Alaska Workers' Compensation Appeals Commission

Kevin J. DeNino,
Appellant,

vs.

Yukon Flats School District, and Alaska Public Entity Insurance,
Appellees.

Final Decision
Decision No. 072 February 27, 2008

AWCAC Appeal No. 07-008
AWCB Decision No. 07-0022
AWCB Case No. 200206420

Appeal from Alaska Workers' Compensation Board Decision No. 07-0022, issued February 14, 2007, by the northern panel at Fairbanks, Alaska, William Walters, Designated Chair, Thomas V. Zimmerman, Member for Industry, Damian J. Thomas, Member for Labor.

Appearances: Kevin J. DeNino, pro se, appellant. Michael A. Budzinski, Russell, Wagg, Gabbert, and Budzinski, P.C., for appellees Yukon Flats School District and Alaska Public Entity Insurance.

This decision has been edited to conform to technical standards for publication.

Commissioners: John Giuchici, Stephen T. Hagedorn, Kristin Knudsen.

By: Kristin Knudsen, Chair.

This is an appeal of a decision denying a workers' compensation claim for a carbon monoxide poisoning injury. The employee argues that certain medical reports should have been excluded under Alaska Rule of Evidence 404 because they contained attacks on his character. We conclude that the reports are not character evidence nor were they offered for an improper purpose. The employee also argues that the employer did not produce substantial evidence to overcome the presumption of compensability because the evidence was doubtful or not qualified scientific evidence; we reject this argument because the evidence offered to overcome the presumption, examined in isolation, was sufficient to eliminate the reasonable possibility that the employee's symptoms were due to carbon monoxide poisoning. The board's findings

are supported by substantial evidence in light of the whole record. We affirm the board's decision.

1. Factual background.

Kevin DeNino obtained a teaching credential through National University in San Diego[1] in 1992 and began working on short contracts and as a substitute teacher. He taught at a number of schools in Southern California. In 2001 he was hired to teach at Fort Yukon by the Yukon Flats School District. He taught ninth grade general science, introduction to biology, and biology.[2] He also taught two physical education classes.[3]

DeNino rented a log cabin in Fort Yukon.[4] It was a one-room cabin with partial walls for the bathroom and bedroom.[5] He had an oil-fueled monitor for heat, and a propane stove-oven and hot water heater.[6] The cabin was owned by David Bridges;[7] the rent was paid by his employer through a payroll deduction.

After his first semester teaching, DeNino went to San Diego and the Seattle area for winter break.[8] He was gone about two and one-half weeks.[9] He turned off the propane to his appliances before he left.[10] On his return to Ft. Yukon, he was picked up by David Bridges and taken to his rented cabin.[11]

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1 DeNino Depo. 4:14-16.

2 Hrg Tr. 98:25 – 99:2.

3 Hrg Tr. 93:14-15.

4 Hrg Tr. 48:12-13, 17-18.

5 Hrg Tr. 42:11-15.

6 Hrg Tr. 42:19-24.

7 Hrg Tr. 92:14-16.

8 Hrg Tr. 105:21-106:6.

9 Hrg. Tr. 90:23-24.

10 Hrg Tr. 90:25-91:3.

11 Hrg Tr. 92:13-21.

DeNino stated that when he stepped into the cabin he collapsed.[12] He quickly regained consciousness, and tried to push himself up, but collapsed again.[13] He crawled to his bed, which was next to the door, and slept for an hour.[14] He then tried to push himself off the bed, collapsed again, and, too disoriented to walk, crawled out of the cabin, leaving the inner and arctic entrance doors open.[15] He immediately "came conscious."[16] He then reentered the cabin, quickly put his things away and left to prepare to teach.[17]

DeNino testified that over the next four months, he suffered a "flu" he could not shake and pounding headaches and his respiratory problems seemed to worsen, but that he always seemed to recover if he was outside the cabin.[18] He also once in late February "lost all bowel movements."[19] In this episode, he lost consciousness upon entering his cabin, recovered, lost consciousness again, and his bowels released.[20] He read about carbon monoxide poisoning in one of his textbooks, and he was told by one of his fellow teachers that it was a common problem in rural Alaska.[21] He began to air out his cabin, but he still had headaches and flu symptoms.[22]

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12 Hrg Tr. 43:5-6.

13 Hrg Tr. 43:8-9.

14 Hrg Tr. 43:10-12.

15 Hrg Tr. 43:12-16.

16 Hrg Tr. 43:18.

17 Hrg Tr. 43:19-25.

18 Hrg Tr. 44:1-7.

19 Hrg Tr. 44:11-12.

20 Hrg Tr. 102:3-7.

21 Hrg Tr. 44:13-21.

22 Hrg Tr. 104:14-15, 105:18-19.

Finally, in April, he became unconscious "for about the eighth time."[23] He quickly recovered, but discovered he was out of propane when he tried to cook a meal.[24] He also discovered that his formerly clean oven had developed a "large heavy soot build up."[25] He had just put in a full bottle of propane a few weeks earlier, so he went to check the bottle and found a crack in the line.[26] He patched the line with electrical tape and duct tape himself,[27] and used the stove to cook dinner before turning the propane off.[28] The next morning, he turned on the propane to take a shower, then turned it off again.[29] He submitted a work order to someone at school district headquarters that day, and came home at the end of the day to find a new line, his stove open, and soot on his new carpet.[30] He asked Peter Sampson, who worked for the school district, about the stove, and was told "the worker had adjusted the regulator on the oven pilot."[31] After reading about carbon monoxide poisoning, he filed a workers' compensation notice of injury with his school principal.[32] DeNino asserts that he was poisoned by carbon monoxide produced by the old stove or oven.[33]

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[23] Hrg Tr. 44:25 – 45:1. He testified that the eight losses of consciousness were in three episodes, one in January, one in February, and one in April. Hrg Tr. 102:14 – 103:2.

[24] Hrg Tr. 45:1-3.

[25] Hrg Tr. 45:3-5.

[26] Hrg Tr. 45:8-10. The bottle was in a shed attached to the cabin and the crack in the line was outside the cabin.

[27] Hrg Tr. 45:20-24. DeNino does not claim that the crack in the propane line itself caused the carbon monoxide poisoning, Hrg Tr. 115:20-24, 116:4-8.

[28] Hrg Tr. 46:1-2.

[29] Hrg Tr. 46:4-6.

[30] Hrg Tr. 46:8, 46:13-19.

[31] Hrg Tr. 46:22 – 47:2.

[32] Hrg Tr. 47:10-16.

[33] Hrg Tr. 116:9-12.

DeNino was not offered a contract for the following year.[34] After he left Alaska at the end of the school year, he sought treatment at the Veterans' Administration Medical Center in San Diego.[35] There he saw Jennifer Wong and Rashida Abbas, physicians in the Internal Medicine service, who reported DeNino

> believes he has been exposed to CO x 9mo and now believes he has s/s CO poisoning. . . . Nl CarboxyHB levels (although would only be useful for acute poisoning). . . . Appears to also have s/s c/w depression which may/not be related to present stressor.[36]

The blood test for COHB July 23, 2002, was within normal limits.[37] DeNino was hired as a teacher in Puyallup, Washington,[38] where he taught junior high science.[39] He quit in his second year there, in November 2003.[40]

DeNino testified he did not become aware of his mental deficits until after leaving the Alaska job, when he found that he was not able to do teaching tasks as well.[41] He had not found another job at the time of the hearing in January 2007.[42] He believed he was not able to perform as he once did before he was poisoned.[43] DeNino ascribed a number of different symptoms to chronic carbon monoxide poisoning, including attention deficit disorder,[44] inability to multitask,[45] loss of memory,[46]

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34 Hrg Tr. 106:20-24, 107:11-12.

35 DeNino Depo. 49:5 – 50:3.

36 SIME Records 000021 (numbered separately in board record).

37 SIME Records 000029.

38 Hrg Tr. 107:13-24.

39 DeNino Depo. 50:15 – 51:12.

40 Hrg Tr. 108:10-15.

41 Hrg Tr. 122:17-20, 123:123-11-15.

42 Hrg Tr. 108:16-19.

43 Hrg Tr. 109:16-17.

44 Hrg Tr. 109:21-23.

45 Hrg Tr. 111:23-24.

46 Hrg Tr. 112:4-6.

diarrhea,[47] muscle aches and joint pain,[48] headaches,[49] gagging,[50] fatigue,[51] emotional mood swings,[52] and incoherence, dizziness or disorientation.[53]

2. Proceedings before the board.

DeNino filed a report of occupational injury on April 18, 2002.[54] The Yukon Flats School District (District) controverted the reported injury on May 24, 2002, claiming the injury was untimely reported and did not arise out of the employment.[55] On September 3, 2002, DeNino, then represented by attorney Michael Patterson, filed a claim for benefits.[56] When the claim was filed, Mr. Patterson had a letter from David Penney, Ph.D., written to Mr. Patterson, that suggested that DeNino had suffered a serious episode of exposure that could have resulted in his death, and that his symptoms as reported were consistent with carbon monoxide poisoning.[57] The District filed an answer denying the claim for benefits September 17, 2002.[58]

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47 Hrg Tr. 112:19.

48 Hrg Tr. 113:20-22.

49 Hrg Tr. 114:1-4.

50 Hrg Tr. 114:20-21. He was not sure if the gagging was not a severe asthma attack. Hrg Tr. 114:24-25.

51 DeNino Depo. 47:15-16.

52 DeNino Depo. 47:17-18.

53 Hrg Tr. 115:12-14.

54 R. 001.

55 R. 002.

56 R. 009-10.

57 R. 0492-493. The letter states that DeNino retained Dr. Penney to provide "some initial advice and opinions regarding the carbon monoxide (CO) poisoning he sustained." DeNino corresponded with Dr. Penney by e-mail and completed questionnaires Dr. Penney sent DeNino. R. 0492. Dr. Penney's report was not filed with the medical summary (R. 0478) required to be filed with the claim. 8 AAC 45.052(a).

58 R. 014-16.

In January 2003, the District petitioned the board for an order dismissing the claim.[59] On January 28, 2003, DeNino's deposition was taken.[60] No prehearing conferences were held in 2003. On August 3, 2003, DeNino's attorney, Mr. Patterson, filed a notice of withdrawal from representing DeNino.[61]

In January 2004, DeNino filed another workers' compensation claim, listing somewhat different symptoms, but still asserting that the carbon monoxide exposure was the cause.[62] The District controverted this claim, asserting he failed to make a timely report of injury and that the injury did not arise out of and in the course of employment.[63] In an answer filed in February 2004, the employer denied liability, again because the injury did not arise out of and in the course of employment.[64]

The Workers' Compensation Division staff began a series of prehearing conferences on March 17, 2004.[65] DeNino identified his attending physician as Dr. Diller and the District's attorney agreed to respond to discovery requests and schedule employer medical examinations.[66] On May 3, 2004, DeNino was examined by Howard Lloyd, Psy.D., a clinical neuropsychologist at Good Samaritan Rehabilitation Center in Puyallup, Washington, on referral by a Dr. Dillard.[67] Dr. Lloyd commented on the relationship between his findings and carbon monoxide exposure reported by DeNino:

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[59] R. 0020-21.

[60] R. 0018-19. The deposition cover page erroneously states January 28, 2002.

[61] R. 0022.

[62] R. 0024-25.

[63] R. 0004.

[64] R. 0026-27.

[65] R. 01056.

[66] R. 01056. Although the prehearing officer's summary states DeNino identified Dr. Diller as his "primary care" physician, Dr. Diller is also identified as DeNino's attending physician on his claim. R. 0024.

[67] R. 0876-82.

> Although Mr. DeNino's cognitive deficits are mild, there is evidence of a decline in functioning relative to premorbid expectations, particularly in higher level attention and some aspects of more complex memory and executive functioning abilities. There was also evidence of slowed fine motor speed and coordination with the left hand and decreased sensory perceptual abilities with the right hand. These findings do not suggest lateralized brain dysfunction, but they do increase the probability that the identified neurocognitive deficits are due to brain dysfunction and not solely a reflection of the cognitive impact that depression and anxiety can have. Thus, while psychological factors are certainly prominent in this case and are likely contributing to Mr. DeNino's current cognitive inefficiency, other factors also appear to be influencing the current pattern of results. The literature on chronic low level carbon monoxide exposure suggests that prominent deficits in attention and memory functioning are commonly seen. However, no unique pattern of neuropsychological or neurobehavioral impairment has been consistently associated with carbon monoxide exposure. In addition to disturbances in memory and attention, the literature also reports deficits in aspects of visuospatial/perceptual functioning, apraxia, and decreased fine motor speed related to carbon monoxide exposure. A range of neurobehavioral and neuropsychiatric symptoms have also been associated with carbon monoxide exposure. Thus, it appears that the current results could be due, at least in part, to carbon monoxide exposure.[68]

At the District's request, DeNino attended examinations by Larry Friedman, Ph.D., a clinical neuropsychologist, on October 20, 2004,[69] Brent Burton, M.D., M.P.H., a medical toxicologist and specialist in occupational medicine, on October 21, 2004,[70] and Eric Goranson, M.D., a psychiatrist, on October 22, 2004.[71] Dr. Friedman reported that

> There is no objective evidence that Mr. DeNino has neuropsychological impairment. Exposure to carbon monoxide,

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[68] R. 0881.

[69] R. 0890-97.

[70] R. 0913-30.

[71] R. 0898-911. Dr. Goranson provided an addendum after reviewing Dr. Freidman's report. R. 0912.

> if it occurred, is not the reason for Mr. DeNino's current subjective report of neurocognitive dysfunction. In my professional opinion, on a more than probable basis, alleged exposure to carbon monoxide has not resulted in any neuropsychological impairment.[72]

Dr. Burton reported that "Mr. DeNino does not have any currently identifiable medical condition potentially related to carbon monoxide exposure. . . His history is inconsistent with an exposure to carbon monoxide, based on either potential source or characteristic symptoms."[73] Dr. Goranson reported that the diagnoses that he made (conversion disorder and personality disorder) had "no causal relationship" with an alleged exposure to carbon monoxide or propane, on a more probable than not basis. In his opinion, "the likelihood that such an exposure ever occurred is so extremely low as to be virtually nonexistent."[74] DeNino requested Laura Dahmer-White, Ph.D., a clinical neuropsychologist, to provide a report comparing Dr. Lloyd's report and Dr. Friedman's report.[75] She reported, after reviewing the reports, Dr. Lloyd's raw testing scores, and Dr. Friedman's raw data, that she fully concurred with Dr. Friedman's opinion that "functional rather than organic factors are responsible for Mr. DeNino's current clinical presentation."[76]

The parties agreed to a board appointed Second Independent Medical Evaluation (SIME) in a prehearing conference January 5, 2005.[77] The SIME was scheduled with Ronald Early, Ph.D., M.D., a psychiatrist, on March 14, 2005,[78] and Thomas Martin, M.D., a medical toxicologist, on March 16, 2005.[79] Dr. Martin reported that he could "say with confidence that it is more likely than not that Mr. DeNino's symptoms **did not**

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72 R. 0896-97.

73 R. 0926.

74 R. 0910.

75 R. 1006.

76 R. 1007.

77 R. 1063.

78 R. 1031-47.

79 R. 1014-30.

result from a toxic exposure in his residential cabin in January 2002 or in the intervening months until May 2002."[80] He did "not think he suffered from acute and/or chronic carbon monoxide exposure or propane intoxication or asphyxiation."[81] He believed that DeNino's "numerous symptoms . . . are more likely than not due to a behavioral problem such as malingering or psychiatric problem such as somatoform disorder, depression or anxiety disorder."[82] Dr. Early agreed that it was more probable than not that DeNino did not experience any form of carbon monoxide or other toxic fume exposure.[83] He believed that it was much more likely that an anxiety related tachycardia caused him to faint.[84] Dr. Early did not believe that DeNino was malingering, but that his belief that he was poisoned by carbon monoxide, and his fear of permanent cognitive damage, was genuine.[85] Dr. Early opined that no relationship existed between DeNino's symptoms and carbon monoxide or propane.[86] He recommended psychotherapy with a psychiatrist who recognizes the "psychobiological basis of the emotional disorder as well as the secondary cognitive dysfunctions, so that the issue of carbon monoxide toxicity can be appropriately dismissed."[87]

DeNino filed a third claim on August 29, 2006.[88] This time he reported the cause of his injury as "chronic carbon monoxide poisoning due to unvented stove/oven and the oven pilot light not adjusted correctly."[89] This claim was controverted September 13, 2006,[90] and answered September 15, 2006.[91] DeNino filed his first

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80 R. 1029. Emphasis in original.

81 R. 1029.

82 R. 1030.

83 R. 1046.

84 R. 1045.

85 R. 1046.

86 R. 1047.

87 R. 1047.

88 R. 0045-46.

89 R. 0045.

90 R. 0006-7.

request for hearing on September 21, 2006, listing all three claims.[92] On September 29, 2006, the District filed an amended answer to the 2002 and 2004 claims, asserting that DeNino had not filed a request for hearing of those claims on time, so that they were dismissed under AS 23.30.110(c).[93] The District filed a similar amended answer to the 2006 claim.[94]

In a prehearing conference on October 9, 2006, the parties agreed to a hearing on January 11, 2007. The conference chair noted that the "statute of limitations defense remains as asserted to original claim."[95] The District filed a formal petition to dismiss the claims pursuant to AS 23.30.110(c) on October 23, 2006.[96] DeNino's response argued that any delay was owing to the District's delays in responding to his discovery requests.[97]

Shortly before the hearing, on December 26, 2006, DeNino filed a petition asking the board to "sanction" Dr. Burton for failing to respond to his request for his hand-written notes.[98] DeNino also filed a voluminous collection of documents, authored and anonymous, as evidence, including numerous internet articles.[99] In response, the employer requested the right to cross-examine some of the authors of articles and statements.[100] In response, DeNino "acknowledge[d] your right to cross-examination" and, to "facilitate" the right, gave some telephone numbers where some people could be contacted, and explained he did not know how to contact others.[101]

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91 R. 0047-49.

92 R. 0050.

93 R. 0053-54.

94 R. 0056-57.

95 R. 01245.

96 R. 0058-59.

97 R. 0060-61.

98 R. 0070-71.

99 R. 0072-451.

100 R. 0452-57.

101 R. 0458-9.

At hearing, the employer presented Dr. Goranson as a witness.[102] DeNino testified on his own behalf at length.[103] DeNino stated he would call Dr. Lloyd and Dr. Diller,[104] but he was unsuccessful in reaching his witnesses by telephone at the hearing.[105] He was offered the opportunity to telephone his witness, Dr. Diller, again, but DeNino did not say that he wanted to call him.[106] The board chair asked DeNino if his evidence was complete and he wanted to do closing argument; DeNino offered no additional evidence, but offered a brief closing statement.[107]

3. The board's decision.

The board heard this case on January 11, 2007, but did not close the record until it had an opportunity to review DeNino's additional documents.[108] The board identified the issues before it as whether DeNino was entitled to certain benefits, rather than the legal or factual issues presented by the parties.[109] Although it acknowledged DeNino's argument that Fort Yukon is a "remote site," so that all his activities should be considered to have arisen from his employment,[110] and the District's argument that the claim was time-barred under AS 23.30.110(c),[111] in its analysis, the board focused on whether DeNino's claim for medical treatment of his symptoms arose out of and in the

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[102] Hrg. Tr. 18:3-40:4. The board took Dr. Goranson's testimony out of order owing to his limited availability, without objection, allowing DeNino the same opportunity. Hrg Tr. 7:12-8:23, 40:13-40:20. DeNino did not schedule a time certain for testimony with his witnesses, Hrg Tr. 8:10-12, and elected to put his own testimony in before calling his witnesses. Hrg Tr. 40:16-20.

[103] Hrg Tr. 41:2–64:16, 66:11-87:14, 88:18-124:21.

[104] Hrg Tr. 65:11-15.

[105] Hrg Tr. 125:7-126:2.

[106] Hrg Tr. 152:19-153:4.

[107] Hrg Tr. 153:13-155:11.

[108] *Kevin J. DeNino v. Yukon Flats Sch. Dist.,* Alaska Workers' Comp. Bd. Dec. No. 07-0022, 1 (February 14, 2007) (W. Walters).

[109] *Id*.

[110] *Id*. at 9.

[111] *Id.* at 10.

course of employment.[112] Without considering whether the cabin was employer-provided housing, as DeNino claimed, or a personal residence brokered by the District as a convenience to new teachers, the board's analysis began with addressing the causal relationship between the alleged carbon monoxide exposure and DeNino's "complex, subtle symptoms at a time remote" from the exposure.[113]

The board began by finding that DeNino's claim concerned a "highly technical area of medicine," and concluding that medical evidence was necessary to attach the presumption of compensability.[114] The board considered that the medical records and opinions of Drs. Dillard and Nessan, and the psychological opinions of Drs. Penney and Lloyd, provided sufficient evidence to attach the presumption.[115] Then, evaluating the evidence produced in rebuttal in isolation, as required by *Veco, Inc. v. Wolfer,*[116] the board found that the two toxicologists, Dr. Martin and Dr. Burton, opined that the symptoms described by DeNino are not consistent with carbon monoxide poisoning. The board stated, citing to *DeYonge v. NANA/Marriott,* [117] that these reports "eliminate exposure to carbon monoxide while working for the employer as a possible cause of the employee's symptoms."[118]

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[112] *Id.* at 11.

[113] *Id.* We note as well that the board correctly applied the law in effect at the time of the claimed injury.

[114] *Id.* (citing *Burgess Constr. Co. v. Smallwood,* 623 P.2d 312 (Alaska 1981)).

[115] *Id.* at 12. David G. Penney, Ph.D., is self-described as a "Director of Surgical Research and Professor of Physiology." R. 0492. The board may have confused his name with Penny Tanner, Ph.D., a psychologist who evaluated DeNino in January 2005. R. 0867.

[116] 693 P.2d 865, 869 (Alaska 1985).

[117] 1 P.3d 90, 96 (Alaska 2000).

[118] *Kevin J. DeNino v. Yukon Flats Sch. Dist.,* Dec. No. 07-0022 at 12.

The board, after reciting that the employee bore the burden of proof of all elements of his claim once the "presumption of continuing compensability"[119] had been rebutted, made the following findings:

> Accordingly, we have reviewed the entire medical and hearing record. We find the great preponderance of the evidence in the available medical record, especially the medical records and opinions of Drs. Martin and Burton, the psychiatric opinions of Drs. Early and Goranson, and the psychological opinions of Drs. Dahmer-White and Friedman, indicate the employee's symptoms are not related to carbon monoxide exposure while working for the employer, but result from functional psychological or personality disorders. Accordingly, we conclude the employee's condition is not work related, and not compensable under the Alaska Workers' Compensation Act. We must deny and dismiss the employee's claim for medical benefits related to carbon monoxide exposure.[120]

Having determined that DeNino's symptoms were not causally related to his employment, the board also denied his claims for compensation, reemployment benefits, interest, attorney fees, and costs.[121] Because the illness was not work-related, the board found that the disputes regarding application of the remote site doctrine, whether the cabin was an employer-provided facility, or whether the DeNino filed a timely request for hearing were moot.[122] DeNino's claim was denied and dismissed. This appeal followed.

4. Standard of Review.

When reviewing appeals from final board decisions, the credibility determinations by the workers' compensation board of a witness before it are binding on the

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[119] *Id.* Although the board referred to a presumption of "continuing compensability," the employer had not admitted liability for a work-related injury and paid compensation; however, the board correctly applied the presumption of compensability to this case.

[120] *Kevin J. DeNino v. Yukon Flats Sch. Dist.,* Dec. No. 07-0022 at 13.

[121] *Id.*

[122] *Id.*

commission.[123] The board's findings regarding the weight to be given a witness's testimony, including medical testimony and reports, is conclusive.[124] If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings. Because the commission makes its decision based on the record before the board, the briefs filed on appeal, and oral argument to the commission,[125] no new evidence may be presented to the commission regarding the merits of the appeal. Whether the evidence the board relied on is "substantial evidence," and whether the board applied the proper legal analysis to the facts, are matters of law to which we are required to apply our independent judgment.[126]

5. Discussion.

DeNino's arguments on appeal may be grouped together as two main arguments. First, DeNino claims that statements by Dr. Burton, Dr. Friedman and Dr. Goranson in their reports were attacks on his character, and so the reports should not have been admissible under Alaska Rule of Evidence 404.[127] Second, he argues that all the other adverse evidence suffers either from reliance on Dr. Burton's and Dr. Goranson's opinions, or a failure to qualify as scientific evidence. Therefore, because only Dr. Diller's report "meets these standards and is backed by scientific medical studies,"[128] he argues that the presumption should not have been overcome, or that his evidence should have been given greater weight, when combined with his testimony, as in *AT&T Alascom v. Orchitt*.[129] He argues that because he has raised

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123 AS 23.30.128(b).

124 AS 23.30.122.

125 AS 23.30.128(a).

126 AS 23.30.128(b).

127 Appellant's Br. at 18-19.

128 *Id.* at 20-21.

129 161 P.3d 1232, (Alaska 2007); Appellant's Br. at 21.

doubts as to the evidence produced by the employer, the medical evidence should be resolved in his favor.[130] We address each argument in turn.

a. Alaska Rule of Evidence 404 does not require the exclusion of physician testimony.

DeNino devoted significant portions of his brief to defending what he believed were attacks on his character by Dr. Goranson and Dr. Burton.[131] He accused Dr. Goranson of "unmitigated gall and mischievous intent," being "particularly offensive,"[132] and lying to the board.[133] He wrote that Dr. Burton's "primary job . . . is to callously discredit Workers' Compensation IME medical diagnosis" and that he "deliberately belittles my statement."[134] He also calls Dr. Burton a liar.[135] DeNino condemned Dr. Friedman's report as having an offensive subtext and lacking supportive data.[136] He says Dr. Friedman was "freed from any academic or professional scruples" and he produced "creative writing and 'junk science.'"[137] "[S]everal medical consultants," DeNino wrote, "felt free to indulge in gratuitous and unwarranted character assassination, including direct assaults on my credibility and character."[138] DeNino argues that Alaska Rule of Evidence 404 prohibits the board's use of these reports.

DeNino misunderstands the purpose of Alaska Rule of Evidence 404, which is to prohibit the use of character evidence to prove conduct on a particular occasion, with

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130 Appellant's Br. at 21, (citing *Beauchamp v. Employers' Liab. Assurance Corp.,* 477 P.2d 993 (Alaska 1970)).

131 Appellant's Br. at 8-16.

132 Appellant's Br. at 15.

133 Appellant's Br. at 14.

134 Appellant's Br. at 8.

135 Appellant's Br. at 10.

136 Appellant's Br. at 17.

137 Appellant's Br. at 18.

138 Appellant's Br. at 18-19.

certain exceptions.[139] It does not bar evidence that contradicts a party's testimony and thus may suggest the party is lying, or that presents relevant evidence of motive or intent, or that contradicts a party's theory of causation. Character evidence is a record or testimony regarding a party's known character traits before the event or party conduct in question.[140]

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[139] Alaska Rule of Evidence 404 provides, in pertinent part:

> Rule 404.
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> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible *for the purpose of proving that the person acted in conformity therewith on a particular occasion*, except:
>
> (1) *Character of Accused.* Evidence of a relevant trait of character offered by an accused, or by the prosecution to rebut the same;
>
> (2) *Character of Victim.* Evidence of a relevant trait of character of a victim of crime offered by an accused, or by the prosecution to rebut the same, ...
>
> (3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) Other Crimes, Wrongs, or Acts.
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> (1) Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. It is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[140] For example, if Joe's neighbor testifies, "Joe was terribly careless, always hurting himself with machinery – why he couldn't gas up a snow blower without starting a fire. As long as I've known him, he never paid attention to instructions, or when people tried to show him how to do anything," the neighbor's testimony is evidence of a "careless" character and a character trait of "not paying attention to instruction." The neighbor's testimony cannot be admitted in Joe's lawsuit for injuries due to an exploding car tire to prove that Joe did not read his car manual before inflating his tires and or that Joe carelessly overinflated the tire so that it exploded. Evidence that Joe is generally careless cannot be used to prove that Joe was careless on a specific day, or that Joe did a specific task carelessly on a particular occasion. On the other hand, if

The District did not offer the expert opinions of Dr. Goranson, Dr. Burton and Dr. Friedman to prove that DeNino engaged in certain conduct at a particular date and time. The employer did not contest DeNino's account of DeNino's specific conduct in January, February and April 2002.[141] The District did not bring forward a witness to testify that DeNino frequently reacted to stress by fainting, that he had often claimed to be more ill than he really was, that he often diagnosed himself with exotic diseases based on something he read, and that he made up symptoms to match his adopted disease. Such evidence would have been prohibited to show that DeNino invented his symptoms after reading about carbon-monoxide poisoning, or he overreacted to a minor illness, because it offers evidence of a character trait for the purpose of proving DeNino acted in conformity with that trait. It could, however, be offered as evidence of conduct consistent with a diagnosis of a pre-existing mental or emotional disorder.

Instead, on the basis of the events that DeNino related to them, the records, their testing, examination, knowledge and experience, Drs. Goranson, Burton, and Friedman drew certain conclusions: that the conduct (collapsing, regaining consciousness, crawling to the bed, crawling to the outside, etc.) were not caused by carbon monoxide exposure. While Dr. Burton suggested that DeNino's account was likely contrived, Dr. Friedman and Dr. Goranson did not challenge DeNino's account of what DeNino did; like Dr. Burton, they said that the events DeNino recounted were incompatible with carbon monoxide poisoning, and that DeNino's conduct could not be explained by exposure to carbon monoxide. His conduct, they said, was due to some other cause, and, based on their education, skills, training and experience, they drew conclusions as to what that cause might be. The doctors' testimony and reports were not offered to show a particular trait of DeNino's character in order to prove that DeNino engaged in the conduct described or that he did not. Their opinions were

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Joe claims that after suffering injuries due to the blown tire he is unable to follow directions, the neighbor's testimony is admissible to show that the impairment predated the injury.

[141] The collapsing incidents were unwitnessed. The School District did not produce evidence that, for example, DeNino was not at home when he claimed to be.

offered to show that DeNino's conduct, coupled with their testing, interviews and reviews of the medical records, *illustrated* the nature of his illness, which was not caused by carbon monoxide.

There is an important distinction between challenging a theory of causation and challenging veracity. If a physician says, "Arsenic does not cause hair to fall out," he is not challenging the employee's testimony that his hair fell out; he is challenging the employee's claim that *because* his hair fell out, he must have been exposed to arsenic. DeNino argues that because he had certain symptoms, he must have been exposed to carbon monoxide. When Dr. Goranson states that DeNino's story "is really unbelievable" he refers to the story that the symptoms were caused by carbon monoxide poisoning, not that DeNino is fabricating his symptoms; indeed, he later says that he does not believe DeNino is malingering, and he would be surprised to find out that he was.[142] Although Dr. Goranson candidly expressed his opinion of the physicians whose "lack of critical thinking skills" gave DeNino extensive reinforcement in his bizarre beliefs, however unbelievable the *theory* underlying DeNino's claim, Dr. Goranson stated he did not believe DeNino was consciously and fraudulently producing symptoms.[143] Similarly, Dr. Friedman's report that "functional and not organic factors" are responsible for DeNino's symptoms,[144] and that lack of internal coherence in testing results and major inconsistencies between measured levels of performance, "indicates that something other than CNS integrity is responsible for test performance,"[145] is not a statement that DeNino is willfully fabricating his illness. So far from attacking DeNino's character, both Dr. Friedman and Dr. Goranson opined that DeNino was not willfully lying to obtain benefits. Dr. Burton, while stating that DeNino's history was "most likely contrived" and that DeNino was probably malingering, was not willing to abandon the

142 R. 0908-09, 910.

143 R. 0909.

144 R. 0896.

145 R. 0895.

possibility that he was suffering from somatization disorder.[146] Dr. Burton testified in his deposition that there were no historical or objective findings that would support a diagnosis of physical disorder such as carbon monoxide intoxication or poisoning, but that "the history and findings, observations of others prompt a conclusion that a psychological disorder is responsible for the expression of [DeNino's] symptoms."[147]

Psychological and psychiatric reports may seem unflattering and be difficult to understand, especially if the subject does not seek the assistance of his own provider in interpreting what such reports mean. A physician must be able to frankly state his or her opinion regarding the cause of the injury or illness and the reasons for that opinion, however uncomfortable to the claimant. If the physician's observations, data, and knowledge of medicine lead her to the conclusion that the claimant's account of how the injury occurred is not likely to be true, the physician's report is not evidence of the claimant's bad character. It is expert opinion evidence addressing the issue of causation.

The District did not offer the reports to prove DeNino's conduct on a particular occasion. Notwithstanding DeNino's belief that unjust aspersions were cast on his character, the physicians' candid assessment that DeNino's story was not a believable account of carbon monoxide poisoning did not require the board to exclude the reports, or strike any part of the reports, as "character evidence."

b. The board's findings of fact were supported by substantial evidence in light of the whole record.

The board's decision reflects that the board applied the three part presumption analysis to DeNino's claim.[148] It found that DeNino had produced "some evidence

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146 R. 0925-26.

147 Burton Depo. 65:1-4.

148 *Kevin J. DeNino*, Dec. No. 07-0022 at 10-12. The three-part analysis begins with the statutory presumption that a claim is covered by the Alaska Workers' Compensation Act, AS 23.30.120(a). First, the employee must establish the preliminary link between his employment and his alleged injury. Once the employee establishes that link, it is the employer's burden to overcome the presumption of compensability by coming forward with substantial evidence that the injury was not work related. If the

linking the employee's symptoms with his reported carbon monoxide exposure."[149] The District does not contest this finding. DeNino makes a number of arguments that challenge the substantiality of the evidence offered to overcome the presumption or to support the board's conclusions. DeNino's arguments are not persuasive. After examining the record before the board, we conclude that the board's findings of fact were supported by substantial evidence in light of the whole record.

DeNino argues, based on his understanding of *Beauchamp v. Employers' Liability Assurance Corp.,*[150] that he has raised doubts in the medical reports of the employer's physicians and the SIME physicians, so that the substance of the evidence should be resolved in his favor. He interprets the statement that "if there is any doubt as to the substance of medical testimony, it must be resolved in favor of the claimant"[151] to mean that doubt in the evidence produced to rebut the presumption must be resolved in his favor. DeNino misunderstands the case. In *Brown v. Patriot Maintenance,*[152] the Alaska Supreme Court explained that

> As applied in *Beauchamp,* then, the rule requiring doubt to be resolved in the claimant's favor served to confirm the board's broad fact-finding discretion and to narrow a reviewing court's authority to reweigh the board's evidentiary determinations. But here, by contrast, Brown paradoxically seeks to invoke the rule for the opposite purpose: she urges us to reverse the board's decision, and thereby narrow its fact finding authority, by combing the record for signs of doubt that the board itself did not consider important. Applying the rule in this way would defeat *Beauchamp's* basic purpose.
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> *Beauchamp* is distinguishable for another important reason. In *Beauchamp* we dealt with a case involving uncertainties arising from a single expert witness's equivocal testimony. Unlike the record in *Beauchamp,* the record here includes the testimony of

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employer meets this burden then the presumption disappears and the employee must prove the claim by a preponderance of the evidence. *DeYonge,* 1 P.3d at 94.

149 *Kevin J. DeNino,* Dec. No. 07-0022 at 12.

150 477 P.2d 993 (Alaska 1970).

151 *Id*. at 997.

152 99 P.3d 544 (Alaska 2004).

> multiple medical experts who gave unequivocal opinions rejecting causation. Here, each of the medical reports the board found persuasive unequivocally expressed the opinion that Brown's condition probably was not caused by her injury; when viewed individually, then, each of these reports unquestionably presented the board with substantial evidence against finding causation. Brown thus seeks to stretch the rule of doubt beyond its original scope. She effectively insists that the rule should apply not just to intrinsic doubt emerging from a single witness's equivocal opinion, but to all doubts generated by conflicting medical testimony. As Patriot Maintenance correctly responds, a conflict between divergent medical views simply "reveals a difference in firmly held medical opinion." In prior decisions we have expressly recognized that this form of "doubt" lies beyond reach of the doubt-rule applied in *Beauchamp.* The rule requiring doubt to be resolved in the claimant's favor does not extend to Brown's situation.[153]

It does not extend to DeNino's situation either. The rule that "inconclusive and ambiguous testimony is construed in favor of the applicant applies at the rebuttal stage, when the board is charged with determining whether the employer has presented sufficient evidence to rebut the presumption of compensability."[154] Thus, if the employer relies on medical evidence to overcome the presumption that, viewed in isolation, is uncertain or inconclusive, the presumption of compensability is not overcome.[155] The evidence presented by the employer in testimony of Dr. Burton and Dr. Goranson, and the reports of Dr. Martin, Dr. Burton, Dr. Early, Dr. Goranson, Dr. Dahmer-White and Dr. Friedman all unequivocally reject causation. The presumption of compensability is overcome if a qualified expert gives an explicit opinion that the work was probably not a substantial factor in bring ing about the claimed injury.[156] The board relied specifically on the opinions of the toxicologists, Dr. Martin

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153 *Id.* at 549-550 (citations omitted).

154 *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 793 (Alaska 2007).

155 *Id.* at 793 n.48, (citing *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 235 (Alaska 1997)).

156 *See Stephens v. ITT/Felec Servs.*, 915 P.2d 620, 625-26 (Alaska 1996) (citing *Big K Grocery v. Gibson*, 836 P.2d 941, 942 (Alaska 1992)).

and Dr. Burton to find that the presumption had been overcome.[157] They unequivocally rejected the possibility that DeNino was exposed to carbon monoxide. We agree with the board that their opinions eliminate the reasonable possibility that DeNino's illness is work-related; they are sufficient to overcome the presumption of compensability.

Without the benefit of the presumption, DeNino must persuade the board by a preponderance of the evidence that his symptoms are the result of carbon monoxide exposure in 2002. DeNino argues that the board could rely on his lay testimony and Dr. Diller's report and that the weight of the evidence is in his favor. DeNino misunderstands what the board does once the presumption of compensability is overcome. The board must weigh all the evidence, and decide in favor of one or the other. In this case the board found that the "great preponderance of the evidence in the available medical record," including the opinions of Dr. Martin, Dr. Burton, Dr. Early, Dr. Goranson, Dr. Dahmer-White and Dr. Friedman, is that carbon monoxide exposure did not cause the claimant's illness.[158] We find, on reading those same opinions, that the opinions relied on by the board are substantial evidence on which a reasonable mind might rely to support its conclusions. We find that there was substantial evidence, particularly in the testimony of Dr. Burton and the reports of Dr. Martin, to support the board's findings.

DeNino argues that the board should have relied on his testimony, combined with the medical report of Dr. Diller, which he characterizes as "the only medical report that meets these [scientific] standards and is backed by scientific medical studies."[159] The board may, after weighing all the evidence, choose to rely on a combination of

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157 *Kevin J. DeNino*, Dec. No. 07-0022 at 12.

158 *Id.* at 13.

159 Appellant's Br. at 20-21. DeNino testified that he wrote 95 percent of the report, Hrg Tr. 131:7-8, and that Dr. Diller wrote nothing specifically in it. Hrg Tr. 129:12-15. DeNino testified, "He says so long as he approves of it, which he did, and he signed off on the cover sheet that all these things were true to his medical knowledge." Hrg Tr. 129:9-11.

relevant, credible lay evidence and medical evidence, if together they provide substantial evidence to support the board's findings.[160] However, the board is not required to *favor* lay testimony over medical testimony; it is required to evaluate lay testimony when the lay evidence may be highly relevant to the issue of causation, even in complex medical cases.[161] Thus, if the medical opinion evidence is based on assumptions regarding the employee's job duties, lay testimony about the job duties is relevant and must be evaluated by the board.[162] In this case, however, DeNino's testimony about his collapse on entering his cabin and the events afterwards was not challenged by the employer. The question the board decided was whether symptoms, as described by DeNino, could have been caused by carbon monoxide exposure. The board was not required to evaluate DeNino's credibility, because the physicians based their opinions on DeNino's account of what happened to him.[163]

The board is charged by the legislature with deciding what evidence has greater weight. In this case, the board explicitly relied upon the opinions of Dr. Martin and Dr. Burton, Dr. Friedman and Dr. Dahmer-White, and Dr. Goranson and Dr. Early.[164] The board found that the "great preponderance" of the medical evidence indicated that

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160 *Smith,* 172 P.3d at 790.

161 *Id.,* citing *Stephens,* 915 P.2d at 620.

162 *Stephens,* 915 P.2d at 627.

163 If the board had decided that the symptoms could have been caused by carbon monoxide exposure, the board would next have to decide if DeNino was exposed to carbon monoxide as a result of a faulty propane regulator as he claimed. This would require determining credibility; DeNino testified he was told by "Peter Sampson" that in April the worker sent to fix the propane line "adjusted the regulator on the oven pilot light." Hrg Tr. 46:20-47:2. Both Samson Peter and Sam John testified differently; Samson Peter testified he had no recollection of talking to DeNino about the repair work at his cabin. Peter Depo. 12:1-5. Sam John testified that after repairing the copper line, he lit the oven pilot light, and that was all. John Depo. 16:1-6. The regulator required no adjustment and is mounted on the propane bottle. John Depo. 16:15-22.

164 Although the board did not explain its choice in any detail, the opinions are unequivocal, coherent and consistent; reflect a complete review of available records; and are based on sound medical principles.

DeNino's symptoms were not related to carbon monoxide exposure. When the board chooses among competing medical opinions, we accept the board's determination of the weight of the evidence, so long as there is substantial evidence in light of the whole record to support the board's findings of fact. The opinions expressed by Dr. Martin and Dr. Burton, Dr. Friedman and Dr. Dahmer-White, and Dr. Goranson and Dr. Early are such relevant evidence that a reasonable mind could rely on to support the conclusion that DeNino's symptoms did not result from carbon monoxide exposure. We conclude that they are substantial evidence.

DeNino argues, for a number of reasons, that the opinions expressed by Dr. Martin, Dr. Goranson, Dr. Friedman, Dr. Burton, and Dr. Early are not acceptable as expert medical or scientific opinion. This argument has no merit. Mr. DeNino's assertion that a toxicologist must use a reference that *DeNino reports* is used in a poison control center in Washington is not a credible basis on which reject relevant medical opinion evidence, offered by national board-certified physicians with appropriate experience, training and education, on the basis of their observations, examination, testing and medical knowledge, within the area of their competence and expertise. So far from being unsubstantiated opinions, as asserted by DeNino, the reports of Dr. Martin, Dr. Goranson, Dr. Friedman, Dr. Burton and Dr. Early were substantiated by specific observations of DeNino and the objective tests he took. The physicians need not quote scientific studies or treatises to bolster their opinions in their reports if they have established their credentials to give an opinion; DeNino did not present *evidence* that they did not have such credentials.[165]

The issue before the board was whether DeNino's illness was caused by exposure to carbon monoxide; the studies of other populations that DeNino argues contradict the adverse physicians' conclusions are of little value unless DeNino

[165] DeNino repeatedly challenged Dr. Burton and Dr. Martin on their acquaintance with a book he learned about by talking to unnamed employees of a poison control center (Appellant's Reply Br. at 2). An expert, he implies, should know and agree with the book, if the expert did not, it undermines a claim to expertise. DeNino did not introduce expert testimony that the book is an authoritative and relevant treatise widely accepted in the field.

demonstrates that his circumstances match those of the population studied. For example, DeNino argues that he presented relevant, unrebutted evidence in

> Gold frank's Toxicologic Emergencies; "Gas kitchen stoves are an important source of CO in indigent populations with marginal heating systems. In fact, the use of gas stoves for supplemental [heat] is predictive of his COHB in patients with headache and dizziness."[166]

DeNino's testimony did not establish that he was an indigent person with a marginal heating system using his gas stove to supplement marginal heat. DeNino's testimony was that he used the stove to cook meals, that the stove had to be ignited when turned on, and that he had turned off the propane to the stove before he left. There is no evidence that the stove or oven was left on for long periods to supplement marginal heat in his cabin in his absence, so that the cabin could fill with sufficient carbon monoxide to cause immediate lapse of consciousness. The quote from "Goldfrank" is not relevant to DeNino's claim.

DeNino's remaining arguments suffer from similar flaws in reasoning. For example, he suggests that Dr. Burton's report lacks substance because Dr. Burton "lied about taking notes."[167] He states that he saw Dr. Burton write on his questionnaire, and he offers the questionnaire, with 10 or 11 words written by Dr. Burton as proof.[168] DeNino thought that Dr. Burton took no other notes.[169] But Dr. Burton did not say he did not take notes; he said that he took hand-written notes that he used to dictate his report, that he destroyed those notes when the report was finished, but he kept the questionnaire.[170] DeNino assumes that, because Dr. Burton wrote briefly on the questionnaire, Dr. Burton regarded the questionnaire as his notes, but Dr. Burton's

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166 Appellant's Reply Br. at 3.

167 Appellant's Br. at 1.

168 Appellant's Br. at 9.

169 Burton Depo. 47:16-20. DeNino, in his cross-examination of Dr. Burton, said, "I only saw him write on the questionnaire and *I don't believe there's any other notes* and I plan to bring that up for the board." *Id.* at 47:17-20. (Emphasis added).

170 Burton Depo. 26:13-22.

testimony makes it clear Dr. Burton referred to the questionnaire as different from his notes. DeNino has not "proved" that Dr. Burton lied about taking notes.

Finally, we address DeNino's apparent conviction that *John's Heating Service v. Lamb*[171] requires the board to recognize his claim for chronic low level carbon monoxide poisoning. We disagree. The Supreme Court held that the jury was permitted to hear the injury theory based on chronic carbon monoxide exposure even though it was based on a differential diagnosis methodology.[172] The board members, who review thousands of pages of medical reports in their work, are familiar with differential diagnoses. The board did not exclude any medical opinion in this case, on the basis that it does not eliminate every other alternative diagnosis or otherwise. *Johns Heating* does not elevate the differential diagnosis method above other methods; it simply says that medical evidence of a diagnosis based on that method cannot be excluded because it is uncertain. The board, like the jury in *John's Heating Service,* had the opportunity to consider all the evidence produced by the plaintiff or claimant. In this case, the board found that the evidence against causation was stronger than the evidence in favor of it.[173] The board is the trier of fact; the board's decision as to which medical opinion has greater weight is conclusive.[174] DeNino's arguments do not persuade us otherwise.

6. Conclusion

After careful consideration of the appellant's arguments, we conclude that the board did not err in refusing to exclude opinions by Drs. Goranson, Friedman and Burton as prohibited "character evidence," or other opinions adverse to DeNino on the

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171 46 P.3d 1024 (Alaska 2002).

172 *Id.* at 1035-36.

173 We note that unlike the Lambs, DeNino produced no photos of corroded furnace parts and no experts to testify that the corrosion could result in carbon monoxide being mixed into the home. *Id.* at 1036. Also, unlike the Lambs, DeNino's testimony was that he fell acutely ill due to carbon monoxide exposure on eight occasions in four months, not that he grew tired and confused, and lost concentration and memory, over an 18-month period of exposure. *Id.* at 1028-29.

174 AS 23.30.122.

basis that they are not scientific evidence, lack substantiality, or for other reasons argued by DeNino. In light of the whole record, there is substantial evidence to support the board's conclusion that DeNino's symptoms were not caused by exposure to carbon monoxide. We therefore AFFIRM the board's decision.

Date: *27 Feb. 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission affirmed (approved) the board's decision denying Kevin DeNino's claim for workers' compensation for injuries due to carbon monoxide exposure. The appeals commission's decision ends all administrative proceedings in Mr. DeNino's workers' compensation case no. 200206420. It is effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision was distributed, look at the Certificate of Distribution in the box below.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court **within 30 days of the date this final decision is mailed** or otherwise distributed and be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. To see the date this decision is mailed, look at the Certificate of Distribution in the box below.

A request for commission reconsideration must be filed within 30 days of the date of mailing of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal this decision 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 appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. A motion for reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 072, the Final Decision in the appeal of Kevin J. DeNino vs. Yukon Flats School District and Alaska Public Entity Insurance, AWCAC Appeal No. 07-008, dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *27th* of *February*, 20*08*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision in AWCAC Appeal No. 07-008 was mailed on *2/27/08* to K. J. DeNino (certified) & M. Budzinski at their addresses of record and faxed to Budzinski, Director WCD, AWCB-Fbx & AWCB Appeals Clerk.

Signed
L. Beard, Appeals Commission Clerk Date