STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner, vs. CARL W. LIEBERT, JR., M.D., Respondent.	)	Case No. 00-4396PL

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on March 6, 2001, in Naples, Florida.

APPEARANCES

For Petitioner: Robert C. Byerts, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Ralph L. Marchbank, Jr., Esquire
Post Office Box 3979
Sarasota, Florida 34230

STATEMENT OF THE ISSUE

Did the Respondent commit the violations alleged in the Amended Administrative Complaint dated March 2, 2001, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

By an Administrative Complaint dated August 30, 2000, and filed with the Division of Administrative Hearings (Division) on October 25, 2000, and amended by order dated March 1, 2001, the Department of Health, Board of Medicine (Board) is seeking to revoke, suspend, or otherwise discipline Respondent's license to practice medicine in the State of Florida.

As grounds therefor, the Board alleges that Respondent violated Section 458.331(1)(t), Florida Statutes, by failing to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances, with regard to a patient known as E. T., in that he failed to: (a) personally examine E. T. in order to evaluate the ongoing bleeding process; or (b) admit E. T. to the hospital until such time that Respondent could personally examine E. T. to evaluate the ongoing bleeding process; or (c) order an ultrasound or other radiographic imaging of the groin vessels to evaluate for a possible surgical bleeding complication.

By an Election of Rights filed with the Board, Respondent denied the allegations contained in the Administrative Complaint and requested a formal administrative hearing.

Respondent has also denied all the allegations contained in the Amended Administrative Complaint.

By letter dated October 25, 2000, the Board referred this matter to the Division for the assignment of an Administrative Law Judge and for the conduct of a formal hearing.

At the hearing, the Board presented the testimony of Eunice Terrenzi and Robert Mullert, M.D. The Board also presented a copy of the videotape and a copy of the transcript of the videotaped deposition of Michael J. Cohen, M.D., in lieu of his live testimony at the hearing. The Board's Exhibits 1-5 were admitted in evidence. Respondent testified in his own behalf and presented the testimony of Jonathan Wideroff, M.D. Respondent's Exhibits 1-2 were admitted in evidence. Section 458.331, Florida Statutes, and Rule 59R-8.001, Florida Administrative Code, were officially recognized.

At the conclusion of the hearing, the parties requested that they be given 30 days from the date the transcript of this proceeding was filed with the Division to file their proposed findings of fact and conclusions of law. The parties' request was granted with the understanding that any time constraint imposed under Rule 28-106.216(1), Florida Administrative Code, was waived in accordance with Rule 28-106.216(2), Florida Administrative Code. A transcript of this

proceeding was filed with the Division on March 29, 2001. Subsequent to the filing of the transcript, Respondent filed an unopposed Motion to Extend Submission of Proposed or Recommended Order, which was granted with the understanding that any time constraints imposed under Rule 28.106.216(1), Florida Administrative Code, was waived in accordance with Rule 28.106-216(2), Florida Administrative Code. The parties timely filed their proposed findings of fact and conclusions of law under the extended time frame.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Board is the agency charged with regulating the practice of medicine in the State of Florida.

2. Respondent, Carl W. Liebert, Jr., M. D. (Dr. Liebert) is and, at all times material hereto, has been licensed to practice medicine in the State of Florida, having been issued license number ME0047601. Respondent is Board-certified in surgery.

3. On January 29, 1997, Respondent performed an abdominal aortic aneurysm repair and an aortobifemoral graft on E. T., a male patient, approximately 70 years of age.

4. The site of the graft for the left femoral artery intruded partially upon the site of a previous graft of the femoral artery performed in 1986. This graft failed immediately after the procedure. Respondent sutured the graft at the left femoral artery partially into old scar tissue from the 1986-failed graft.

5. After the surgery, on the Sunday before his release from the Naples Community Hospital (Hospital) on Thursday, February 6, 1997, E. T. suddenly and abruptly fell in his hospital room. Respondent was concerned about the possible damage this fall may have caused to the surgical repair. Although E. T. experienced pain in his left groin area, the location of one of the aortobifemoral grafts, while in the Hospital, there is no evidence that any harm resulted from the fall or that the pain was a result of the fall.

6. After the surgery, during E. T.'s stay in the Naples Community Hospital (Hospital), there was lymphatic drainage, a pinkish colored fluid, from the incision in his left groin. While the lymphatic fluid may have been blood stained resulting in the pinkish color, the lymphatic drainage was not as described in the nurse's notes as being "a bloody discharge."

7. On Thursday, February 6, 1997, E.T. was discharged from the Hospital. After E. T.'s discharge from the Hospital, his wife cared for him in their home in Naples, Florida.

8. As expected by Dr. Liebert, the incision in E. T.'s left groin area continued to have lymphatic drainage after E. T.'s discharge from the Hospital. The incision in E. T.'s left groin area continued to drain a pinkish colored fluid.

9. The lymphatic drainage from the incision in E. T.'s left groin continued over the weekend and on Monday, February 10, 1997, E. T.'s wife contacted Respondent's office to advise Respondent of the drainage and of the pain E. T. was experiencing. Although E. T.'s wife did not speak directly to Respondent, she assumed that the person to whom she spoke with over the telephone conveyed her message to Respondent. E. T.'s wife was given a prescription for Percocet for pain and told that Respondent would see E. T. in his office on Thursday, February 13, 1997.

10. On Wednesday, February 12, 1997, while showering and cleansing the incision on his left groin, E. T. inadvertently disturbed the incision on his left groin, which caused the incision to drain profusely. After leaving the shower, E. T.'s wife assisted E. T. in drying-off his body and controlling the drainage from the incision.

11. The wife stemmed the flow of the drainage with a towel and called the Collier County Emergency Medical Services (EMS) and Respondent's office. The wife explained to the person answering Respondent's telephone, the circumstances of the occurrence with E. T., and that she had called the Collier County EMS personnel. The wife also requested that Respondent come to the Hospital.

12. On February 12, 1997, in response to E. T.'s wife's call, the Collier County EMS personnel responded to E. T.'s home at approximately 7:25 a.m., performed an initial treatment for the drainage from E.T.'s left groin and transported E. T. by ambulance to the Hospital. The EMS personnel noted that E. T. complained of bleeding and it was their initial impression that E. T. was bleeding from his femoral artery. However, the EMS personnel did not confirm that E. T. was bleeding from his left femoral artery. The EMS personnel also noted what they considered to be a large amount of thick, clotty blood, which they estimated to be approximately 1000 milliliters (ml's) or 1000 cubic centimeters (cc's), surrounding E. T.

13. Based on the records of the EMS personnel and on E. T.'s description given to Dr. Mulert, E. T.'s wife's testimony that the incision spurted blood for approximately 3-4 feet appears to be somewhat exaggerated.

14. The EMS personnel, assuming that E. T. had recently loss blood, administered 300 cc of fluid intravenously to E. T. When the EMS personnel attempted to move E. T., the drainage from the incision started again, but was controlled with a trauma dressing and pressure applied by a sandbag.

15. The EMS personnel presented E. T. at the Emergency Room (ER) of the Hospital at approximately 7:52 a.m. on February 12, 1997. The ER nurse noted that a pressure dressing along with a sandbag had been applied and that the drainage or bleeding was under control.

16. The ER nurse drew blood from E. T. and noted in her record that it was for a "type and cross" in preparation for a blood transfusion should one become necessary. However, Dr. Robert Mulert, the ER physician who attended E. T. while in the ER, noted in his records that he had requested a "type and hold," a less elaborate procedure than a "type and cross," which requires checking the antibodies and making sure the blood in question is compatible blood. Based on his estimate of E. T.'s blood loss and E. T.'s vital signs and other health conditions, Dr. Mulert did not consider E. T. as a patient in need of a blood transfusion.

17. Upon E. T.'s arrival at the Hospital, Dr. Mulert made a brief assessment of E. T.'s condition to confirm that

there was no active bleeding and that the patient did not need emergent intervention.

18. Although Dr. Mulert is not a vascular surgeon or even a general surgeon, he has one year of residency training in surgery and is a Board-certified emergency room physician who has been working as an emergency room physician for approximately 27 years. Dr. Mulert is qualified to examine patients such as E. T. and advise the primary treating physician of his findings. Dr. Liebert has worked with, and relied on, Dr. Mulert's expertise as an emergency room physician in treating many of his patients who are presented at the Hospital for emergency treatment for approximately 15 years.

19. Dr. Mulert discussed E. T.'s condition by telephone with Dr. Liebert on two separate occasions during E. T.'s visit to the Hospital on February 12, 1997. The first occasion was shortly after E. T. was admitted to the Hospital ER. During this first occasion, Dr. Mulert advised Dr. Liebert that his patient, E. T. had been admitted to the Hospital with a reported acute hemorrhaging or bleeding of the incision in the area of his left groin and that E. T.'s wife was asking for Dr. Liebert.

20. In some instances, the primary physician will assume treatment at this juncture. However, it is not unusual for the ER physician to continue treatment.

21. The decision was for Dr. Mulert to continue treatment and to keep Dr. Liebert advised as to E. T.'s condition.

22. There is nothing in the record to indicate Dr. Liebert's location on the morning of February 12, 1997; nor is there any evidence to indicate that Dr. Liebert was prevented from examining E. T. on the morning of February 12, 1997.

23. Also, during this first discussion, Dr. Mulert advised Dr. Liebert, based on the information that he had gathered, that E. T.'s blood loss was approximately 500 cc's but that there was no active bleeding at that time.

24. Dr. Mulert also advised Dr. Liebert that he intended to deal with the patient's problems by proceeding with his plan to assess E. T.'s blood count, to monitor E.T.'s vital signs, and to see if the patient met Dr. Mulert's criteria for stability: Can he get up? Can he walk? Can he talk? Does the patient make sense? Does the patient have discharge stability?

25. Subsequent to this first discussion, Dr. Mulert made a more detailed examination of the wound to determine if the

wound was infected, the depth of the wound, and the need to pack the wound with sterile dressing, etc.

26. After reviewing the EMS personnel records, E. T.'s history, talking with E. T., and reviewing the results of his examination, Dr. Mulert's impression was that E. T. had a hematoma under a surgical wound; that the wound had come apart; and that the collection of blood (old blood) within the hematoma had expressed from that surgical wound. The blood within the hematoma is referred to as "old blood" in that it was no longer in the vascular system and was not being replenished with oxygen.

27. While E. T.'s vital signs were low compared to his vital signs taken while in the Hospital on visits prior to February 12, 1997, they were not significantly lower and were within a normal range for a patient, such as E. T., who was on beta blockers. E. T.'s vital signs were inconsistent with an aggressive femoral graft leak.

28. The hematocrit and hemoglobin values on February 12, 1997, were slightly lower than the hematocrit and hemoglobin values while in the hospital during his most recent visit in January 1997. However, based on the testimony of Dr. Liebert, which I find to be credible, that was to be expected since E. T. had been given a significant amount of auto-transfused blood during his surgery on January 29, 1997.

Also, the lower values were consistent with a 500 cc or less blood loss by a patient that had just recently undergone surgery.

29. During either the first or second conversation, Dr. Mulert advised Dr. Liebert that the surgical site had come apart.

30. During his care of E. T., Dr. Mulert became aware that Dr. Liebert had performed an abdominal aortic aneurysm repair earlier in the year, and that the repair was under the nine-inch incision on E. T.’s left groin but did not know the exact location of the repair.

31. If Dr. Liebert made a diagnosis, he did not convey such diagnosis to Dr. Mulert.

32. Neither Dr. Liebert nor Dr. Mulert discussed or made a differential diagnosis. However, it was the testimony of both Dr. Mulert and Dr. Liebert, which I find to be credible, that based on the facts presented in respect to E. T. by Dr. Mulert, a differential diagnosis was unnecessary. A differential diagnosis is a mechanism physicians use to identify and evaluate possible alternative causes for observed symptoms.

33. During the second telephone conversation, Dr. Mulert advised Dr. Liebert that the patient had been stable for approximately four hours, that his vital signs were within

normal ranges, that his blood counts were basically unchanged, that there was no active bleeding and had not been any active bleeding for approximately four hours, that the patient was up and walking around the ER, that the patient was asymptomatic when vertical that the patient was not orthostatic when walking, that the patient wanted to go home, and that the incision in the left groin area needed to be repaired.

34. There was no discussion between Dr. Mulert and Dr. Liebert concerning the admission of E. T. to the Hospital for the purpose of further examining the possibility of arterial bleeding.

35. Ultrasound and computerized tomography (CT) were available to patients at the Hospital. While these tests don't always "rule out" internal bleeding or suture line disruptions, they can, in certain instances, "rule in" these conditions. Based on the facts in respect to E. T.'s condition presented by Dr. Mulert on February 12, 1997, particularly that they were dealing with an open wound, and Dr. Liebert's feelings as to the somewhat limited use of these tests in this type situation, there was no ultrasound or CT scan performed.

36. Based on the facts in respect to E. T.'s condition as presented by Dr. Mulert on February 12, 1997, the failure of Dr. Liebert to utilize the ultrasound or CT scan to further

examine E. T. in regard to arterial bleeding does not constitute the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable prudent similar physician as being acceptable under similar conditions and circumstances, notwithstanding the testimony of Michael J. Cohen, M.D. to the contrary.

37. Subsequently, Dr. Mulert sewed up the incision which had come apart.

38. Dr. Liebert did not personally examine E. T. at any time while he was in the ER to evaluate the cause of E. T.'s problem in relation to arterial bleeding, but relied on Dr. Mulert to provide him with facts surrounding E. T.'s condition based on Dr. Mulert's examination of E. T. and his assessment of E.T.'s problem.

39. Based on the facts in respect to E. T.'s condition in relation to arterial bleeding as presented by Dr. Mulert on February 12, 1997, the failure of Dr. Liebert to personally examine E. T. prior to his discharge or to delay E. T.'s discharge so as to allow time for Dr. Liebert personally examine E. T. to determine for himself E. T.'s problem in relation to arterial bleeding does not constitute the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable prudent similar physician as being acceptable under similar conditions and

circumstances, notwithstanding the testimony of Michael J. Cohen, M.D. to the contrary.

38. E. T. was discharged from the Hospital at approximately 12:00 noon on February 12, 1997.

38. After his discharge on February 12, 1997, E. T. had an uneventful afternoon and evening.

39. After getting out of his bed on the morning of February 13, 1997, E. T. walked from his bedroom into the kitchen and as he stood in the kitchen the left groin incision erupted again, hemorrhaging blood onto the kitchen floor.

40. The EMS personnel were called responded to the call around 5:30 a.m. Prior to the arrival of the EMS personnel the bleeding had stopped. The EMS personnel noticed a moderate blood loss. The EMS personnel dressed the left groin wound, administered fluids and transported E. T. to the Hospital where he was admitted to the ER at approximately 6:00 a.m.

41. Although E. T. received blood and fluids, his condition deteriorated rapidly and E. T. expired at approximately 7:24 a.m. on February 13, 1997.

42. No autopsy was performed. However, the cause of death was most likely myocardial infarction that resulted from a loss of blood.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

44. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The Board has the burden of proof in this proceeding. To meet its burden, the Board must establish facts upon which its allegations are based by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996) and Sections 120.57(1)(j) and 458.331(3), Florida Statutes (2000).

45. Section 458.331(1)(t), (2) Florida Statutes, provides in pertinent part as follows:

> Grounds for disciplinary action; action by the board and department.
>
> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable prudent similar physician as being acceptable under similar conditions and circumstances . . . As used in this paragraph, . . . "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent

> similar physician as being acceptable under similar conditions and circumstances" shall not be construed so as to require more than one instance, event, or act.
>
> * * *
>
> (2) When the board finds any person guilty of any of the grounds set forth in subsection (1), . . . it may enter an order imposing one or more of the following penalties:
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> * * *
>
> (b) Revocation or suspension of a license.
>
> (c) Restriction of practice.
>
> (d) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense.
>
> (e) Issuance of a reprimand.
>
> (f) Placement of the physician on probation for a period of time and subject to such conditions as the board may specify, including, but not limited to, requiring the physician to submit to treatment, to attend continuing education courses, to submit to reexamination, or to work under the supervision of another physician.
>
> (Emphasis furnished.)

46. Without question, hindsight is better than foresight and I am sure that if Dr. Liebert were faced with this same situation today his decision would be entirely different. However, Dr. Liebert is not charged with failure to read the future but is charged with the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable prudent similar physician as being acceptable under similar conditions and circumstances. The Board has failed to meet its burden in this regard.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Board enter a final order dismissing the Amended Administrative Complaint dated March 2, 2001.

DONE AND ENTERED this 1st day of August, 2001, in Tallahassee, Leon County, Florida.

_____
WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 1st day of August, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.