo testified there were no patients on the CVSU during the period from August 20, 2018, to September 23, 2018, who were on isolation precautions for C. diff. There were four patients who were diagnosed with C. diff in the hospital during the period from August 20, 2018, to September 30, 2018. Ms. Mayo testified Mr. Woodell could not have been exposed to these patients, as he was not assigned to their care teams, did not do any vitals or assessments on them, and did not write any progress notes on them. The only patient who tested positive for C. diff within the time Mr. Woodell alleged he was exposed to a patient with C. diff on the CVSU, was on the SPCU and was on airborne isolation. Going into those airborne isolation rooms is very restricted and someone from another unit would not be going into those rooms to assist.[60]

Ms. Mayo testified she had been in her position as the infection prevention coordinator for ARH since 2018 and during that time there had been no outbreaks of C. diff at the hospital. She also stated she inquired of human resources if any other employees had made a claim for having contracted C. diff at ARH and was told none had. Ms. Mayo testified if a patient in the hospital had symptoms of C. diff, it is not medically probable that it would not have been noted in the patient's medical record.[61]

Ms. Mayo testified Mr. Woodell worked with one patient with active diarrhea close to the time he claimed he was exposed to C. diff. The patient was diagnosed with intermittent GI upset and IBS. This patient tested negative for C. diff on September 23, 2018. The PCR test, which is part of the testing for C. diff, is extremely accurate with only a 0.1 percent chance of a false negative.[62]

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59 May 18, 2022, Hr'g Tr. at 37:11 – 39:4.

60 May 18, 2022, Hr'g Tr. at 43:24 – 47:11, 48:5-22.

61 May 18, 2022, Hr'g Tr. at 76:3-20.

62 May 18, 2022, Hr'g Tr. at 90:8 – 92:11.

The Board found that Ms. Mayo was credible.[63]

Mr. Woodell testified at the hearing on May 18, 2022, he was exposed to C. diff while taking care of one patient, whose name he could not remember, on September 21, 2018. Mr. Woodell testified this patient had C. diff, but it was never documented. Therefore, Mr. Woodell stated, when Ms. Mayo looked in the records to determine whether Mr. Woodell encountered a patient with C. diff on September 21, 2018, this information was not in the records as the patient had an unknown case of C. diff. He worked with this patient for twelve hours without being aware the patient had diarrhea. There were no precautions on the door or in the electronic medical records. There was no yellow banner on the chart. There was no diagnostic code submitted by the physician. Being unaware this patient had C. diff, he did not wear gown and gloves when going into the room. He did follow universal precautions when working with the patient. Mr. Woodell testified the patient's physician, whose name he also could not remember, did not put the C. diff code into the record. Mr. Woodell testified that at the following shift he heard the patient's physician discussing the patient with the nurse. The physician was upset that the patient was not under precautions. Mr. Woodell then notified the charge nurse that he had taken care of this patient when no precautions were in place. Mr. Woodell testified he was unaware if the patient ever tested positive for C. diff in the hospital setting. Mr. Woodell believed the physician had diagnosed the patient with C. diff, but had not entered the diagnostic code into the electronic medical records. Mr. Woodell believed this patient had C. diff based on the conversation he overheard between the patient's physician and the nurse caring for the patient on that day. Mr. Woodell was unaware if precautions were placed on the patient as he did not care for the patient again.[64]

The Board found that Mr. Woodell is very sincere in his belief he contracted C. diff on September 21, 2018, while working for ARH. The Board then stated that important inconsistencies in his testimony detracted from his credibility. In *Woodell I*, Mr. Woodell

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63 *Woodell X* at 26, No. 50.

64 May 18, 2022, Hr'g Tr. at 77:23 – 89:13.

testified he overheard the conversation between the physician and the nurse caring for the patient from whom he believes he contracted C. diff discussing the need for contact precautions being placed on that patient. When he returned to work the next day or next shift, he testified contact precautions had been placed on the patient he cared for on September 21, 2018. Subsequently, in *Woodell VII*, Mr. Woodell testified when he returned to work on the next day or next shift, he took care of another patient and was unaware whether contact precautions had been placed on the patient.[65]

3. Procedural history.

The first decision in the history of this claim is *Woodell I*, an Interlocutory Decision and Order, that dealt with the question of whether Mr. Woodell had timely reported his work injury. The Board determined he notified his charge nurse and, thus, ARH had actual notice of his exposure to C-Diff. The Board found that on September 21, 2018, Mr. Woodell developed a C. diff infection while working for ARH.[66] The Board stated ARH did not produce evidence contrary to Mr. Woodell's testimony he reported his September 21, 2018, exposure to the charge nurse, in part because ARH did not interview the charge nurse.[67]

ARH petitioned the Commission for review and the Commission remanded the matter to the Board in *Woodell II* for additional findings regarding credibility of various witnesses. In *Woodell III*, the Board found Ms. Miller's testimony lacked completeness and weight and gave her testimony little weight. The matter returned to the Commission which, in *Woodell IV*, affirmed the Board's finding that Mr. Woodell gave timely notice of his exposure to C. diff.

Both *Woodell V* and *VI* resolved various discovery disputes and were not appealed to the Commission.

On February 28, 2019, ARH filed its request to cross-examine Dr. Price on his February 18, 2019, letter that Mr. Woodell contracted C. diff while working at ARH. On

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65 *Woodell X* at 26-27, No. 52.

66 *Woodell I* at 10.

67 *Woodell I* at 10.

March 18, 2019, ARH filed its request to cross-examine Dr. Gillis regarding his letter that Mr. Woodell contracted C. diff while working for ARH, and to cross-examine Dr. Cedeno on his February 27, 2019, letter also stating Mr. Woodell contracted C. diff while working at ARH. On December 3, 2019, ARH filed its request for cross-examination of Dr. Wigington on his November 5, 2019, letter regarding the opinions he expressed.[68]

On September 21, 2020, in *Woodell VII*, the Board, relying on Dr. Price's February 18, 2019, opinion letter, Dr. Cedeno's February 27, 2019, opinion letter, and Dr. Gillis' March 13, 2019, opinion letter, found Mr. Woodell raised the presumption he had sustained a compensable injury when he acquired C. diff while working for ARH.[69] The Board denied ARH's requests to cross-examine four physicians who wrote opinion letters stating that Mr. Woodell's C. diff was contracted through his work at ARH in 2018. The Board contended that these opinion letters were medical reports and, thus, the requests for cross-examination had to be filed following the Affidavit of Readiness for Hearing, which ARH had not done. The Board then relied in part on these opinion letters in finding that Mr. Woodell contracted C. diff in the course and scope of his employment with ARH. ARH timely appealed this decision to the Commission.

In *Woodell VIII*, the Commission held the Board applied the wrong regulation because opinion letters are not medical records kept in the course of a medical practice and, thus, are subject to cross-examination under 8 AAC 45.120. The Commission found ARH's requests were timely and remanded the matter to the Board to allow ARH the right to cross-examine these doctors before their letters could be admitted into evidence. The Commission noted that the Board had also misapplied the presumption analysis by determining the credibility of ARH's evidence at the rebuttal stage. Since this issue had not been appealed, the Commission did not address this misapplication of the law.

On February 16, 2022, Mr. Woodell filed a medical summary with Dr. Price's January 27, 2022, opinion letter prepared for litigation stating he had come to the conclusion Mr. Woodell was not able to sit for thirty minutes, walk over a block, or lift

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68 R. 0168, 0173, 0392.

69 *Woodell VII* at 16-17.

over ten pounds without inflicting pain to the back, neck, and knees.[70] On February 17, 2022, ARH timely filed its request to cross-examine Dr. Price regarding the opinions expressed in his January 27, 2022, letter, the basis for these opinions, the records in the provider's possession which were a basis for his opinions, and the provider's qualifications to express such opinions.[71]

The Commission further found ARH's due process rights were violated as it had timely requested the right to cross-examine Mr. Woodell's physicians, Dr. Cedeno, on his February 27, 2019, opinion letter; Dr. Gillis, on his March 13, 2019, opinion letter; Dr. Wigington, on his December 3, 2019, opinion letter; and Dr. Price, on his February 18, 2019, opinion letter. However, Mr. Woodell had not made these physicians available for cross-examination. *Woodell VIII* remanded the matter to the Board to afford ARH the right to cross-examine these doctors.[72]

On September 14, 2021, ARH timely filed its request to cross-examine both chiropractor Dr. Carlson on his September 1, 2021, opinion letter and Dr. Price on his September 9, 2021, opinion letter. ARH wished to examine them both on their opinions expressed in their letters, the basis for these opinions, the records in their possession which were a basis for their opinions, and the provider's qualifications to express such opinions.[73]

On March 16, 2022, *Woodell IX* ordered ARH to make Dr. Mohan available for Mr. Woodell to complete his cross-examination and for Mr. Woodell to make his treating physicians, Drs. Cedeno, Gillis, Wiginton, and Price, available for cross-examination if he intended to rely on their opinion letters.[74] In order to allow Mr. Woodell to decide how to present these doctors for cross-examination, the Board, in *Woodell IX*, continued the scheduled hearing on the merits of the claim. The Board explained to Mr. Woodell that

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70 R. 2577.

71 R. 1740.

72 *Woodell VIII* at 21.

73 R. 0963.

74 *Woodell IX* at 6.

ARH had the right to cross-examine these doctors about their opinions as expressed in the letters, and it was his responsibility either to present the doctors at the hearing or to arrange for their depositions. If he were successful at hearing his expenses would be reimbursed. The Board held that these letters were not medical records kept in the regular practice of medicine, but were opinion letters prepared in the course of litigation. Thus, since ARH had requested the right to cross-examine the doctors, the letters were not admissible under a hearsay exception.

At the hearing in *Woodell X*, Mr. Woodell did not present any of the doctors for cross-examination and the four opinion letters were excluded from evidence as hearsay. Since the Board, in *Woodell VII*, had improperly relied on these letters in reaching its conclusion that Mr. Woodell contracted C. diff in the course and scope of his employment at ARH, the Board now held a hearing de novo. ARH presented several witnesses who reviewed the policies and procedures at ARH regarding C. diff, and who testified about the lack of C. diff patients in the hospital on the wards where Mr. Woodell had worked at the time of the alleged contact with a C. diff patient. The Board held that law of the case did not apply to a new hearing since the Board erroneously held that ARH did not have the right to cross-examine the doctors about their opinions and relied incorrectly on these opinion letters in reaching its conclusions. The opinion letters were excluded from evidence. The Board, in *Woodell X*, held that the preponderance of the evidence showed that Mr. Woodell could not have contracted C. diff on September 21, 2018, because there was no patient in his ward on that date who had tested positive for C. diff. His claim was denied and dismissed.

Mr. Woodell timely appealed this decision to the Commission.

4. 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.[75] Substantial evidence is relevant evidence that a reasonable mind might accept as

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[75] AS 23.30.128(b).

adequate to support a conclusion.[76] "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."[77] 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.[78] The Board's conclusions with regard to credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.[79]

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.[80] Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.[81]

5. Discussion.

In *Woodell VII*, the Board found that Mr. Woodell contracted C. diff through his work at ARH. However, the Board misapplied the law regarding a party's right of cross-examination of opinion letters, and incorrectly applied the test for determining if an employer has rebutted the presumption of compensability. The Commission remanded, finding that ARH had timely requested the right to cross-examine several of Mr. Woodell's doctors about their opinion letters.[82] The Commission held that the Board had applied the wrong regulation because opinion letters are not medical records kept in the ordinary

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[76] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994) (*Norcon, Inc.*).

[77] *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) (*McGahuey*).

[78] AS 23.30.122.

[79] AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013) (*Sosa de Rosario*).

[80] AS 23.30.128(b).

[81] *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

[82] *Woodell VIII.*

practice. A different regulation governs requests for cross-examination of non-medical records. The Commission also noted that the Board, in *Woodell VII*, incorrectly analyzed the presumption of compensability by determining credibility at the rebuttal stage. The Commission remanded the matter to the Board to allow ARH its right of cross-examination.

On remand, the Board, in *Woodell X*, determined that a hearing de novo was required and advised Mr. Woodell of his need to produce the authors of the opinion letters for cross-examination by ARH, either at hearing or by deposition. The Board further decided that since a hearing was necessary to allow ARH to cross-examine the authors of the opinion letters, the doctrine of law of the case did not apply, and a hearing de novo would be held. At the de novo hearing, Mr. Woodell did not produce any of the doctors for cross-examination. Therefore, the Board excluded the opinion letters from consideration as evidence. The Board addressed the issue of causation of Mr. Woodell's diagnosis of C. diff in January/February 2019, and found the injury did not arise out of the course and scope of his employment. The Board found Mr. Woodell had no evidence connecting his C. diff diagnosis to his employment other than his own testimony which the Board found not credible.[83] The Board dismissed his claim and Mr. Woodell timely appealed the decision to the Commission.

Mr. Woodell asserted he was exposed to C. diff while working at ARH, but the case was unrecorded, despite the testimony by Ms. Mayo that the redundant systems in place made such a possibility virtually impossible. Mr. Woodell also contended the opinion letters of Drs. Price, Gillis, Cedeno, and Wigington should have been admitted under a hearsay exception to support the diagnosis of C. diff. He further asserts that the doctrine of law of the case should have been followed, meaning that the credibility findings and the Board's conclusion that he acquired C. diff through his work at ARH in *Woodell VII* should have controlled the May 2022 hearing. Mr. Woodell also contends that the Hearing Officer was biased against him, and cites to several instances as evidence where the

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[83] *Woodell X* at 39.

Hearing Officer allowed ARH's attorney to respond to a question, which in Mr. Woodell's opinion, should have been answered by the Hearing Officer.

ARH, to the contrary, avers that the Board was correct in holding a hearing de novo to allow it to exercise its right to cross-examine the authors of the several opinion letters prepared for litigation and offered by Mr. Woodell as evidence he acquired C. diff while working at ARH. ARH states that the letters were not necessary to support the diagnosis of C. diff because ARH agreed that Mr. Woodell had been diagnosed in 2019 with C. diff. The issue before the Board was whether Mr. Woodell contracted C. diff in the course and scope of his employment with ARH, which ARH denied asserting that he did not have any exposure to a C. diff patient in September 2018. As to the claim of bias by the Hearing Officer, ARH states that Mr. Woodell failed to object to her prior to the hearing, did not object to her on the record at the hearing, and did not present any evidence of bias by her, especially anything that would have necessitated her recusal.

a. Law of the case doctrine and application.

A main contention of Mr. Woodell is that the Board, in the May 2022 hearing, should have accepted and applied, under the doctrine of law of the case, the findings of the Board in *Woodell VII.* However, the Commission reversed the Board's decision in *Woodell VII* holding that the Board erroneously applied the law and denied ARH its right to cross-examine several doctors. These doctors wrote letters for the purpose of Mr. Woodell's litigation, stating Mr. Woodell contracted C. diff while working for ARH. The Board, in *Woodell X*, found that a hearing de novo was required because the Board, in *Woodell VII*, relied on improperly admitted evidence for its decision, and law of the case did not apply.

Law of the case is a judicial doctrine to prevent re-litigation of issues decided in a previous decision in the same case.[84] In *Wolff*, the Alaska Supreme Court (Court) stated:

> The doctrine of the law of the case prohibits the reconsideration of issues which have been adjudicated in a previous appeal in the same case. . . . Even issues not explicitly discussed in the first appellate opinion, but directly

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84 *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758 (Alaska 1977)(*Wolff*).

> involved with or 'necessarily inhering' in the decision will be considered the law of the case. This doctrine is akin to the doctrine of res judicata.[85]

In addressing the application of res judicata or claim preclusion to workers' compensation cases, the Court, in *Robertson v. American Mechanical, Inc.*, held that while this doctrine applies in workers' compensation cases it is not applied as strictly in administrative proceedings as in civil litigation.[86] The Court, in *Dieringer v. Martin*, stated:

> The law of the case is both a doctrine of economy and of obedience to the judicial hierarchy. The doctrine applies to all previously litigated issues unless there are 'exceptional circumstances presenting a clear error constituting manifest injustice.'[87]

In *Beal v. Beal*, the Court held that "law of the case doctrine . . . is 'grounded in the principle of stare decisis'" and is similar to the doctrine of res judicata.[88] That is, there is a general prohibition against reconsideration of issues which have been already adjudicated in a previous appeal. Exceptional circumstances must exist to reconsider an issue already decided on appeal because of clear error which constitutes a manifest injustice.[89] The Commission, in *Failla v. Fairbanks Resource Agency, Inc.*, acknowledged that law of the case doctrine may apply in workers' compensation cases.[90]

The issue of the right of ARH to cross-examine the opinion letters of Drs. Price, Gillis, Cedeno, and Wigington was established on appeal to the Commission when it remanded that issue to the Board. The Commission held the requests were timely made and the Board had applied erroneously the wrong regulation.[91] The Commission, in its remand, overturned the Board decision in *Woodell VII.*[92]

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85 *Wolff*, 560 P.2d 763.

86 *Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 779-780 (Alaska 2002).

87 *Dieringer v. Martin*, 187 P.3d 468, 473-74 (Alaska 2008).

88 *Beal v. Beal*, 209 P.3d 1012, 1016 (Alaska 2009).

89 *Id.* at 1017.

90 *Failla v. Fairbanks Resource Agency, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 162 (June 8, 2012).

91 *Woodell VIII.*

92 *Woodell VIII.*

The doctrine of law of the case generally applies to issues determined on appeal. Therefore, it does not apply to a hearing on remand of a prior Board decision. The Commission's remand established the issues to be determined and, in this case, the remand undid the findings of fact and credibility findings in *Woodell VII.* The Commission remanded to the Board to rehear the matter after allowing ARH its right to cross-examine the authors of the opinion letters. The findings of fact and legal decisions in *Woodell VII* were to be reconsidered, applying the correct legal principles. Since *Woodell VII* relied on inadmissible evidence to make its factual and credibility findings, a new hearing de novo was required. Mr. Woodell was obligated to provide the authors of the opinion letters for cross-examination, and was told if he did not, the letters would be excluded from evidence. He was unable or declined to make the authors of the opinion letters available for cross-examination. Therefore, the Board rightfully excluded these letters from evidence. If ARH were not allowed to relitigate the issue of causation, it would result in a manifest injustice because ARH's due process rights would have been violated. The Board held, "[w]here a party is unable to present its case because of a significant denial of its right to due process, that party is entitled to a hearing de novo."[93]

The Board correctly found that the doctrine of law of the case did not apply to the hearing on remand.

b. Causation is the issue, not whether Mr. Woodell was diagnosed with C. diff.

The Board denied and dismissed Mr. Woodell's claim for benefits for C. diff which he asserts arose from his employment with ARH. The Board reaffirmed its oral order excluding the opinion letters of Drs. Price, Cedeno, Gillis, Wigington, and Carlson because these letters were prepared in support of Mr. Woodell's workers' compensation claim. These letters were not medical records prepared in the course of medical treatment. These letters were hearsay being offered for the truth of the matter asserted, i.e. that Mr. Woodell was infected with C. diff through his work at ARH. As such, ARH properly

[93] *Woodell X* at 37, citing *Nash v. Matanuska-Susitna Borough,* 239 P.3d 692, 698 (Alaska 2010).

had the right to cross-examine the doctors regarding the basis for their opinions. Mr. Woodell did not provide ARH with this right of cross-examination by either scheduling depositions of the doctors or having the doctors testify at hearing. Therefore, these letters were properly excluded from the record.[94]

Since the Board, in *Woodell VII*, had relied on these opinion letters in reaching its conclusion that Mr. Woodell was exposed to C. diff while working for ARH, the Board, in *Woodell X*, held a hearing de novo. The four opinion letters were excluded from consideration by the Board because ARH had properly requested its right to cross-examine these doctors about the basis of their opinions. Mr. Woodell had the right to ask these doctors to testify at the hearing; he also had the right to proceed to hearing without the opinion letters being in evidence. He did not present the doctors and elected to go forward to hearing without the opinion letters being considered.

Mr. Woodell contends the Board did not discuss his medical records which show that he was diagnosed with C. diff. However, the question before the Board was whether Mr. Woodell was exposed to C. diff during the course and scope of his work at ARH and, thus, leading to his diagnosis. ARH admitted he had been diagnosed and treated for C. diff. The question before the Board was whether he contracted C. diff at work.

At the hearing de novo, the Board applied the presumption of compensability analysis to Mr. Woodell's claim. The first step in the analysis requires the injured worker to establish a preliminary link between work and the injury.[95] The injured worker must adduce "some minimal" relevant evidence to establish this preliminary link.[96] Credibility of evidence is not considered at this step. If the claim is a highly technical medical issue

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[94] *See, Employers Commercial Union Ins. Group v. Schoen*, 519 P.2d 819 (Alaska 1974) holding that the statutory right of cross-examination is absolute; *Commercial Union Ins. Cos. v. Smallwood*, 550 P.2d 1261 (Alaska 1976) holding that a party must provide the opposing party with an opportunity to cross-examine the author of a medical report.

[95] AS 23.30.120(a); *See*, *McGahuey*, 262 P.3d 613, 620; *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987).

[96] *McGahuey*, 262 P.3d 613, 620.

medical evidence may be required to establish the link.[97] The Board found that C. diff is a highly technical issue, and medical evidence was necessary. Therefore, Mr. Woodell's assertion that he contracted C. diff through his work was probably insufficient. However, the Board allowed this testimony plus the physicians' reliance on his reports regarding how he believed he contracted C. diff as sufficient to raise the presumption.[98] Credibility of witnesses is not weighed at this step.[99]

Once the presumption of compensability is established, the employer must rebut the presumption with substantial evidence of either an alternative explanation that excludes work-related factors as a substantial cause of the need for medical treatment, or substantial evidence that eliminated any reasonable possibility that work was a factor in causing the disability.[100] Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion.[101] Credibility is not weighed at this step, but the evidence is viewed in isolation without regard to the injured worker's evidence.[102]

To rebut the presumption, ARH presented Ms. Mayo's testimony, which was unequivocal and not contradicted, that there were no C. diff patients in the hospital nor on the ward at the time Mr. Woodell asserts he was exposed to C. diff (September 21, 2018). The Board held that her testimony standing alone rebutted the presumption by establishing that it was not possible for Mr. Woodell to contract C. diff on that date at ARH.

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97 *See, Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

98 *Woodell X* at 37-38.

99 *Resler v. Univ. Servs., Inc.*, 778 P.2d 1146, 1148-1149 (Alaska 1989).

100 *See, Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-612 (Alaska 1999) (*Tolbert*); *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016) (*Huit*).

101 *Tolbert*, 973 P.2d 603, 611-612.

102 *Norcon, Inc.*, 880 P.2d 1051, 1054; the Commission notes that in *Woodell VII*, the Board erroneously found that ARH had not rebutted the presumption because the Board weighed and found not credible ARH's evidence at this step.

Once ARH rebutted the presumption, the burden of proof shifted back to Mr. Woodell to prove by a preponderance of the evidence that he contracted C. diff while working at ARH on September 21, 2018.[103] At this step the credibility of the evidence is weighed. Mr. Woodell needed to "induce a belief" that the facts asserted are probably true.[104]

The only evidence proffered by Mr. Woodell was his own testimony that he overheard a doctor and a nurse talking about a patient he thought he had worked with the day before who was diagnosed with C. diff. Mr. Woodell, in his latest appeal brief, asserts he participated in the conversation between a doctor and a nurse about a patient having been diagnosed with C. diff the day after his alleged exposure. However, on August 20, 2020, he testified several times that he merely overheard a conversation. "And then it wasn't until the next shift, it wasn't actually even my patient at that time, when I overheard that this patient had had C. diff and the precautions needed to be replaced."[105] At the hearing on May 18, 2022, Mr. Woodell then testified that he was involved in the conversation between the doctor and the nurse that the doctor had diagnosed the patient with C. diff.[106] He added he overheard a conversation and then became part of it.[107] He also offered the four excluded opinion letters from various treating doctors stating that he probably contracted C. diff through his work via unprotected exposure to a patient diagnosed with C. diff.

The Board found that the discrepancies in Mr. Woodell's testimony made him not credible. Since the earlier hearing was closer in time to the actual events, it makes sense that the Board would rely on Mr. Woodell's original testimony that he overheard a conversation which led him to believe that he had been exposed to C. diff.

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103 *See, e.g., Huit*, 372 P.3d 904.

104 *Saxon v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

105 August 20, 2020, Hr'g Tr. at 40:25 – 41:3; See also, 42:17-20; 49:22-25, 50:5-12, 53:18 – 54:7, 56:25 – 57:4, 58:14 – 59:2.

106 May 18, 2022, Hr'g Tr. at 87:8-12.

107 May 18, 2022, Hr'g Tr. at 88:10-21.

Furthermore, Mr. Woodell admitted that it was his position that the reason there was no record of his being around a patient with C. diff on September 21, 2018, was because it was "an unknown case of C. diff."[108] In fact, Ms. Mayo was recalled to clarify whether any patients cared for by Mr. Woodell had diarrhea, intermittent GI upset, and irritable bowel syndrome. Her testimony stated there was one patient who was tested for C. diff on September 23, 2018, and the tests were negative.[109]

The Board also noted the excluded physicians' letters were based on Mr. Woodell's own testimony which the Board found not credible, and the doctors provided no basis for their opinions other than Mr. Woodell's own reports to them.

The Board found Ms. Mayo to be credible and relied on her testimony regarding hospital protocols for recording and tracking C. diff in the hospital. The Board also relied on the medical testimony of Dr. Bardana and especially his description of Mr. Woodell's long history and struggle with IBS. Similarly, the Board found Drs. Mohan and Davidson to be credible and gave weight to their testimony. These findings of credibility are binding on the Commission.[110]

The Board's finding that Mr. Woodell did not prove his claim by a preponderance of the evidence is supported by the substantial evidence of Drs. Bardana, Mohan, and Davidson and the testimony of Ms. Mayo. The Board's decision is affirmed.

c. Bias of Hearing Officer.

Mr. Woodell asserts in his brief that the Hearing Officer, Ms. DeMarsh, was biased in her demeanor to him. He lists several instances from the transcripts of the prehearing and May 18, 2022, hearing to support his claim that she deferred to ARH's counsel and showed disdain for him. The specific instances are found in the transcripts as follows:

Jan. 20, 2022, prehearing at 14:15, 17:15-16, 40:5-6, 41:23.

May 18, 2022, hearing at 6:15, 8:10-12, 54:1-2.

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108 May 18, 2022, Hr'g Tr. at 79:9-19, 80:18-25.

109 May 18, 2022, Hr'g Tr. at 90:8-16.

110 See AS 23.30.122; *Sosa de Rosario*, 297 P.3d 139.

At the prehearing, Ms. Schwarting, in response to a position being stated by Mr. Woodell, stated, "that's a substantive issue" to which Ms. DeMarsh replied, "Yeah, that's a separate issue."[111] The next instance Mr. Woodell cites is his questioning the addition of an EME physician when Ms. Schwarting interjected that "I think we're going into the" to which Ms. DeMarsh responded, "We are. We are." Ms. DeMarsh then reminded Mr. Woodell the issue was ARH's right to cross-examine his doctors regarding their opinion letters and advising him that the letters will be excluded, if the doctors do not testify at hearing or by deposition.[112] A third instance is in response to Mr. Woodell's question about what happens to the September 2020 decision and order and Ms. Schwarting stated, "I think that's a difficult question to answer," to which Ms. DeMarsh stated, "It is a difficult question. And one of the things that I was going to request that the parties do is submit briefing on whether that is the law of the case, whether those credibility findings are the law of the case, because the Appeals Commission say they cannot . . . question the Board's findings on credibility, but we're not sure about the Board."[113]

Moreover, like his objections to Ms. Schwarting's statements at the prehearing, the Commission found nothing improper in the three statements Mr. Woodell delineated. The May 18, 2022, transcript, at page 6, showed the Hearing Officer allowed Ms. Schwarting to continue to explain her objection to a question. The Hearing Officer then allowed Mr. Woodell to speak to ARH's objections.[114] The transcript, at page 8, indicated that after Mr. Woodell's statement about admission of the opinion letters, the Hearing Officer allowed Ms. Schwarting to respond.[115] The transcript, at pages 53 through 54, showed Ms. Schwarting responding to Mr. Woodell's questioning of her witness and the Hearing

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[111] Jan. 20, 2022, Hr'g Tr. at 14:15-17.

[112] Jan. 20, 2022, Hr'g Tr. at 17:15-23.

[113] Jan. 20, 2022, Hr'g Tr. at 40:5-14.

[114] May 18, 2022, Hr'g Tr. at 6:16 – 8:6.

[115] May 18, 2022, Hr'g Tr. at 8:10-12.

Officer allowing her to explain her objection.[116] None of these examples show any bias on the part of the Hearing Officer and do not meet the grounds for recusal of a hearing officer.

In his brief, Mr. Woodell states he spoke to the Technician (Tech) at the Board who told him he needed to ask the Hearing Officer to recuse herself at the hearing. The Tech then advised him that Ms. DeMarsh would be retiring before the hearing. At the April prehearing, Ms. DeMarsh clearly indicated she would be conducting the hearing. Between the prehearing and the hearing, Mr. Woodell did not seek to recuse Ms. DeMarsh. As Mr. Woodell noted, she did conduct the hearing, but Mr. Woodell did not ask her to recuse herself. There was opportunity at the beginning of the hearing for him to do so, if he wished, when the Hearing Officer asked the parties about preliminary issues to be addressed. He did not raise the issue. His objection now that the Hearing Officer was biased is untimely. Nonetheless, the Commission reviewed each of his objections to the conduct of the Hearing Officer and found no evidence of bias or disdain for Mr. Woodell.

The Alaska Administrative Procedures Act (APA) provides for the mechanism for asking a hearing officer to withdraw from a case.[117] The APA provides the mechanism for seeking disqualification.

> A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. If the request concerns an agency member the issue shall be determined by the other members of the agency. If the request concerns the hearing officer, the issue shall be determined by the agency when the agency hears the case with the hearing officer, and by the hearing officer when the officer hears the case alone. An agency

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[116] May 18, 2022, Hr'g Tr. at 53:10 – 54:2.

[117] The APA applies if the Alaska Workers' Compensation Act (Act) does not have a specific statute governing a particular situation. See, AS 44.62.330. The Act does not have a provision for seeking disqualification of a hearing officer.

> member may not withdraw voluntarily or be disqualified if the disqualification would prevent the existence of a quorum qualified to act in the particular case.[118]

Mr. Woodell did not file an affidavit stating why he believed the Hearing Officer could not be fair and impartial prior to the hearing. He likewise did not orally request another hearing officer at the beginning of the hearing in May 2022.

Generally, to demonstrate a bias in the hearing officer which would result in an unfair hearing, evidence must establish by objective facts that bias exists. Objective facts are such that a fair-minded person could determine an appearance of partiality on the part of the hearing officer.[119] The Court has stated that to show bias "a party must show that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence."[120] The Court continued that "[a]dministrative agency personnel are presumed to be honest and impartial until a party shows actual bias or prejudgment."[121] The ruling by a judge against a party is not evidence of judicial bias and a greater showing must be made.[122]

Mr. Woodell may believe that statements made by Ms. DeMarsh were somehow demeaning, but his belief is not objective evidence. A reading of the statements does not demonstrate any evidence of hostility towards him. He presented no objective evidence of bias, and he has not shown any actual bias on the part of the hearing officer here. The Commission denies his claim of bias by Hearing Officer DeMarsh.

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118 AS 44.62.450(c).

119 See, *Municipality of Anchorage v. Faust*, Alaska Workers' Comp. App. Comm'n Dec. No. 078 at 28 (May 22, 2008).

120 *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).

121 *Id.*

122 *Patterson v. Cox*, 323 P.3d 1118, 1123 (Alaska 2014)(citation omitted).

6. Conclusion and order.

The Board's decision is AFFIRMED.

Date: ____*19 April 2023*______ 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. 302 issued in the matter of *Kade Woodell v. Alaska Regional Hospital and Indemnity Insurance Company of North America*, AWCAC Appeal No. 22-012, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 19, 2023.

Date: *April 21, 2023*

Signed

K. Morrison, Appeals Commission Clerk