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0003130

STATE OF WISCONSIN
BEFORE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	**FINAL DECISION AND ORDER WITH VARIANCE**
PERI L. ALDRICH, M.D., RESPONDENT.	DHA Case No. SPS-12-0031 DSLC Case No. 11 MED 123

BACKGROUND

On September 23, 2013, Administrative Law Judge Jennifer Nashold (ALJ), State of Wisconsin, Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above matter. On October 9, 2013, objections to the Proposed Decision were filed by Attorney Steve Sager, Sager & Colwin Law Offices, S.C. on behalf of the Respondent. On October 21, 2013, Attorney Kim Kluck filed a response to the objections on behalf of the Department of Safety and Professional Services, Division of Legal Services and Compliance. Both parties appeared before the Medical Examining Board (Board) on November 20, 2013 to present oral argument in support of their submissions. The Board considered the PDO, the objections and the parties' oral arguments, and at its meeting on December 11, 2013, the Board consulted with the ALJ on her determinations with regard to the witnesses' credibility. After deliberation the Board voted to approve the PDO with variance. The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance.

DECISION

Pursuant to Wis. Stat. §§ 440.035(1) and 448.02, the Board is the regulatory authority and final decision maker governing disciplinary matters of those credentialed by the Board. The pending matter is a class 2 proceeding pursuant to Wis. Stat. § 227.01(3). The Board may make modifications to a PDO, a class 2 proceeding, pursuant to Wis. Stat. § 227.46(2).

In the present case, the Board adopts the **FINDINGS OF FACTS** set forth in the PDO with the exception of paragraph 22. The Board revises Finding of Fact 22 and makes additional findings numbered paragraphs 24 through 26. The Board modifies or eliminates the remainder of the PDO as follows:

DISCUSSION AND EXPLANATION OF VARIANCE

Burden of Proof

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3); *see also* Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is "more likely than not" that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter,* 60 F.3d 270, 280 (7th Cir. 1995).

Allegation of Negligent Treatment

Pursuant to Wis. Stat. § 448.02(3) (c), the Board may warn or reprimand a licensee or may limit, suspend or revoke a license if it finds that the licensee has engaged in unprofessional conduct or has been "negligent in treating a patient."

The Division alleges that Dr. Aldrich engaged in negligent treatment of a patient by failing to have Patient G.S. undergo an oxygen saturation test in a timely fashion following the December 18, 2003 clinic visit with Physician Assistant (PA) Cornelius. (Complainant's Closing Argument, p. 3)

In disciplinary proceedings, the civil standard for medical negligence is to be used in determining whether, for disciplinary purposes, a physician was negligent in treating a patient. *Dept. of Reg & Licensing v. Med. Examining Bd.*, 215 Wis. 2d 188, 197-98, 572 N.W.2d 508 (Ct.

App. 1997). The standard is whether the physician used the degree of skill and care that a reasonable physician would use in the same or similar circumstances. *Id.* at 197, 200. Wisconsin Stat. § 448.02(3) (c) does not require proof that the credential holder's negligence caused harm to anyone, only that there has been negligence in treatment. This is different from what is required in a medical malpractice action. In a medical malpractice action, in addition to proving the physician's negligence, the plaintiff must prove there was harm to the patient and that the physician's negligence was the cause of that harm. Wis. J.I. – Civil § 1023.

The parties have stipulated that in reviewing treatment records in medical charts created by physician assistants and making decisions on whether to continue or alter treatment for a patient seen by a physician assistant, the supervising physician is making treatment decisions for the patient. They have further stipulated that making treatment decisions for a patient constitutes treatment of a patient.

Thus, the question in this case is two-fold: whether Dr. Aldrich reviewed the physician assistant treatment records of PA Cornelius and made a decision on whether to continue or alter treatment of Patient G.S. and, if so, whether such treatment of patient G.S. was negligent because Dr. Aldrich failed to order a saturation test in a timely fashion following the December 18, 2003 clinic visit with PA Cornelius. The ALJ concluded that a preponderance of evidence supports the conclusion that Dr. Aldrich reviewed the treatment records of PA Cornelius and made a decision not to alter the treatment for Patient G.S.. The Board concurs with these conclusions. The ALJ further found that Dr. Aldrich was negligent in failing to order an oxygen saturation test in a timely fashion after reviewing PA Cornelius' December 18, 2003 note. The Board disagrees.

The Board considered the evaluation of the ALJ with regard to the medical testimony of each of the expert witnesses; however, the Board finds that the more persuasive expert testimony is that of Dr. Ness. As Dr. Ness testified, while an oxygen saturation level may have been useful as part of the evaluation of the patient's medical condition, it was not negligent to fail to order such a test. Rather, as testified to by Dr. Ness, total presentation and evaluation of the patient is the determinative factor. In this case, physician assistant Cornelius evaluated the patient and reached the correct diagnosis of probable pneumonia as admitted by both experts. Appropriate confirming diagnostics, including a chest x-ray and a CBC, were offered to the patient and were declined.

Dr. Aldrich reviewed the note of PA Cornelius sometime between December 19 and December 22, 2003. Dr. Aldrich testified that she had knowledge of the competence and skill level of PA Cornelius that had developed over a period of time. (Vol. I, pps. 122-126]. Based on that knowledge it was reasonable for her to rely on PA Cornelius' clinical findings regarding the patient's condition, the provisional diagnosis of probable pneumonia and the diagnostic and treatment recommendations. The Board agrees with both experts' conclusions that based on the patient's presenting symptoms and the clinical findings as recorded, probable pneumonia was the correct diagnosis. Further, the Board concurs with Dr. Ness' testimony that Tequin was an appropriate treatment option after the lack of response to the previously prescribed antibiotics. The recommendation to the patient of further testing by chest x-ray and CBC was within the standard of care. While the oxygen saturation test may have also been ordered for further information, it was not negligent on the part of Dr. Aldrich to fail to order such a test at this juncture in the patient care. The chest x-ray and CBS were sufficient to confirm the diagnosis and the recommended treatment with Tequin, at this point, was appropriate.

Based on the expert testimony and the entirety of the record, the Board finds Dr. Ness' testimony that Dr. Aldrich was not negligent in failing to order the oxygen saturation test more credible than Dr. O'Brien's testimony that such failure was negligent.

Based on the above, the Board modifies Finding of Fact 22, the Conclusions of Law and the Order. The Board makes additional Findings of Fact 34 to 26.

FINDINGS OF FACT

22. Dr. Ness knew that the patient's oxygen saturation level could not have been normal based on the patient's symptoms on December 18, 2003. On cross examination, Dr. Ness acknowledged his deposition testimony in which he stated that obtaining an oxygen saturation level is "useful" in evaluating a patient who has been diagnosed with pneumonia. He further stated that that opinion was consistent with his testimony at hearing. (Vol. II, p. 228, line 9 to p.229 line 2.) Dr. Ness also testified that "...a lot of things are useful, but the general evaluation by the physician or physician assistant is the critical part in the evaluation." (Vol. II, p. 227, line 17-20)

24. Dr. Aldrich testified that when the physician assistants Conrad and Cornelius began working with her, she was present in the building until "we had really developed that level of trust and comfort with decision-making and practice style." (Vol. I, p. 124, lines 16-18)

25. Dr. Aldrich would recheck physical findings and obtain additional history especially when working with individuals she had not worked with before. (Vol. I, p. 125, lines 2-6)

26. Dr. Aldrich had worked with physician assistants Conrad and Cornelius for several years by 2003. (Vol. I , p. 125 line 23 – p. 126, line 11)

CONCLUSIONS OF LAW

1. The Board has jurisdiction to act in this matter, pursuant to Wis. Stat. § 448.02(3).

2. Pursuant to Wis. Stat. § 448.02(3) (c), the Board may warn or reprimand a licensee or may limit, suspend or revoke a license if it finds that the licensee has engaged in unprofessional conduct or negligence in treatment of a patient.

3. The Division has not shown by a preponderance of the evidence that Dr. Aldrich engaged in negligent treatment of Patient G.S. by failing to order an oxygen saturation test for Patient G.S. after reviewing PA Cornelius' December 18, 2003 medical note.

ORDER

For the reasons set forth above, IT IS ORDERED that this matter be dismissed.

IT IS FURTHER ORDERED that no costs be imposed.

This Order is effective as of December 11, 2013.

Dated at Madison, Wisconsin this 27th day of March, 2014.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

Kenneth Simons MD
A Member of the Board

Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

0003130

In the Matter of the Disciplinary Proceedings
Against **PERI L. ALDRICH, M.D.**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-12-0031

Division of Legal Services and Compliance[1] Case No. 11 MED 123

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

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PROCEDURAL HISTORY

On April 11, 2012, the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division) filed a formal Complaint against Respondent, Dr. Peri Aldrich, alleging that Dr. Aldrich engaged in negligence in treatment of a patient, in violation of

[1] The Division of Legal Services and Compliance was formerly known as the Division of Enforcement.

Wis. Stat. § 448.02(3), with regard to Patient G.S. On May 2, 2012, counsel for Dr. Aldrich filed an Answer to the Complaint, denying negligence.

On July 5, 2012 the Division filed an Amended Complaint, again alleging that Dr. Aldrich engaged in negligence in treatment of a patient, in violation of Wis. Stat. § 448.02(3), with regard to patient G.S. On July 13, 2012, counsel for Dr. Aldrich filed an Answer to the Amended Complaint, denying negligence.

On September 14, 2012, the Division filed a motion for summary judgment, to which counsel for Dr. Aldrich filed a response on November 12, 2012. The Division filed a reply brief on December 6, 2012, and on February 14, 2013, the undersigned administrative law judge (ALJ) issued a Summary Judgment Order denying the Division's motion. The Division appealed the ALJ's order to the Wisconsin Medical Examining Board (Board), and on May 1, 2013, the Board issued an order affirming the ALJ's Summary Judgment Order.

A hearing was held in this matter on June 11-12, 2013. The parties submitted post-hearing briefs, with the last submission received on August 15, 2013.

FINDINGS OF FACT

1. Respondent Peri L. Aldrich, M.D. (D.O.B. 7/23/1952) was granted a license to practice medicine and surgery in the State of Wisconsin (license number 21592-20) on July 4, 1978. Dr. Aldrich's registration expired on October 31, 2011. (Amended Complaint, ¶ 1; Amended Answer, ¶ 1)

2. At all times relevant to this proceeding, Dr. Aldrich contracted with Bellin Health Family Medical Center in Bonduel, Wisconsin (Bonduel Clinic), where she served as a supervising physician. (Amended Complaint, ¶ 4; Amended Answer, ¶ 2)

3. According to the December 15, 2003 medical note of Physician Assistant (PA) Michael Conard and Bonduel Clinic employee Kimberly Buettner, on December 15, 2003, Patient G.S., a 25 year-old male non-smoker, presented to the Bonduel Clinic with an elevated

temperature of 100.9, damp skin, a heart rate of 142 beats per minute, a respiratory rate of 24 breaths per minute, chills, night sweats and a 10-day history of cough and fever. According to the December 15, 2003 note, Patient G.S. was on two antibiotics, amoxicillin and doxycycline, and a prescription cough medication. PA Conard discontinued the over-the-counter cough medicine and prescribed another cough medicine. PA Conard testified that he re-checked Patient G.S.'s heart rate in light of Ms. Buettner's notation that the rate was 142 beats per minute; however, he did not document that he did so. PA Conard instructed Patient G.S. to continue with his antibiotic regimen and ordered a TB skin test. (Joint Exh. 3)

4. Dr. Aldrich was the supervising physician for PA Conard. Dr. Aldrich did not review and sign the office note created by PA Conard until sometime after February 13, 2004. It is not clear from the record when the note was first made available to her for review. (Hrg. Trans. Vol. I, p. 134, line 18 – p. 135, p. 16)

5. On December 18, 2003, Patient G.S. returned to the Bonduel Clinic to have his TB test read, at which time he also complained of worsening symptoms. As a result, he saw another physician assistant, Penny Cornelius, who was also supervised by Dr. Aldrich. PA Cornelius reviewed PA Conard's medical note for Patient G.S. before evaluating him. PA Cornelius documented that Patient G.S. was there on a follow up for his cough; that he had an elevated temperature and cough for two weeks; that his "coughing seems to be worse;" that the antibiotics he was on, Amoxicillin and Doxycycline, "do not seem to be helping;" that he had a fever of 101.3; that his respiration rate was 32; that he had "decreased breath sounds to the right base;" that he coughed throughout the examination; that his cough intensified when he reclined; that he gets a headache with his cough; and that he had bilateral lower lung pain. PA Cornelius noted that Patient G.S.'s TB test result was negative and she diagnosed him with "probable pneumonia." She recommended a chest x-ray and a Complete Blood Count (CBC), but Patient G.S. refused due to cost. PA Cornelius changed his antibiotic to Tequin 400 mg. daily, and told

him to increase fluids. (Joint Exh. 3; Hrg. Trans. Vol. I, p. 176, line 16 – p. 182, line 25; Exh. 8, p. 345, lines 21-24)

6. Although PA Cornelius reviewed PA Conard's December 15, 2003 note before evaluating Patient G.S., PA Cornelius' note does not indicate that there was another note from the December 15, 2003 visit at Bonduel Clinic. However, PA Cornelius' note does indicate that Patient G.S. was at the clinic as a "follow-up on his cough," that a TB test had been done and that the results were negative. (Joint Exh. 3; Hrg. Trans. Vol. I, p. 161, lines 3-8, p. 168, line 8 – p. 169, line 6)

7. On December 19, 2003, PA Cornelius dictated her office note for the December 18, 2003 visit with Patient G.S and the note was transcribed the same day. Following transcription, the note was sent back to her for approval and signature. The December 18, 2003 note contains PA Cornelius' signature, but does not indicate the date it was signed. According to PA Cornelius, if notes are high priority, they can be transcribed and sent back for approval within an hour; however, she stated, "If you are low on the priority list, like many rural clinics are, it could have been the next day." The day after December 19, 2003 was December 20, 2003, which was a Saturday. Therefore, if the note was sent to PA Cornelius for approval and signature the day after December 19, 2003, it would have been received by PA Cornelius on the following Monday, December 22, 2003. However, at her deposition, PA Cornelius testified that it was the standard practice to send her notes to the supervising physician the day they were transcribed. (Joint Exh. 3; Division's Exh. 6, p. 56, line 14-22; Hrg. Trans. Vol. I, p. 184, line 13 – p. 187, line 1)

8. After PA Cornelius approved the electronic transcribed note, it was automatically sent to Dr. Aldrich for her review. The medical record reflects that Dr. Aldrich reviewed and signed the December 18, 2003 note; however, the record does not reflect when she reviewed or signed it. Dr. Aldrich usually checked for documents to sign "a couple times a day." Dr. Aldrich

conceded that she may have signed the December 18 note on December 19, 2003 and also stated that if she were in the office, she would have checked her computer for documents to sign at the end of the day on Friday and that if she were not in her office, she would have checked on the following Monday. (Joint Exh. 3; Hrg. Trans. Vol. I, p. 157, line 23 – p. 158, line 6; p. 160, lines 2-20; p. 172, lines 14-18; Division's Exh. 7, p. 23, lines 6-17; p. 37, line 21 – p. 38, line 6)

9. At no time following her review of the medical note did Dr. Aldrich contact Patient G.S. personally or direct a physician assistant to do so, in order to test Patient G.S.' oxygen saturation level.[2] Dr. Aldrich agreed with PA Cornelius' December 18, 2003 treatment of Patient G.S. and did not believe that an oxygen saturation test was necessary.

10. On December 23, 2003, Patient G.S. was admitted to the ICU at Saint Vincent Hospital in Green Bay. On the date of admission, an oxygen saturation test was conducted and revealed an oxygen saturation level of 71 percent, which meant that he was not getting oxygen in his lungs very well and was clinically sick. For a healthy 25 year-old patient, the normal range for oxygen saturation is 95 or above. (Hrg. Trans. Vol. I, p. 47, lines 15-18; p. 102, lines 3-16; Amended Complaint, ¶ 8; Amended Answer, ¶ 7)

11. On December 26, 2003, Patient G.S. was placed on a mechanical ventilator. On January 1, 2004, Patient G.S. suffered cardiac arrest and was unable to be resuscitated. The cause of death was acute respiratory distress syndrome from severe diffuse pneumonia due to blastomycosis. (Amended Complaint, ¶ 8; Amended Answer, ¶ 7)

12. The oxygen saturation level measures the amount of oxygen in the bloodstream and is a measurement of respiratory function. The oxygen saturation level provides information that the respiration rate does not provide. For example, there are other factors that can elevate the respiratory rate; however, the oxygen saturation level is more specific to lung function. Oxygen saturation indicates a patient's aeration, how well the lungs are working and how well the patient

is exchanging oxygen and getting oxygen into the bloodstream. A person's red blood cells must carry sufficient oxygen through the arteries to all of the internal organs to keep the person alive. Suspected low oxygen intake should be confirmed as there is specific treatment available for that condition. (Hrg. Trans. Vol. I, p. 47, lines 3-14; Vol. II, p. 229, lines 3-8; p. 233, lines 7-11; Division's Exh. 9, p. 128, line 7 – p. 129, line 4; p. 132, line 22 – p. 133, line 4)

13. A normal respiration rate for a 25 year-old male like Patient G.S. would be 12 - 18 breaths per minute. A respiration rate of 32 breaths per minute is a significantly elevated respiration rate and amounts to taking a breath every two seconds. With a respiration rate of 32, Patient G.S. was essentially "panting." (Hrg. Trans. Vol. I, p. 104, line 23 – p. 105, line 2; Vol. II, p. 248, lines 7-15)

14. On October 2, 2009, a jury returned a Special Verdict in Brown County Circuit Court Case No. 2008CV0034 concluding that Dr. Aldrich was negligent in her supervision of physician assistants Michael Conard and/or Penny Cornelius in regard to the care and treatment of Patient G.S. and that Dr. Aldrich's negligence was a cause of G.S.'s injuries. The jury attributed 35 percent of the total causal negligence to Dr. Aldrich. (Division's Exh. 3, pp. 17-18)

15. Through its Special Verdict, the jury also found Bellin Health Systems, Inc. "negligent in its care and treatment of [G.S.]" "through either of [its] employees, Penny Cornelius or Michael Conard." The jury further found that such negligence was a cause of G.S.'s injuries and that Bellin Health Systems was 65 percent negligent. (*Id.*)

16. The jury's Special Verdict was affirmed by a circuit court Order for Judgment after hearing motions after the verdict. (Division's Exh. 3, pp. 13-16)

17. The parties stipulated to the following: "(1) In reviewing treatment records in medical charts created by physician assistants and making decisions on whether to continue or alter treatment for a patient seen by a physician[] assistant, the supervising physician is making

[2] The physicians who testified in this case used the terms "pulse ox" and "oxygen saturation test" interchangeably.

treatment decisions for the patient. (2) Making treatment decisions for a patient constitutes treatment of a patient." (Division's Motion and Brief in Support of Summary Judgment, Kluck Aff. ¶ 2, Ex. B, Stipulation of Complainant and Respondent)

18. At the disciplinary hearing held in this matter on June 11-12, 2013, Dr. Shawn O'Brien testified as the Division's expert. Dr. O'Brien is licensed to practice medicine in Wisconsin and graduated from the Medical College of Wisconsin in 1995. He completed a residency in emergency medicine in 1999 and became board certified in emergency medicine in 2000. Dr. O'Brien currently works as an emergency physician at St. Mary's Hospital in Madison, Wisconsin, at Columbus Hospital in Columbus, Wisconsin, and at a freestanding emergency room in Sun Prairie, Wisconsin. He is the medical director of the freestanding emergency room in Sun Prairie. He has supervised physician assistants for the past six years in an emergency room setting. As a supervising physician, he has worked alongside physician assistants and has evaluated patients after physician assistants have seen the patients. On other occasions, the physician assistant has seen the patient and Dr. O'Brien has looked at the medical charting and discussed the case with the physician assistant to review the care provided. Dr. O'Brien reviews all medical records created by the physician assistants under his supervision. After reviewing a medical record created by the physician assistant, Dr. O'Brien may sign off on the chart, discuss the chart with the physician assistant without seeing the patient again, or may request to see the patient. He has not supervised physician assistants from remote locations. (Hrg. Trans. Vol. I, p. 36, line 24 – p. 38, line 20; p. 39, lines 5-19; p. 40, line 13 – p. 43, line 16; p. 58, lines 1-19)

19. Dr. O'Brien opined that given the documented evidence of Patient G.S.'s elevated respiratory rate of 32 breaths per minute on December 18, 2003, and the fact that he had not improved for two weeks despite being on antibiotics, a reasonable supervising physician would

have contacted the patient or the physician assistant to have a oxygen saturation test performed on the patient. (Hrg. Trans. Vol. I, p. 46, line 6 – p. 47, line 2; p. p. 95, lines 9-13)[3]

20. Dr. Keith Ness testified for Dr. Aldrich. He received his bachelors and medical degrees from the University of Wisconsin-Madison and completed his residency in 1978. After his residency he moved to Mauston, Wisconsin where he has been in family practice until retiring in 2012. He is now the medical director for a secure treatment facility in Mauston. He was board certified in family practice until his 2012 retirement. He practiced as the emergency room director at the hospital in Mauston for nine years, 1980 – 1989. As part of his family practice, he hired physician assistants, and for almost twenty years, was directly involved in their training. His supervisory role included regular chart review of physician assistants at outreach clinics in Elroy, Necedah and Lake Delton, Wisconsin. (Hrg. Trans. Vol. II, p. 195, line 12 – p. 201, line 22; Resp. Exh. 2)

21. Dr. Ness opined that Dr. Aldrich's supervisory function in providing care and treatment to Patient E.S. was not negligent, was within the standard of care, and did not expose the patient to any unreasonable risk of harm. He stated that the oxygen saturation level would be an "interesting" finding, but it would not change the general impression for patient care. He also stated that oxygen levels can vary greatly from almost minute to minute. He testified: "One of the rules, really, that we use in medicine is to treat the patient and not the lab work. The majority of our evaluation of a patient relates to how they appear, the general symptoms that they're presenting with, how they look, their color, their behavior, their actions, the symptoms. The laboratory work, CBCs, chest x-rays, oxygen levels, all these types of things are additional bits of information that we basically throw in the pot and stir up and come up with our general

[3] Dr. O'Brien testified that he did not fault anyone in the Bonduel clinic for failing to diagnose blastomycosis on December 15 or 18, 2003 as "[t]hat's a tough diagnosis to make." (Hrg. Trans. Vol. I, p. 68, line 22 – p. 69, line 3)

assessment." (Hrg. Trans. Vol. II, p. 211, line 18 – p. 212, line 10. p. 214, line 14 – p. 215, line 22)

22. Dr. Ness testified that he had no way of knowing what Patient G.S's oxygen saturation level would have been on December 18, 2003. However, given the patient's symptoms on December 18, Dr. Ness knew that it would not be in the normal 95-100 range. He also acknowledged on cross-examination that obtaining an oxygen saturation level is important in treating and evaluating a patient who has been diagnosed with pneumonia and is not improving. (Hrg. Trans. Vol. II, p. 228, line 9 – p. 229, line 2; p. 241, lines 12-20)

23. Both experts agreed with PA Cornelius' diagnosis of pneumonia and both agreed that that is a common presentation during December and January in Wisconsin. (Vol. I, p. 54, line 15 - p. 55, line 13; Vol. II. p. 222, lines 4-22)

DISCUSSION

Burden of Proof

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3); *see also* Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is "more likely than not" that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter,* 60 F.3d 270, 280 (7th Cir. 1995).

Allegation of Negligent Treatment

Pursuant to Wis. Stat. § 448.02(3)(c), the Board may warn or reprimand a licensee or may limit, suspend or revoke a license if it finds that the licensee has engaged in unprofessional conduct or has been "negligent in treating a patient."

The Division alleges that Dr. Aldrich engaged in negligent treatment of a patient by failing to have Patient G.S. undergo an oxygen saturation test in a timely fashion following the December 18, 2003 clinic visit with PA Cornelius. (Complainant's Closing Argument, p. 3)

In disciplinary proceedings, the civil standard for medical negligence is to be used in determining whether, for disciplinary purposes, a physician was negligent in treating a patient. *Dept. of Reg & Licensing v. Med. Examining Bd.*, 215 Wis. 2d 188, 197-98, 572 N.W.2d 508 (Ct. App. 1997). The standard is whether the physician used the degree of skill and care that a reasonable physician would use in the same or similar circumstances. *Id.* at 197, 200. Wisconsin Stat. § 448.02(3)(c) does not require proof that the credential holder's negligence caused harm to anyone, only that there has been negligence in treatment. This is different from what is required in a medical malpractice action. In a medical malpractice action, in addition to proving the physician's negligence, the plaintiff must prove there was harm to the patient and that the physician's negligence was the cause of that harm. Wis. J.I. – Civil § 1023.

The parties have stipulated that in reviewing treatment records in medical charts created by physician assistants and making decisions on whether to continue or alter treatment for a patient seen by a physician assistant, the supervising physician is making treatment decisions for the patient. They have further stipulated that making treatment decisions for a patient constitutes treatment of a patient.

Thus, the questions in this case are two-fold: whether Dr. Aldrich reviewed the physician assistant treatment records of PA Cornelius and made a decision on whether to continue or alter treatment of Patient G.S. and, if so, whether such treatment of patient G.S. was negligent because Dr. Aldrich failed to order a saturation test in a timely fashion following the December 18, 2003 clinic visit with PA Cornelius. I conclude that a preponderance of evidence supports the conclusion that Dr. Aldrich reviewed the treatment records of PA Cornelius, made a decision not

to alter the treatment for Patient G.S., and was negligent in failing to order an oxygen saturation test in a timely fashion after reviewing PA Cornelius' December 18, 2003 note.

The evidence in this case indicates that Dr. Aldrich likely reviewed PA Cornelius' December 18, 2003 note on December 19, 2003, but at the latest, December 23, 2003. PA Cornelius dictated and transcribed her note on December 19, 2003. At her deposition, PA Cornelius testified that it was the standard practice to send her notes to the supervising physician the day they were transcribed. At hearing, she testified that if the notes are a priority, they can be returned for review and signature within an hour, although she stated that for non-priority notes, it "could have been the next day." This testimony suggests that it is more likely than not that she received the note back for review and signed it the same day she transcribed it, Friday, December 19, 2003. Once she signed the note, it was automatically sent to Dr. Aldrich. Dr. Aldrich conceded she could have signed the note on December 19, 2003, and further testified that if she were at the office on a Friday, she would have checked for documents to sign at the end of the day.

Counsel for Dr. Aldrich argues that PA Cornelius' December 18, 2003 note could have been reviewed and signed by Dr. Aldrich on December 22 or 23, 2003 and that in such a scenario, her ordering an oxygen saturation test would not have made a difference because Patient G.S. would have had to obtain the test at the hospital, where he already was on December 23, 2003 and where he did in fact obtain an oxygen saturation test that day.

However, even assuming that Dr. Aldrich did not review the December 18 note until December 23, 2003, the day that Patient G.S. went to the emergency room at St. Vincent Hospital, the fact remains that Dr. Aldrich chose to take no action regarding Patient G.S., not because she knew he was already at the emergency room, but because she did not think altering PA Cornelius' course of treatment was necessary. That Patient G.S. was already at the hospital was of no consequence because that fact did not influence Dr. Aldrich's decision-making or

actions and cannot serve as a basis to conclude that she was not negligent in approving PA Cornelius' course of treatment rather than altering it by requiring an oxygen saturation test. In a disciplinary proceeding, the Division is not required to prove that the negligence caused injury or damage; it is the physician's decision-making and medical judgment which are at issue.

Based on the foregoing, I conclude that it is more likely than not that Dr. Aldrich reviewed PA Cornelius' treatment records in Patient G.S.'s medical charts during a time period when she believed that Patient G.S. was still under PA Cornelius' treatment plan, and that during that time period, she made a decision not to alter PA Cornelius' treatment for Patient G.S. by ordering an oxygen saturation test. Having so concluded, the next question is whether Dr. Aldrich's failure to order the oxygen saturation test constituted negligent treatment of Patient G.S. Based on the expert testimony and the entirety of the record, I find Dr. O'Brien's testimony that Dr. Aldrich was negligent in failing to order the oxygen saturation test more credible than Dr. Ness's suggestion that such failure was not negligent.

Dr. O'Brien opined that given the documented evidence of Patient G.S.'s elevated respiratory rate of 32 breaths per minute on December 18, 2003, and the fact that he had not improved for two weeks, despite being on antibiotics, a reasonable supervising physician would have contacted the patient or the physician assistant to have an oxygen saturation test performed on the patient. The record establishes that a normal respiration rate for a 25 year-old male like Patient G.S. would be 12 - 18 breaths per minute, that a rate of 32 breaths per minute is a significantly elevated respiration rate and that Patient G.S. was essentially panting.

The record also establishes that oxygen saturation level measures the amount of oxygen in the bloodstream and is a measurement of respiratory function. In addition, the oxygen saturation level provides information that the respiration rate does not provide. For example, there are other factors that can elevate the respiratory rate but the oxygen saturation level is more specific to lung function. Oxygen saturation indicates how well the lungs are working and how

well the patient is exchanging oxygen and getting oxygen into the bloodstream. Oxygen must be carried to the internal organs to keep the person alive. Suspected low oxygen intake should be confirmed as there is specific treatment available for that condition.

Indeed, when Patient G.S. voluntarily went to the emergency room on December 23, 2003, the hospital performed an oxygen saturation test that same day, which indicated a level of 71 percent, which was way below the normal 95-100 percent. On December 26, 2003, Patient G.S. was placed on a mechanical ventilator. On January 1, 2004, Patient G.S. suffered cardiac arrest and the cause of death was acute respiratory distress syndrome from severe diffuse pneumonia due to blastomycosis.

These facts undercut Dr. Ness' suggestion that the oxygen saturation test is somehow unreliable due to its variability, as well as his suggestion that the oxygen saturation level is nothing more than an interesting bit of information.

In fact, Dr. Ness ultimately acknowledged on cross-examination (when confronted with his deposition testimony that indicated the same) that obtaining an oxygen saturation level is important in treating and evaluating a patient who has been diagnosed with pneumonia and is not improving.

In view of the foregoing, I conclude that a preponderance of the evidence supports the Division's allegation that Dr. Aldrich's failure to order an oxygen saturation test following her review of PA Cornelius' December 18, 2003 note fell below the degree of skill and care that a reasonable physician would have used in the same or similar circumstances. Therefore, Dr. Aldrich engaged in negligent treatment of a patient under Wis. Stat. § 448.02(3)(c).[4]

[4] The parties briefed the issue of when PA Conard's December 15, 2003 note was available for Dr. Aldrich to review. In view of the conclusion that Dr. Aldrich should have ordered an oxygen saturation test based on PA Cornelius' December 18, 2003 note, I need not decide when Dr. Aldrich first reviewed PA Conard's December 15, 2003 note. The parties also briefed the issue of whether, under the doctrine of issue preclusion, the jury's finding of negligent supervision conclusively decides that issue in this case. However, whether issue preclusion applies need not be decided for purposes of reaching a decision in this case.

Discipline

In light of the violation set forth above, Dr. Aldrich is subject to discipline pursuant to Wis. Stat. § 448.02(3)(c). The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich,* 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division recommends that a limitation be placed on Dr. Aldrich's license prohibiting her from supervising physician assistants until such time as she petitions the Board and demonstrates to the Board's satisfaction that she is able to supervise physician assistants with reasonable skill and judgment. I agree that the Division's recommended discipline is warranted. The evidence in this proceeding demonstrates that Dr. Aldrich's medical judgment was below the standard of what a reasonable supervising physician would have done under the circumstances. In addition to the evidence presented in this proceeding, a jury likewise concluded in a civil proceeding that Dr. Aldrich negligently supervised physician assistants Cornelius and/or Conard, and that Bellin Health Systems, Inc., through PA Conrad and/or Cornelius, was negligent in its care and treatment of Patient G.S.

It is also noted that Dr. Aldrich has had two prior disciplinary actions against her. The first was in 2004 for failing to determine the cause of a patient's chronic GI blood loss and anemia (the cause was, in fact, colon cancer), in violation of Wis. Stat. § 448.02(3), for which she was reprimanded and ordered to take continuing medical education courses. (Division's Exhibit 1) The next disciplinary action was in 2009 for excessively prescribing opioids and opiates for chronic pain and failing to take appropriate precautions to prevent abuse or diversion by patients, for which the Board limited Dr. Aldrich's ability to prescribe such medications. (Division's Exh. 2)

Limiting Dr. Aldrich's license to prevent her from supervising physician assistants until it can be shown to the Board's satisfaction that she can do so in a safe and effective manner will serve the goals of rehabilitation, protection of the public and deterrence.

Costs

Pursuant to Wis. Stat. § 440.22, the Board has the authority to assess respondents for costs of the disciplinary proceedings. Factors to consider include: (1) the number of counts charged, contested and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, Case No. LS 0802183 CHI (Aug. 14, 2008).

The Division recommends that full costs be imposed on Dr. Aldrich for this proceeding. I agree that full costs are warranted, except for those costs associated with the Division's motion for summary judgment, with respect to which the Division did not prevail.

Following a hearing, the Division proved the one count alleged in this proceeding. The count proven, negligent treatment, was serious in that Dr. Aldrich failed to order a test which a reasonable physician would have ordered, a test which could have prevented Patient G.S.' continued deterioration and ultimate death. Further, it would be unfair for other licensees to have to absorb the costs for Dr. Aldrich's negligence. In addition, as set forth above, Dr. Aldrich has had two prior disciplinary actions taken against her. Based on the foregoing, imposing costs on Dr. Aldrich for this proceeding is warranted.

However, imposition of costs on Dr. Aldrich is not appropriate for that portion of these proceedings associated with the Division's unsuccessful motion for summary judgment, including appealing the denial order to the Board. I conclude that it would be unfair to require Dr. Aldrich to pay the costs associated with summary judgment proceedings in which she

ultimately prevailed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to act in this matter, pursuant to Wis. Stat. § 448.02(3).

2. Pursuant to Wis. Stat. § 448.02(3)(c), the Board may warn or reprimand a licensee or may limit, suspend or revoke a license if it finds that the licensee has engaged in unprofessional conduct or negligence in treatment of a patient.

3. The Division has shown by a preponderance of the evidence that Dr. Aldrich engaged in negligent treatment of Patient G.S. by failing to order an oxygen saturation test for Patient G.S. after reviewing PA Cornelius' December 18, 2003 medical note.

4. Pursuant to Wis. Stat. § 448.02(3)(c) and *State v. Aldrich,* 71 Wis. 2d 206, 237 N.W.2d 689 (1976), it is appropriate for the Board to limit Dr. Aldrich's medical license in the manner outlined in the Order section below.

5. Pursuant to Wis. Stat. § 440.22, it is appropriate for the Board to impose the full costs of these disciplinary proceedings on Dr. Aldrich, with the exception of those costs associated with the Division's summary judgment motion.

ORDER

For the reasons set forth above, IT IS ORDERED that:

1. Dr. Aldrich's license is limited to prohibit her from supervising physician assistants until such time as she petitions the Board and demonstrates to the Board's satisfaction that she is able to supervise physician assistants with reasonable skill and judgment.

2. Dr. Aldrich shall pay the recoverable costs in this matter, except for those associated with the Division's motion for summary judgment, in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 8935
Madison, WI 53708-8935

3. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin on September 23, 2013.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Jennifer E. Nashold
Administrative Law Judge