

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
OSTEOPATHIC MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 99-2391
)
VINCENT SUNDRY, D.O.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 1, 1999, in Tarpon Springs, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John E. Terrel, Esquire
Agency for Health Care Administration
Practitioner Regulation-Legal A
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Pamela A.M. Campbell, Esquire
535 Central Avenue, Suite 403
St. Petersburg, Florida 33701

Howard H. Whittington, Esquire
1100 Cleveland Street, Suite 900
Clearwater, Florida 33755

STATEMENT OF THE ISSUES

The issues for determination in this case are whether Respondent's license to practice osteopathic medicine should be revoked or otherwise disciplined for the reasons set forth in the

Administrative Complaint, specifically for: 1) Respondent's failure to meet the acceptable standard of care for osteopathic medicine in his treatment of Patients S.R., K.P., R.Y., V.E., C.K., and S.P.; and 2) Respondent's failure to keep adequate medical records for the named patients.

PRELIMINARY STATEMENT

On October 24, 1996, Petitioner, Department of Health, filed a fourteen-count Administrative Complaint alleging that Respondent violated Section 459.015(1)(x), Florida Statutes, in that he failed to practice osteopathic medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances, and violated Section 459.015(1)(o), Florida Statutes, in that he failed to keep written medical records justifying the course of treatment of the patient. The fourteen counts alleged separate violations of the cited statutes as to seven different patients.

On November 19, 1996, Respondent executed an Election of Rights form indicating that he requested an opportunity to discuss a settlement agreement with the agency. The Election of Rights form indicated that within sixty days of the date the Administrative Complaint was served, the Respondent must either submit a signed settlement agreement or choose an administrative remedy, i.e., formal proceedings pursuant to Section 120.57(1), Florida Statutes, informal proceedings pursuant to Section

120.57(2), Florida Statutes, or a waiver of the right to contest the allegations of the Administrative Complaint.

Despite the sixty-day limitation set forth in the Election of Rights form, the settlement discussions apparently continued for more than two years. By letter dated May 28, 1999, counsel for Petitioner informed counsel for Respondent that the negotiations had reached an impasse and that the case would be forwarded to the Division of Administrative Hearings. On the same date, the matter was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge and the conduct of a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes. Pursuant to the Prehearing Order, the parties filed a Prehearing Stipulation on August 31, 1999. The formal hearing was conducted on September 1, 1999.

At the commencement of the final hearing, Petitioner withdrew Counts Thirteen and Fourteen of the Administrative Complaint relating to Patient W.G. The hearing proceeded on the remaining twelve counts involving the six patients named above.

At hearing, Petitioner presented the testimony of James Taylor, D.O., an expert in osteopathic general medicine, and the deposition testimony of Tom A. Latus, D.O., also an expert in osteopathic general medicine. Petitioner's Exhibits 1-6 were received in evidence. Respondent testified on his own behalf and presented the testimony of C.K., one of Respondent's patients

whose treatment was at issue. Respondent's Exhibit 1, the deposition testimony of Themistocles Diamandis, M.D., a medical doctor and expert in the field of general family practice, was received in evidence.

On September 17, 1999, the Transcript of the hearing was filed. Pursuant to Petitioner's Motion for Extension of Time, filed October 20, 1999, the parties were granted without objection additional time in which to file proposed recommended orders. On October 29, 1999, Respondent filed a Proposed Recommended Order. On November 1, 1999, Petitioner filed a Proposed Recommended Order.

On November 9, 1999, Petitioner filed a Motion to Strike, alleging that Respondent's Proposed Recommended Order raised for the first time the argument that Respondent will be penalized twice if he is found guilty of the medical records violations in this case. Respondent's argument is that the Board of Osteopathic Medicine has already addressed the medical records issue in a Final Order issued on August 18, 1993, and that Respondent should not be penalized twice for these violations.

The Motion to Strike is denied. However, Respondent's argument is rejected. Respondent offers no support for the assertion that a 1993 penalty for failure to keep proper medical records should insulate him from being penalized for a subsequent failure to keep proper medical records. This argument is without merit.

FINDINGS OF FACT

1. Petitioner, Department of Health, is the state agency vested with the statutory authority to enforce the disciplinary standards for the practice of osteopathic medicine under Chapters 455 and 459, Florida Statutes.

2. Respondent, Vincent Sundry, D.O., is and at all material times was, a licensed osteopathic physician in Florida, having been issued license number OS 001383.

3. Central to the standard of care issues in this case is Respondent's use of vitamin B-12 injections. Respondent testified that it is his practice to give patients 2 cc injections of B-12 "to get rid of lethargy and malaise." Respondent testified that he does not use B-12 to treat medical conditions. Respondent believes that B-12 improves the flow of oxygen in the blood and provides a boost of energy.

4. It is also Respondent's practice to mix ½ cc of B-12 with other medications to ease the sting of injections. Respondent testified that he learned this technique from a supervising physician at his osteopathic college in the 1950's. In those days, medications such as penicillin were delivered in a heavy, syrup-like suspension, and the needles were of a larger gauge than is now common. Respondent's supervising osteopathic physician believed that thinning the medicine with B-12 resulted in a less painful shot. Respondent adopted the practice and has maintained it throughout his career.

5. Petitioner's expert witness, Dr. Taylor, testified that B-12 shots are indicated only for pernicious anemia or an inability to absorb B-12 naturally. He testified that the only way to test for anemia or a B-12 loss is to draw a complete blood count ("CBC") and test the values of the hemoglobin.

6. Dr. Taylor testified that giving B-12 injections to patients can be misleading, suggesting that it will make them feel better or have more energy when in fact it has no more effect than a placebo. Dr. Taylor stated that under some circumstances a placebo may be useful, but only as a last resort when conventional medications have failed. Dr. Taylor was also concerned that use of B-12 for such imprecise complaints as "lethargy" or "malaise" could lead to a delay in the correct diagnosis and treatment of the patient's condition.

7. Dr. Taylor conceded that B-12 is harmless, and that he has never seen a toxic or allergic reaction to B-12.

8. Petitioner's other expert, Dr. Latus, agreed that the accepted conditions for B-12 injections are pernicious anemia or a B-12 deficiency proven by blood tests. Dr. Latus also agreed that he was aware of no contraindications for B-12, and that the amounts of B-12 administered by Respondent were appropriate and not dangerous.

9. Dr. Latus testified that some patients respond to placebos, but had no opinion on whether administering placebos constituted malpractice by an osteopathic physician.

10. Respondent's expert witness, Dr. Diamandis, also served as Respondent's monitor during the 1992-1997 probation imposed on Respondent by an earlier order of the Board of Osteopathic Medicine. Dr. Diamandis testified that he has given B-12 injections to patients at their request, when the patients believed it would help them and after he had examined them.

11. Dr. Diamandis summarized his view of B-12 as follows:

It's a funny thing, you can't draw lines on B-12 and limit B-12, the use. You also cannot draw any lines and say you're treating something when you give B-12, because it's only a treatment for pernicious anemia, and it might also be a treatment for something else these days. Who knows.

We've been drinking wine for a long time. Now they say it's good for platelets to thin the blood a little bit . . . So I don't think you can draw the line and say you shouldn't use B-12. You can draw a line that says it's only good for this that we know of.

But a lot of people feel good when they get the shots. Maybe someone can come along and tell you why they feel good. Maybe a psychiatrist could do it.

12. Dr. Diamandis did not accept Respondent's use of ½ cc of B-12 to take the sting out of an injection as a method he would use in his own practice. However, he also declined to opine that Respondent's method would constitute a deviation from the standard of care. Dr. Latus could not recall having been taught this method in his osteopathic training.

13. As to several of the patients discussed in detail below, Petitioner pursued a theory that Respondent was using B-12

to treat conditions such as contact dermatitis, viral sinusitis, and ear infections, because the B-12 injections coincided with Respondent's efforts to address those conditions. As stated above, Respondent denied that he ever used B-12 to treat any medical condition other than complaints of "lethargy" and "malaise." Respondent's testimony on this point is credited. Petitioner failed to demonstrate that Respondent's unorthodox use of B-12 constitutes a deviation from the standard of care.

Patient S.R.

14. Patient S.R., a 26-year-old female, first visited Respondent's office on February 3, 1994, complaining of headaches caused by stress and tension. On March 2, 1994, Respondent treated S.R. for two abscesses in the upper right leg.

15. Respondent cleaned the area of the abscesses, did a xylocaine block, incised and drained the abscesses, and bandaged the area. He gave S.R. injections of 1 cc of dexamethasone, a corticosteroid; 1 cc of lincomycin, an antibiotic; and ½ cc of B-12. Respondent testified that these injections did not go into the muscle tissue, but were done superficially around the abscesses.

16. Respondent prescribed tetracycline, an antibiotic, and Librax to ease "the stress and strain going on in her nerves."

17. Dr. Taylor testified that the dexamethasone was contraindicated, because injections of cortisone or steroids given at the time of an infection tend to blunt the immune system

and slow the healing process. Dr. Taylor found this especially significant because S.R.'s infection was so serious that it had to be incised and drained. Dr. Taylor also found problematic Respondent's failure to schedule a follow-up visit a few days later to assess the healing process.

18. Dr. Taylor testified that lincomycin has a side effect profile so bad that the Food and Drug Administration removed oral lincomycin off the market. He testified that in 1994 there were other injectable antibiotics with fewer potential side effects that could have been given to S.R.

19. Dr. Taylor testified that Respondent's progress notes for S.R. simply set out a diagnosis and plan of treatment, without recording the size and duration of the abscesses, or the patient's temperature, vital signs, or blood pressure.

20. Dr. Latus testified that dexamethasone is not normally given in the case of an abscess or infection because it would have no effect. He agreed with Dr. Taylor that dexamethasone is a steroid that blunts the natural immune system, and thus should not have been used to treat S.R.'s abscesses. He also agreed that Respondent's records did not sufficiently explain the situation or the reasons for the course of treatment Respondent pursued.

21. Dr. Diamandis testified that he would not criticize the use of dexamethasone or some other anti-inflammatory in certain situations involving infections. However, the situations he

described involved relatively extreme situations such as a patient with her throat so swollen there is concern that breathing will become obstructed, or a patient who is running a fever in the range of 104 degrees. These situations are not analogous to Respondent's use of dexamethasone to treat S.R.

22. Respondent testified that he administered the dexamethasone to take down the inflammation of the abscesses, in conjunction with the lincomycin to take down the infection.

23. The evidence establishes that Respondent did not meet the applicable standard of care by administering dexamethasone for the treatment of Patient S.R.'s abscesses, and by failing to monitor the patient's progress after the initial treatment. Respondent's other actions in treating S.R., though subject to differences of opinion, met the standard of care.

24. The evidence establishes that Respondent's medical records failed to justify the course and scope of treatment concerning the use of dexamethasone. Respondent's records failed to record such basic information as the patient's vital signs, and recorded no specific observations concerning the abscesses.

Patient K.P.

25. On February 1, 1994, Patient K.P., a 56-year-old female, first presented to Respondent with a severe gastric upset. Respondent diagnosed gastritis and esophagitis.

26. On March 4, 1994, Patient K.P. again visited Respondent. No complaint is noted for K.P. in Respondent's

notes. The notes indicate that K.P.'s weight was 193 pounds, her blood pressure was 130/82, and her heart tones and lungs were normal.

27. Respondent decided to place K.P. on a weight regimen. He placed K.P. on thyroids; Lasix, a diuretic; and human chorionic gonadotropin (HCG), a hormone produced during pregnancy.

28. During a subsequent visit for the weight regimen on April 5, 1994, Respondent also prescribed Zestoretic, an antihypertensive combined with a diuretic. Respondent noted K.P.'s weight at 192 pounds during this visit.

29. On April 26, 1994, K.P. visited Respondent complaining of bouts of vertigo. Respondent noted that her blood pressure had dropped to 114/78, and her weight was 188 pounds. Respondent also noted that K.P. was leaving for Canada, and he continued all the prescribed medications in larger quantities.

30. Dr. Taylor testified that the use of HCG for obesity is inappropriate, because HGC is no more effective than a placebo for weight loss. Respondent testified that the HCG was not prescribed for weight loss but to treat menopausal syndrome in K.P., to "quiet her nerves" and help her lose weight. Respondent denied ever using HCG for diet patients. However, Dr. Diamandis, the probation monitor, recalled that Respondent had used HCG in the past for weight loss.

31. Dr. Taylor disagreed with the use of Lasix for weight loss. He testified that Lasix artificially induces dehydration,

giving the false appearance of weight loss. When the medication is stopped, the volume of fluids returns.

32. Dr. Taylor testified that thyroids could induce a hypometabolic state, and has an adverse effect on the patient's thyroid gland itself by discouraging the natural production of thyroid hormone. The thyroid gland can begin to dysfunction or decrease the amount of thyroid hormone it would make. Dr. Taylor stated that giving a patient thyroid for a period of weeks or months could induce hypothyroidism.

33. Dr. Taylor also questioned the use of Zestoretic, noting that nothing in Respondent's records for K.P. indicates hypertension. Dr. Taylor pointed out that this prescription, coupled with Lasix, meant that K.P. was now taking two diuretics, which would result in low blood pressure and a lower level of potassium and other salts in the bloodstream. Dr. Taylor testified that he was not surprised that K.P.'s chief complaints on April 26, 1994 were bouts of vertigo and decreasing blood pressure, as these symptoms were to be expected with the medications Respondent prescribed.

34. Dr. Taylor concluded that Respondent's treatment constituted a major safety issue for K.P. Respondent continued the prescriptions for K.P. when she went to Canada, without taking any steps to monitor her condition. Respondent's records indicated no monitoring of the patient's electrolytes, no chronic medication list, no chronic problem list, and no discussion of

diet for K.P., despite the fact that she was seeing Respondent for weight loss.

35. The evidence establishes that Respondent did not meet the applicable standard of care by administering thyroid, Lasix, HCG, and Zestoretic for the treatment of Patient K.P.'s weight problem.

36. The evidence establishes that Respondent's medical records failed to justify the course and scope of treatment concerning the use of thyroid, Lasix, HCG, and Zestoretic.

Patient R.Y.

37. Respondent's records indicate that Patient R.Y. visited Respondent 39 times over the period from early March 1993 through September 26, 1994. Twenty-one of those visits, from March 1993 through February 1994, involved persistent contact dermatitis, a skin rash resulting from exposure to a primary irritant or to a sensitizing antigen.

38. Upon his initial diagnosis of contact dermatitis, Respondent gave R.Y. injections of dexamethasone and Vistaril, a tranquilizer, as well as B-12. Respondent also prescribed an oral antihistamine. On nine subsequent visits, Respondent gave B-12 injections to R.Y.

39. Dr. Latus testified that nothing in the medical record or his experience indicated that B-12 injections were appropriate treatment for contact dermatitis. As found above, Respondent denied that he used B-12 as a treatment for any condition other

than lethargy and malaise, and that denial was credited. Aside from the use of B-12, Dr. Latus found nothing inappropriate in Respondent's treatment of R.Y.

40. Dr. Taylor joined Dr. Latus' objection to the B-12 injections, and also criticized Respondent for seeing the patient 21 times over an 11-month period for contact dermatitis. Dr. Taylor opined that such a large number of visits without resolving the problem should have caused Respondent to refer R.Y. to a dermatologist.

41. Respondent testified that he tried to refer R.Y. to a dermatologist, but that he refused to go because of the expense. Respondent stated that R.Y.'s condition was responsive to the treatment he was giving, but that the condition was caused by R.Y.'s working with concrete and stucco, and that R.Y. refused to find another line of work. Respondent concluded that until R.Y. was willing to quit working with the materials that were causing his problem, a specialist could not achieve any better result than Respondent.

42. The evidence failed to establish that Respondent did not meet the applicable standard of care as to his treatment of Patient R.Y.'s contact dermatitis. Respondent's medical records, while lacking descriptive detail of the color and quality of the rash, adequately justify the course and scope of treatment of Patient R.Y.

Patient V.E.

43. On March 15, 1994, Patient V.E., a 38-year-old female, presented to Respondent with a complaint of pain in the lateral left foot. Respondent's records attribute the pain to a cheap pair of shoes that V.E. had worn for four or five days. Respondent diagnosed a severe ligamentous sprain, and possible falling arch. Respondent gave V.E. a one cc injection of prednisone, a steroid, and eight 375 milligram tablets of Naprosyn, an anti-inflammatory.

44. On March 31, 1994, V.E. returned to Respondent, again indicating pain in her left foot, in the third and fourth metatarsal area, accompanied by edema. Respondent injected the area with xylocaine, a pain killer, then with dexamethasone. He prescribed Lasix to reduce the swelling.

45. The only item in the treatment of V.E. that either Dr. Taylor or Dr. Latus found to be objectionable was an unrecorded injection of ½ cc of B-12. Both doctors opined that B-12 is not indicated for a foot sprain.

46. Respondent testified that the B-12 was not administered to remedy the foot sprain, but to ease the sting of the dexamethasone injection. Respondent testified that he did not chart the B-12 because it was not used to treat anything, and it was only 1/2 cc to thin out the medicine.

47. Respondent did record the 1/2 cc of B-12 in the shot records he was required to submit to the Board of Osteopathic

Medicine as part of his probation. Dr. Taylor opined that the failure to include the 1/2 cc B-12 injection in the patient record constituted improper documentation. However, Dr. Latus expressly declined to opine on the question whether the failure to include the B-12 injection constituted improper documentation.

48. The evidence failed to establish that Respondent did not meet the applicable standard of care as to his treatment of Patient V.E.'s ligamentous sprain. Despite their failure to include the 1/2 cc injection of B-12, Respondent's medical records adequately justify the course and scope of treatment of Patient V.E.

Patient C.K.

49. Patient C.K.'s first visit to Respondent was on September 10, 1982, when he completed a medical history questionnaire indicating he was diabetic and took a "diabetes pill." The visits at issue in this case occurred in 1993 and 1994, when C.K. was in his early eighties.

50. On March 9, 1993, Respondent diagnosed C.K. with back spasms and a pelvic tilt. Respondent applied osteopathic manipulative therapy, gave an injection of dexamethasone and 1/2 cc of B-12, and prescribed an anti-inflammatory medication.

51. On April 1, 1994, C.K. visited Respondent with a complaint of pain in his left hip over the sciatic notch. Respondent repeated the injection of dexamethasone and B-12, and gave C.K. a refill of the anti-inflammatory medication.

52. On April 2, 1994, Respondent recorded that C.K.'s hip pain had curtailed most of his activities, and a "probable need for radiological evaluation." Respondent recorded that C.K. was responsive to the osteopathic manipulative therapy, which restored some ability to bend, stoop, and move without pain. Respondent's records do not indicate follow-up regarding the radiological examination, and do not indicate that X-rays were ever taken of C.K.

53. Patient C.K. testified that he used to go to Respondent for his neck and back, but that Respondent never treated his diabetes. He recalled the manipulative therapy, and recalled requesting and receiving a B-12 shot from Respondent. He could recall receiving no X-rays. C.K. testified that he now works-out at the gym five or six days a week and suffers no back problems, but would return to Respondent if he did.

54. Dr. Latus concluded that, aside from the B-12 injection, Respondent provided satisfactory and adequate care to Patient C.K.

55. Dr. Taylor expressed concern about the B-12 and, more significantly, about Respondent's administering corticosteroids to a diabetic patient, particularly where there is no record of what medication C.K. was taking for his diabetes. Dr. Taylor testified that corticosteroids elevate blood glucose, and should be avoided for diabetic patients unless they are in severe pain or unless corticosteroids are mandated for the patient's

condition. Dr. Taylor also criticized the lack of follow-up on the probable need for radiological examination.

56. The evidence establishes that Respondent did not meet the applicable standard of care by administering dexamethasone for the treatment of Patient C.K.'s hip pain, given that C.K. was a diabetic. Because C.K. appeared to respond positively to the osteopathic treatments, Respondent's failure to refer C.K. to a radiologist was within the standard of care.

57. The evidence establishes that Respondent's medical records failed to justify the course and scope of treatment concerning the use of dexamethasone. The records do not indicate the type of diabetes medication that C.K. was taking, or even an acknowledgment by Respondent that he took C.K.'s diabetes into account before administering dexamethasone.

Patient S.P.

58. Patient S.P., a 61-year-old female, visited Respondent only once, on April 1, 1994. She complained of vertigo, lethargy and malaise. She also indicated that, two to three weeks previously, she had a severe ear infection that was never treated. Respondent characterized S.P. as displaying overall myalgia, aching in her joints, hardly able to move. Her throat was swollen and inflamed.

59. Respondent manipulated her back for the aches and pains, and manipulated her sinuses. Respondent diagnosed S.P. as having viral sinusitis, though he took no cultures to

definitively diagnose the viral origin. He gave S.P. an injection of dexamethasone with ½ cc of B-12, and prescribed a ten-day course of vibramycin, a tetracycline antibiotic.

60. Respondent testified that S.P. was on her way home to Michigan, but felt too sick to fly. His goal was to make her feel well enough to get home, at which point she would visit her own physician.

61. Dr. Latus testified that, except for the B-12, the treatment of Patient S.P. was appropriate.

61. Dr. Taylor testified that, aside from the B-12, Respondent misprescribed antibiotics to treat what he had diagnosed as a viral illness. Viral illnesses are not treated with antibiotics.

62. However, Respondent could not definitively diagnose whether the infection was viral or bacterial without taking cultures. Under the rushed circumstances, Respondent prudently prescribed an antibiotic. At worst, the antibiotic would be ineffective; if the sinusitis was in fact a bacterial infection, the antibiotic would have a salutary impact.

63. The evidence failed to establish that Respondent did not meet the applicable standard of care as to his treatment of Patient S.P.'s symptoms. Respondent's medical records adequately justify the course and scope of treatment of Patient S.P.

Conclusion

64. In summary, the weight of the expert testimony and other evidence establishes that Respondent did not practice with an acceptable level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances as to Patients S.R., K.P., and C.K.

65. The weight of the expert testimony and other evidence establishes that Respondent did practice with an acceptable level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances as to Patients R.Y., V.E., and S.P.

CONCLUSIONS OF LAW

66. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569, 120.57(1), and 455.225, Florida Statutes.

67. License revocation and discipline proceedings are penal in nature. The burden of proof on Petitioner in this proceeding was to demonstrate the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Section 458.331(3), Florida Statutes; Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Dept. of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

68. The "clear and convincing" standard requires:

that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

The findings in this case were made based on the Ferris standard.

69. Pursuant to Section 459.015(2), Florida Statutes, the Board of Osteopathic Medicine is authorized to revoke, suspend or otherwise discipline the license of a physician for violating the following relevant provisions of Section 459.015, Florida Statutes:

(1)(o) Failing to keep legible . . . medical records . . . that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

(x) Gross or repeated malpractice or the failure to practice osteopathic medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances As used in this paragraph, "gross malpractice" or "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable

under similar conditions and circumstances," shall not be construed so as to require more than one instance, event, or act. Nothing in this paragraph shall be construed to require that an osteopathic physician be incompetent to practice osteopathic medicine in order to be disciplined pursuant to this paragraph

. .

70. The Administrative Complaint, as amended at the final hearing, alleged that Respondent violated both of the quoted statutory provisions as to each of six patients: Patient S.R. (Counts One and Two); Patient K.P. (Counts Three and Four); Patient R.Y. (Counts Five and Six); Patient V.E. (Counts Seven and Eight); Patient C.K. (Counts Nine and Ten); and Patient S.P. (Counts Eleven and Twelve).

Patient S.R.

71. Count One of the Administrative Complaint alleged that Respondent violated Section 459.015(1)(x), Florida Statutes, by administering injections that were not indicated, and by failing to perform a culture and sensitivity although the patient's abscesses were draining. The evidence established that the dexamethasone administered by Respondent was contraindicated, and that the lincomycin administered by Respondent had a poor side effect profile compared to alternative injectable antibiotics. The evidence also established that Respondent failed to monitor the patient's progress after the initial treatment. Petitioner has established by clear and convincing evidence that Respondent failed to practice osteopathic medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent

similar osteopathic physician as being acceptable under similar conditions and circumstances, in violation of Section 459.015(1)(x), Florida Statutes.

72. Count Two of the Administrative Complaint alleged that Respondent failed to keep adequate written medical records justifying the course of treatment of Patient S.R. The evidence established that Respondent failed to record basic information such as the patient's vital signs, failed to record specific observations concerning the patient's abscesses, and failed to justify the use of a corticosteroid to treat an infection. Petitioner has established by clear and convincing evidence that Respondent violated Section 459.015(1)(o), Florida Statutes.

Patient K.P.

73. Count Three of the Administrative Complaint alleged that Respondent failed adequately to treat Patient K.P. by administering an injection of HCG that was not indicated in the patient's treatment for weight loss. The evidence established that Respondent improperly administered HCG, thyroid, and two diuretics for a weight loss regimen. The evidence did not firmly establish that Respondent's treatment caused vertigo and decreasing blood pressure in K.P., but did establish that those symptoms were entirely consistent with a reaction to the prescribed medications. Petitioner has established by clear and convincing evidence that Respondent failed to practice osteopathic medicine with that level of care, skill, and

treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances, in violation of Section 459.015(1)(x), Florida Statutes.

74. Count Four of the Administrative Complaint alleged that Respondent failed to keep adequate written medical records justifying the course of treatment of Patient K.P. The evidence established that Respondent's written records did not justify the course of treatment he pursued for this patient's weight regimen. Petitioner has established by clear and convincing evidence that Respondent violated Section 459.015(1)(o), Florida Statutes.

Patient R.Y.

75. Count Five of the Administrative Complaint alleged that Respondent failed adequately to treat Patient R.Y. by administering B-12 injections that were not indicated in the patient's treatment for contact dermatitis. The evidence established that the B-12 injections were unrelated to the treatment for contact dermatitis. Respondent's treatment of Patient R.Y. was otherwise reasonable under the circumstances, i.e., Patient R.Y. refused to cease working with the materials that were causing his skin rash, and declined Respondent's efforts to refer him to a specialist. Petitioner has failed to establish by clear and convincing evidence that Respondent failed to practice osteopathic medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar

osteopathic physician as being acceptable under similar conditions and circumstances, in violation of Section 459.015(1)(x), Florida Statutes.

76. Count Six of the Administrative Complaint alleged that Respondent failed to keep adequate written medical records justifying the course of treatment of Patient R.Y. The evidence established that Respondent's written records adequately justified the course of treatment he pursued for this patient's contact dermatitis. Petitioner has failed to establish by clear and convincing evidence that Respondent violated Section 459.015(1)(o), Florida Statutes.

Patient V.E.

77. Count Seven of the Administrative Complaint alleged that Respondent failed adequately to treat Patient R.Y. by administering B-12 injections that were not indicated in the patient's treatment for a ligamentous sprain of the foot. The evidence established that the B-12 injections were unrelated to the treatment for the sprain. Respondent's treatment of Patient V.E. was otherwise reasonable under the circumstances. Petitioner has failed to establish by clear and convincing evidence that Respondent failed to practice osteopathic medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances, in violation of Section 459.015(1)(x), Florida Statutes.

78. Count Eight of the Administrative Complaint alleged that Respondent failed to keep adequate written medical records justifying the course of treatment of Patient V.E. The evidence established that Respondent's written records adequately justified the course of treatment he pursued for this patient's ligamentous sprain. Respondent adequately explained his failure to include the ½ cc injection of B-12 on the patient record, and he did include it as required on his probationary shot record. Petitioner's experts were divided as to whether failure to include the B-12 injections in the patient record constituted improper documentation. Petitioner has failed to establish by clear and convincing evidence that Respondent violated Section 459.015(1)(o), Florida Statutes.

Patient C.K.

79. Count Nine of the Administrative Complaint alleges that Respondent failed adequately to treat Patient C.K. by administering injections that were not indicated in the patient's treatment for back and hip pain. The evidence established that C.K. was a diabetic, that Respondent apparently made no inquiry as to C.K.'s medications for diabetes, that Respondent administered a corticosteroid to C.K., and that corticosteroids elevate blood glucose, a problematic effect for a diabetic patient. C.K.'s testimony on behalf of Respondent was an admirable show of confidence and loyalty, but has no bearing on an assessment of the quality of Respondent's treatment.

Petitioner has established by clear and convincing evidence that Respondent failed to practice osteopathic medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances, in violation of Section 459.015(1)(x), Florida Statutes.

80. Count Ten of the Administrative Complaint alleged that Respondent failed to keep adequate written medical records justifying the course of treatment of Patient C.K. The evidence established that Respondent's written records did not justify the course of treatment he pursued for this patient's back and hip pain. Respondent's medical records do not indicate the type of diabetes medication that C.K. was taking, or any indication that Respondent took C.K.'s diabetes into account before administering a corticosteroid. Petitioner has established by clear and convincing evidence that Respondent violated Section 459.015(1)(o), Florida Statutes.

Patient S.P.

81. Count Eleven of the Administrative Complaint alleged that Respondent failed adequately to treat Patient S.P. by administering injections that were not indicated in the patient's treatment for viral sinusitis. The evidence established that Respondent's diagnosis of a viral illness was premature, and that the antibiotics he prescribed could have had a salutary effect on bacterial sinusitis, and would have no deleterious effect even if

the condition were viral. Respondent was dealing with a patient who was attempting to travel home to Michigan, and his goal was to get her well enough to fly home to visit her own physician. Under all the circumstances, Respondent's treatment of Patient S.P. was prudent. Petitioner has failed to establish by clear and convincing evidence that Respondent failed to practice osteopathic medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances, in violation of Section 459.015(1)(x), Florida Statutes.

82. Count Twelve of the Administrative Complaint alleged that Respondent failed to keep adequate written medical records documenting his treatment of Patient S.P. This patient visited Respondent only once, and Respondent adequately charted the record of this visit and justified his treatment. Petitioner has failed to establish by clear and convincing evidence that Respondent violated Section 459.015(1)(o), Florida Statutes.

83. Rule 64B15-19.003, Florida Administrative Code, provides aggravating or mitigating factors to be considered in imposing a penalty upon a licensee. A mitigating factor relevant to this proceeding is the lack of pecuniary gain to the licensee, and the general observation that Respondent is a small-town osteopathic physician attempting to provide convenient, affordable service to a patient base without much money to spare

for minor medical problems. Aggravating factors are: the number of repetitions of offenses; the number of times the licensee has been previously disciplined by the Board; and the negligence of the licensee in committing the violations. Thus, aggravating factors outweigh the mitigating factor.

84. Another potential aggravating factor is the "actual knowledge of the licensee pertaining to the violation." A disturbing element of these proceedings was Respondent's apparent lack of knowledge of the contraindications for corticosteroids in treating infections and treating patients with diabetes, and of prescribing multiple diuretics as part of a weight loss regimen.

Respondent demonstrated a pattern of administering these contraindicated medications, then failing to monitor the progress of the patients. It was simply fortuitous that the worst result was Patient K.P.'s bouts of vertigo and decreasing blood pressure.

85. Another concern is the disciplinary history of Respondent, who has twice been subject to discipline by the Board. In 1984, the Board's Final Order revoked Respondent's license, but stayed the revocation in lieu of a five-year probation. Later that year, Respondent's license was revoked for violation of the probation. In 1993, Respondent was again placed on probation pursuant to a consent agreement.

86. The range of penalties for violation of Section 459.015(1)(o), Florida Statutes, are probation with suspension up

to a maximum six-month suspension, and an administrative fine from \$1,500.00 to \$5,000.00. Rule 64B15-19.002(16), Florida Administrative Code. The range of penalties for violation of Section 459.015(1)(x), Florida Statutes, is from reprimand and probation conditioned on continuing education, to suspension followed by probation, to revocation, and an administrative fine up to \$5,000.00.

87. Based upon the totality of the circumstances, it is concluded that the appropriate penalty is revocation of Respondent's license to practice osteopathic medicine in the State of Florida.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the Department of Health, Board of Osteopathic Medicine enter a final order determining that Vincent Sundry has committed three violations of Section 459.015(1)(o), Florida Statutes, three violations of Section 459.015(1)(x), Florida Statutes, and revoking his license to practice osteopathic medicine in the State of Florida.

DONE AND ENTERED this 14th day of April, 2000, in
Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2000.

COPIES FURNISHED:

John E. Terrel, Esquire
Agency for Health Care Administration
Practitioner Regulation-Legal A
Post Office Box 14229
Tallahassee, Florida 32317-4229

Pamela A.M. Campbell, Esquire
535 Central Avenue, Suite 403
St. Petersburg, Florida 33701

Howard H. Whittington, Esquire
1100 Cleveland Street, Suite 900
Clearwater, Florida 33755

Bill Bukhalt, Executive Director
Board of Osteopathic Medicine
Department of Health
1940 North Monroe Street
Tallahassee, Florida 32399-0750

Angela T. Hall, Agency Clerk
Department of Health
2020 Capital Circle, Southeast
Bin A02
Tallahassee, Florida 32399-1701

William Large, General Counsel
Department of Health
2020 Capital Circle, Southeast
Bin A02
Tallahassee, Florida 32399-1701

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.