

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
BOARD OF OSTEOPATHIC MEDICINE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 05-0860PL  
 )  
SHELLY O. WOLLAND, D.O., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, in Fort Lauderdale, Florida, on June 21, 2005.

APPEARANCES

For Petitioner: Diane K. Kiesling  
Attorney Supervisor, Litigation  
Office of the General Counsel  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

For Respondent: Joseph s. Paglino, Esquire  
Law Offices of Joseph S. Paglino  
12865 West Dixie Highway  
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Shelly O. Wolland, D.O., committed the violations alleged in an

Administrative Complaint dated February 15, 2005, issued by Petitioner, the Department of Health, in DOH Case No. 2004-50416, and, if so, what disciplinary action should be taken against her.

PRELIMINARY STATEMENT

In a two-count Administrative Complaint dated February 15, 2005, DOH Case No. 2004-50416, Petitioner alleged that Dr. Wolland violated one statutory provision governing the practice of health care practitioners in Florida, Section 456.072(1)(q), Florida Statutes (2003-2004). The Administrative Complaint alleged that Dr. Wolland had by certain specified conduct violated an Order of Emergency Restriction of License issued by Petitioner in DOH Case No. 2001-21687. Dr. Wolland executed an Election of Rights form disputing the allegations of material fact contained in the Administrative Complaint and requested a formal administrative hearing. The Election of Rights form was filed with Petitioner by counsel for Dr. Wolland.

On March 8, 2005, Petitioner filed the Administrative Complaint and Dr. Wolland's request for hearing with the Division of Administrative Hearings for assignment of an administrative law judge to conduct an evidentiary hearing. The matter was designated DOAH Case No. 05-0860PL and was assigned to the undersigned.

On March 17, 2005, a Notice of Hearing was entered scheduling the final hearing of this matter for May 31 through June 3, 2005. The final hearing was subsequently rescheduled, at the request of Respondent, to June 21 through 23, 2005.

Beginning March 14, 2005, and continuing until the final hearing of this matter, Dr. Wolland filed a series of motions challenging the Order of Emergency Restriction of License and Petitioner's conduct since the issuance of the Order. Those motions included, but are not limited to, a Motion to Vacate Emergency Restriction of License in DOAH Case No. 2001-21687, denied by Order entered March 17, 2005; Respondent's Motion to Dismiss, denied by Order entered March 22, 2005; and a Motion to Strike Count(s) from Administrative Complaint, denied by Order entered May 9, 2005.<sup>1</sup>

The various pleadings filed by Dr. Wolland challenged the Order of Emergency Restriction of License essentially alleged various reasons why the Order, in Dr. Wolland's opinion, is not a valid order. These efforts were rejected first, because this forum has no jurisdiction to hear a challenge to the validity of the Order of Emergency Restriction and, secondly, because none of the pleadings suggested that, at the times material to this case, the order had been declared invalid by any entity.

On April 18, 2005, Dr. Wolland moved for the consolidation of this case with DOAH Case No. 05-1238PL. The latter case

involves Dr. Wolland's challenge of the Administrative Complaint issued against her in DOH Case No. 2001-22687 which includes alleged violations which formed the basis for issuance of the Order of Emergency Restriction of License. Dr. Wolland argued that the cases should be consolidated so that she would have an opportunity to have the Order of Emergency Restriction of License declared invalid. The Motion was denied by Order entered April 26, 2005. The Motion was denied because, again, this forum has no authority to declare the Order of Emergency Restriction of License "invalid" and, even it did, such a ruling would not apply retroactively to the times relevant to this proceeding.

Despite efforts to explain the limited scope of this case and the denial of Dr. Wolland's attempts to question the validity of the Order of Emergency Restriction of License, there followed a continuing series of motions filed by Dr. Wolland and Petitioner. Those motions were disposed of in an Order on Outstanding Motions entered May 9, 2005. The Order made clear that Dr. Wolland's arguments concerning the validity of the Order of Emergency Restriction of License had been preserved for appeal and that further argument of the issue would not be considered. Dr. Wolland was also informed that continued efforts to raise the issue would result in the imposition of an award of fees and costs to Petitioner.

Despite the foregoing admonition, on May 19, 2005, Dr. Wolland filed a Motion in Limine raising the same issues addressed in the Order on Outstanding Motions. The Motion in Limine was denied by an Order entered May 20, 2005. A ruling on a Motion for an Award of Attorney's Fees and Costs filed by Petitioner in response to the Motion was, however, reserved until the issuance of this Recommended Order.<sup>2</sup> In light of the recommendation in this Order and, consequently, the likelihood that the costs associated with Petitioner's prosecution of this case will be assessed against Dr. Wolland,<sup>3</sup> the Motion for an Award of Attorney's Fees and Costs is hereby denied.

On June 7, 2005, Petitioner filed a Notice of Intent to Admit Medical Records. Dr. Wolland filed an Objection to Petitioner's Notice of Intent to Admit Medical Records on June 15, 2005. On June 16, 2005, Petitioner filed an Addendum to Notice of Petitioner's Intent to Admit Medical Records.

Both parties filed unilateral pre-hearing statements.<sup>4</sup> Dr. Wolland admitted certain facts which have been included in this Recommended Order to the extent relevant.

Immediately before the final hearing, Petitioner filed a Motion to Strike, seeking an order striking portions of the deposition testimony of R.S. Power, Petitioner's Agency Clerk, and Joel B. Rose, D.O. Dr. Wolland filed "objections" to the Motion on June 23, 2005. The Motion is hereby denied.

At the final hearing, Petitioner presented the testimony of R.S. Power, Petitioner's Agency Clerk, by deposition; Joel B. Rose, D.O., an expert witness, by deposition; Christie Jackson; Anthony Spine; Thomas Toia, D.C.; Ephraim Livingston, Esquire; and William Miller, Esquire. Petitioner also had admitted Petitioner's Exhibits numbered 1 through 4, 7 through 8, 10, 11, and 13. Dr. Wolland testified on her own behalf. She offered no exhibits. Dr. Wolland was also given an opportunity to proffer in writing alleged facts and argument concerning her argument that the Order of Emergency Restriction of License was invalidly issued.

Official recognition of Florida Administrative Code Rule 64B15-15.006 was taken at the request of Petitioner.

On July 1, 2005, Dr. Wolland filed Respondent's Request for Copy of Transcript of Final Hearing. Although it did not appear that Dr. Wolland was seeking an order from this forum, an Order Concerning Request for Copy of Transcript was entered July 8, 2005, informing Dr. Wolland that, if she were making a public records request from the Division of Administrative Hearings for a copy of the Transcript, she would have to make her request through the Clerk of the Division of Administrative Hearings.

On July 25, 2005, Dr. Wolland filed Respondent's Motion for Official Recognition. On July 29, 2005, Petitioner objected to the Motion in a Response to Respondent's [Second] Motion for

Official Recognition. Dr. Wolland filed a Reply on August 3, 2005. After consideration of the Motion, it is hereby denied.

A Notice of Filing of Transcript was issued July 8, 2005, informing the parties that the Transcript of the final hearing had been filed with the Division on July 7, 2005, and that they had until July 29, 2005, to file proposed recommended orders. Both parties timely filed Proposed Recommended Orders,<sup>5</sup> which have been fully considered in rendering this Recommended Order. Dr. Wolland also filed Respondent's Proffer as to the Unlawfulness of the March 18, 2002 Order addressing issues previously determined not to be relevant to this matter.

#### FINDINGS OF FACT<sup>6</sup>

##### A. The Parties.

1. Petitioner, the Department of Health (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for the investigation and prosecution of complaints involving physicians licensed to practice osteopathic medicine in Florida.<sup>7</sup>

2. Respondent, Shelly O. Wolland, D.O., is, and was at the times material to this matter, an osteopathic physician licensed to practice osteopathic medicine in Florida, having been issued, on September 30, 1987, license number OS 5378.

3. During the parts of 2003 and 2004 relevant to this proceeding, Dr. Wolland worked as an osteopathic physician at

Advanced Integrated Medical Center (hereinafter referred to as "Advanced"), located at 1655 East Oakland Park Boulevard, Fort Lauderdale, Florida. She usually worked at Advanced on Tuesdays and Thursdays.

B. The Order of Emergency Restriction of License.

4. On or about March 18, 2002, the Secretary of the Department issued an Order of Emergency Restriction of License (hereinafter referred to as the "ERO") in DOH Case No. 2001-21687.<sup>8</sup>

5. The ERO provides the following restrictions on Dr. Wolland's practice of osteopathic medicine:

1. The license of Shelly O. Wolland, D.O., license number OS 005378, is hereby immediately restricted in the following manner:

a. Dr. Wolland's license is hereby restricted and she is prohibited from dispensing, administering, or injecting any medication except for those medicines that may be required to sustain a patient's life in a bona fide medical emergency. [Emphasis added].

. . . .

The ERO clearly prohibits Dr. Wolland from "dispensing . . . any medication," "administering . . . any medication" OR "injecting . . . any medication."<sup>9</sup>

6. The rationale for issuing the ERO is also explained in some detail in the Order. In summary, the ERO was issued due to



concerns about Dr. Wolland's handling of medications which, while including pre-filled syringes, also include other medications which the Department believed were improperly stored. The Department, while concerned about the pre-filled syringes, was also concerned about medications allegedly found on November 29, 2001, at a clinic allegedly owned by Dr. Wolland, which could be dispensed or administered other than by injection. Reading the ERO in its entirety, it is clear that the Department not only prohibited Dr. Wolland from giving injections, but it also prohibited Dr. Wolland from administering or dispensing any medications except in a medical emergency.

7. The ERO goes on to inform Dr. Wolland of the consequences of her failure to comply with the restrictions placed on her practice:

2. Dr. Wolland's failure to comply with the restrictions placed on her license to practice osteopathic medicine shall constitute grounds for a suspension of her license to practice osteopathic medicine.

3. A proceeding seeking appropriate discipline, including, but not limited to, the suspension or revocation of the license to practice as a physician of Shelly O. Wolland, D.O. shall be promptly instituted and acted upon in compliance with Section 120.60(6), Florida Statutes.<sup>[10]</sup>

8. The ERO also contains the following "NOTICE OF RIGHT TO JUDICIAL REVIEW":

Pursuant to Sections 120.60(6), and 120.68, Florida Statutes, the Department's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Petition for Review in accordance with Rule 9.100, Florida Rules of Appellate Procedure, with the Department of Health and a second copy of the petition accompanied by a filing fee prescribed by law with the District Court of Appeal within thirty (30) days of the date this Order is filed.

9. The ERO was personally served on Dr. Wolland on March 26, 2002, by Department Investigative Manager Christie Jackson. Dr. Wolland was, therefore, aware of the ERO during the times relevant to this matter.

10. The ERO has not been vacated or modified by the Secretary of the Department; it has not been superseded by a Final Order of the Board of Osteopathic Medicine; and it has not been overturned by a District Court of Appeal or any other court of competent jurisdiction.

11. At all times relevant to this proceeding, the ERO has been in effect.

C. Dr. Wolland's Treatment of E.K.

12. On or about November 20, 2003, a Thursday, E.K. presented to Advanced for anti-aging treatment by botox<sup>11</sup> injections and to obtain information on testosterone

supplementation. Dr. Wolland made the following diagnosis of E.K.:

Herniation of L2 and L4 dx by MRI  
Low back pain, chronic  
Left shoulder Capsular shift for chronic dislocations  
History of total knee reconstruction  
Decreased libido and erections less full.  
Normal again of face, patient wants botox treatment

13. A treatment plan was established by Dr. Wolland which included administering or dispensing the following medications: Depotestosterone,<sup>12</sup> a prescription of Viagra, trigger point injections<sup>13</sup> on both sides and iliolumbar on both sides, and botox injections. Except for the Viagra, these medications were to be administered or dispensed via injection.

14. As ordered by Dr. Wolland, E.K. received an injection of 200 mg of Depotestosterone intramuscularly; over ten injections containing Lidocaine, dextrose, and Vitamin B12 on both sides in the iliolumbar region; two injections to the low back/sacral region; and botox injections to the glabellar folds and crows' feet area of the eyes.

15. Dr. Wolland signed the examination notes and she initialed the SOAP notes for E.K.'s treatments of November 20, 2003. While her signature and initials verify that she ordered these medications be given via injection and that they were in

fact given, they do not indicate who actually administered the injections.

16. Diagram notes showing where the injections were given to E.K. on November 20, 2003, were made by Bach McComb, D.O., another osteopathic physician who was employed at Advanced during the times relevant to this proceeding. Dr. Wolland, at least on this point, testified credibly and convincingly that it was Dr. McComb who actually gave the injections, which Dr. Wolland had ordered and which she actually witnessed.

17. On December 11, 2003, a Thursday, E.K. presented at Advanced for follow-up treatment. After conducting a physical examination of E.K., Dr. Wolland made the following diagnoses of E.K.:

Herniation of L2 and L4 dx by MRI  
Low back pain, chronic  
Decrease of normal lumbar lordosis  
curvature.  
Left shoulder Capsular shift for chronic  
dislocations  
History of total knee reconstruction  
Decreased libido and erections less full.

18. A treatment plan was established by Dr. Wolland which included the administration or dispensing of the following medications and treatments: Depotestosterone, a testosterone gel, prescription of Viagra, trigger point injections on both sides and iliolumbar on both sides, and injection therapy to the lower back. All of these medications and treatments, except the

Viagra and the testosterone gel, were to be administered or dispensed via injection. E.K. was also scheduled by Dr. Wolland to return in three weeks "for follow up of botox and prolotherapy"<sup>14</sup> and "[p]lan prolotherapy to shoulder . . . ."

19. As ordered by Dr. Wolland, E.K. received an injection of Depotestosterone and trigger point injections on both sides and the iliolumbar area of his back.

20. Dr. Wolland signed the examination notes and she initialed the SOAP notes for E.K.'s treatment of December 11, 2003. While her signature and initials verify that she ordered the medications received by E.K. on December 11, 2003, were to be given via injection and that they were in fact given, they do not indicate who actually administered the injections.

21. Diagram notes showing where the injections were given to E.K. on December 11, 2003, were made by Dr. McComb. Dr. Wolland ordered and actually witnessed the injections.

22. On or about December 30, 2003, a Tuesday, E.K. presented for follow-up treatment scheduled during his December 11, 2003, visit. After conducting a physical examination of E.K., Dr. Wolland made the following diagnoses of E.K.:

Herniation of L2 and L4  
Low back pain, chronic  
Decrease of normal lumbar lordosis  
curvature.

Left shoulder Capsular shift for chronic  
dislocations  
History of total knee reconstruction  
Decreased libido and erections less full.  
Hypercholesterolemia- 218 LDL is 144, HDL  
50  
PSA - .7 CBC-normal indices

23. A treatment plan was established by Dr. Wolland which included the following medications and treatments:  
Depotestosterone, intramuscularly, over ten injections containing Lidocaine, dextrose, and Vitamin B12 on both sides in the iliolumbar region and eight injections to the left shoulder; and injections containing Lidocaine, dextrose, and Vitamin B<sup>12</sup> to the low back/sacral region. The medications, dextrose, and Vitamin B<sup>12</sup> were to be given via injection. All of the injections ordered by Dr. Wolland were received by E.K. on December 30, 2003.

24. Dr. Wolland signed the examination notes and she initialed the SOAP notes for E.K.'s treatment of December 30, 2003. While her signature and initials verify that she ordered the medications received by E.K. on December 30, 2003, were to be given via injection and that they were in fact given, they do not indicate who actually administered the injections.

25. Diagram notes showing where the injections were given to E.K. on December 30, 2003, were made by Dr. McComb. Dr. Wolland ordered and actually witnessed the injections.

26. On or about March 19, 2004, a Thursday, E.K. presented for follow-up treatment.<sup>15</sup> After conducting a physical examination of E.K., Dr. Wolland made the following assessment of E.K.:

Chronic Low back pain  
Herniated lumbar discs  
Ligamentous instability of sacroiliac and lumbar area  
right knee knee [sic] instability 2ndry to acl reconstruction and repeated injury  
left shoulder pain  
hypotestosterone level  
facial wrinkling

27. A treatment plan was established by Dr. Wolland which included:

modified injection therapy to sacroiliac area  
bilat  
facet injection paravertebral bilat at lumbosacral level L4-5 and L5 S1 #4  
Ligament injection sacroiliac and lumbar bilat iliolumbar and sacroiliac bilat #4 injection sites.  
Ozone ot sacroiliac joint bilat  
Modified injection therapy of lumbar area  
Modified injection therapy of right knee 6 Injection sites to ligamentous attachments  
. . . .  
ozone to right knee joint  
depotestosterone 200 mg IM

28. Pursuant to Dr. Wolland's orders, E.K. received a 200 mg injection of Depotestosterone intramuscularly; over ten injections on both sides in the iliolumbar region; six injections to the sacroiliac region; four injections to the right knee; ozone to the right knee and sacroiliac joint; joint

injection to the right knee; and botox injections to the forehead and other facial areas.

29. Dr. Wolland signed the examination notes and she initialed the SOAP notes for E.K.'s treatment of March 19, 2004. While her signature and initials verify that she ordered the medications received by E.K. on March 19, 2004, were to be given via injection and that they were in fact given, they do not indicate who actually administered the injections.

30. Diagram notes showing where the injections were given to E.K. on March 19, 2004, were made by Dr. McComb. Dr. Wolland ordered and actually witnessed the injections.

31. E.K.'s final visit to Advanced alleged in the Administrative Complaint took place on or about September 1, 2004, a Wednesday. The evidence failed to prove who ordered or actually administered the treatment received by E.K. on this date. While Dr. Wolland had signed the examination notes and initialed SOAP notes for prior visits, facts that she readily admitted, her signature and initials do not appear on any of the medical records for the September 1, 2004, visit. No credible evidence was offered that would support a finding that Dr. Wolland saw E.K. on September 1, 2004.<sup>16</sup>



D. Dr. Wolland's Treatment of B.K.

32. On or about December 11, 2003, B.K., the wife of E.K., presented to Advanced and, in particular, Dr. Wolland for anti-aging treatment.

33. The following "treatment plan" was established by Dr. Wolland for B.K.:

Risks and benefits of botox treatment  
Consent signed  
Botox treatment given today to crows feet  
and glabellar fold area

34. Pursuant to Dr. Wolland's orders, B.K. received injections of botox to the crows feet and glabellar fold area of her face.

35. Dr. Wolland signed the examination notes and she initialed the SOAP notes for B.K.'s treatment of December 11, 2003. While her signature and initials verify that she ordered the medications received by B.K. on December 11, 2003, were to be given via injection and that they were in fact given, they do not indicate who actually administered the injections.

36. Diagram notes showing where the injections were given to B.K. on December 11, 2003, were made by Dr. McComb. Dr. Wolland ordered and actually witnessed the injections.

37. On or about December 30, 2003, B.K. again presented to Advanced and was seen by Dr. Wolland. B.K. made this visit to

receive additional botox injections, which she received after Dr. Wolland conducted a physical examination of her.

38. As in the other visit by B.K. and the visits of E.K., Dr. Wolland signed B.K.'s examination notes and she initialed B.K.'s SOAP notes for the medications she received on December 30, 2003. While her signature and initials verify that she ordered the medications received by B.K. on December 30, 2003, were to be given via injection and that they were in fact given, they do not indicate who actually administered the injections.

39. Diagram notes showing where the injections were given to B.K. on December 30, 2003, were made by Dr. McComb. Dr. Wolland ordered and actually witnessed the injections.

E. Dr. Wolland's Violation of the ERO.

40. The evidence clearly and convincingly proved that Dr. Wolland conducted examinations of E.K. and B.K. on several occasions, as discussed, supra, made a diagnosis of their respective conditions, developed and ordered a treatment plan for each, which included administering and dispensing of medications, dextrose, and vitamins via injections, supervised and witnessed the injections, and otherwise ensured that her treatment plan, in particular the administering and dispensing of the prescribed medications, was carried out. While the evidence failed to prove that Dr. Wolland actually gave any

injection to E.K. or B.K., she admittedly caused the injections to be given, and, therefore, administered and dispensed the medications.

41. The foregoing activities constitute "administering . . . any medication . . ." an activity prohibited by the ERO except when "required to sustain a patient's life in a bona fide medical emergency." None of the medications administered to E.K. or B.K. were administered to sustain their lives.

42. The common definition of "administer" includes any activity "to manage or supervise the execution, use, or conduct of . . . ." Webster's Ninth New Collegiate Dictionary (1984). With regard to medications, to "administer" means to "give or apply." Wordnet.Princeton.edu/perl/webwn.

43. Dr. Wolland's activities also constitute "dispensing" of medications in violation of the ERO. A physician dispenses medications every time she causes a medication to be given to a patient. Dr. Wolland should have understood that she was dispensing medications whether she physically gave the medications to E.K. or B.K. or, as here, by her action caused someone else to physically deliver the medications via injections.

44. While Dr. Wolland may not have directly given or applied any medications to E.K. or B.K., without her orders, E.K. and B.K. would not have received any medications. She did,

therefore, by ordering her treatment plans carried out, give, and, therefore, administer and dispense the medications specified in her treatment plans. This finding is supported by Dr. Rose's testimony, which is accepted and credited in this regard, that a reasonably prudent similar physician would understand that the ERO limited not only Dr. Wolland's ability to actually give an injection of medications, but her ability to order or cause anyone else to do so.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction.

45. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2004).

##### B. The Charges of the Administrative Complaint.

46. The grounds which may support the Department's assertion that Dr. Wolland's license should be disciplined are limited to those specifically alleged in the Administrative Complaint. See, e.g., Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2d DCA 1984).

47. Section 456.072(2), Florida Statutes, authorizes the Board of Osteopathic Medicine (hereinafter referred to as the

"Board"), to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice osteopathic medicine in Florida if a physician commits one or more of the acts specified in Section 456.072(1), Florida Statutes.

48. In its Administrative Complaint, the Department has alleged that Dr. Wolland violated Section 456.072(1)(q), Florida Statutes, which provides that the following act constitutes grounds for disciplinary action by the Board: "Violating a lawful order of the department or the board, or failing to comply with a lawfully issued subpoena of the department."

49. The Department has alleged that Dr. Wolland committed a violation of Section 456.072(1)(q), Florida Statutes, due to her treatment of B.K. (Count One) and her treatment of E.K. (Count Two). In particular, it has been alleged that she violated the ERO by administering or dispensing medications via injections to them.

C. The Burden and Standard of Proof.

50. The Department seeks to impose penalties against Dr. Wolland through the Administrative Complaint that include suspension or revocation of her license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving the specific allegations of fact that support its charge that Dr. Wolland violated Section 456.072(1)(q),

Florida Statutes, by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(h), Florida Statutes ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

51. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence 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 the 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).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida

Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

D. Dr. Wolland's Violation of the ERO.

52. The evidence proved clearly and convincingly first, that the Department issued the ERO. Secondly, the evidence proved that at no time prior to the events which gave rise to the Administrative Complaint at issue in this proceeding has the ERO been challenged by Dr. Wolland, withdrawn or modified in any way by the Department or any other entity, or declared invalid by any court of competent jurisdiction.

53. The evidence therefore proved clearly and convincingly that, during 2003 and 2004 when Dr. Wolland treated E.K. and B.K., the ERO was "a lawful order of the . . . Department . . . ."

54. The Department also proved clearly and convincingly that Dr. Wolland, by ordering the medications received by E.K. on November 20 and December 11 and 30, 2003, and March 19, 2004, and by B.K. on December 11 and 30, 2003, administered and dispensed medications via injection in violation of the ERO.

55. What the evidence did not prove, however, was that Dr. Wolland actually gave the injections received by E.K. and B.K. as argued by the Department. The Department's suggestion that Dr. Rose's "opinion" testimony that, based upon Dr. Wolland's initials and signature on the medical records for

E.K. and B.K., Dr. Wolland must have actually administered the injections, is not persuasive. Whether Dr. Wolland actually stuck the needles into E.K. and B.K. simply cannot be proved by opinion testimony, especially where the only eyewitness to the events to testify at hearing, Dr. Wolland, testified credibly and convincingly, at least on this point, that she did not actually give the injections.

56. Additionally, Dr. Rose's suggestion that, since no other physician's name appears in the medical records other than Dr. Wolland's, she must have given the injections is rejected. This forum and, no doubt, the Board have seen too many cases where medical records have proven to be less than adequate. It is, therefore, just as plausible that the person who actually gave the injections was simply not noted in the medical records. This is especially true since Dr. McComb gave the shots and, as alleged, but not proved, his license was suspended at the time.

57. Finally, the Department's suggestion that the statements made during an interview of E.K., which the Department admitted constitutes hearsay, can be relied upon to corroborate or further explain Dr. Rose's opinion is rejected for three reasons.

a. First, Dr. Rose's opinion testimony, as explained, supra, cannot form the basis of a finding of simple "fact" that Dr. Wolland gave the injections; whether Dr. Wolland actually



stuck the needle into E.K. and B.K. requires actual knowledge and not speculation in the guise of "opinion."

b. Secondly, the hearsay evidence, which consists almost exclusively of comments attributable to E.K., is of such questionable reliability, that to rely upon the statements in any fashion would clearly violate Dr. Wolland's due process right to confront evidence presented against her.

c. Finally, the circumstances surrounding the taking of the hearsay statement, in particular, the condition of E.K. and B.K. at the time the statement was taken, raise such serious questions concerning the credibility of E.K. and B.K. at the time, that the statements are simply not reliable. Both E.K. and B.K. at the time they were questioned were patients of Shepherd's Center, a critical care facility located in Atlanta, Georgia, recovering from having received improper botox injections. Given their condition, as described by Mr. Livingston and Mr. Miller, it is concluded that it was critical for the trier of fact to have observed them while the statements were given in order to determine their credibility. Not having been able to do so, their statements can be given no weight, even if otherwise admissible.

#### E. The Appropriate Penalty

58. In determining the appropriate punitive action to recommend to the Board in these cases, it is necessary to

consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

59. The Board's guidelines are set out in Florida Administrative Code Rule 64B15-19.002, which provides the following instruction on the application of the penalty ranges provided in the Rule:

In imposing discipline upon applicants and licensees, the board shall act in accordance with the following disciplinary guidelines and shall impose a penalty within the range corresponding to the violations set forth below. The statutory language is intended to provide a description of the violation and is not a complete statement of the violation; the complete statement may be found in the statutory provision cited directly under each violation description.

60. Florida Administrative Code Rule 64B15-19.002(31), goes on to provide, in pertinent part, a minimum penalty of a reprimand and a \$5,000.00 fine and a maximum penalty of a suspension followed by a probation and a \$7,500.00 fine. Greater penalties are specified for a second offense, which is not at issue in this case.

61. Florida Administrative Code Rule 64B15-19.003, provides that, in determining the appropriate penalty, the

following aggravating and mitigating circumstances are to be taken into account in determining the penalty:

- (1) The danger to the public;
  - (2) The length of time since the violations;
  - (3) The number of times the licensee has been previously disciplined by the Board;
  - (4) The length of time the licensee has practiced;
  - (5) The actual damage, physical or otherwise, caused by the violation;
  - (6) The deterrent effect of the penalty imposed;
  - (7) The effect of penalty upon the licensee's livelihood;
  - (8) Any effort of rehabilitation by the licensee;
  - (9) The actual knowledge of the licensee pertaining to the violation;
  - (10) Attempts by the licensee to correct or stop violations or refusal by licensee to correct or stop violations;
  - (11) Related violations against licensee in another state, including findings of guilt or innocence, penalties imposed and penalties served;
  - (12) The actual negligence of the licensee pertaining to any violations;
  - (13) The penalties imposed for related offenses;
  - (14) The pecuniary gain to the licensee;
  - (15) Any other relevant mitigating or aggravating factors under the circumstances.
- Any penalties imposed by the board may not exceed the maximum penalties set forth in Section 459.015(2), F.S.

62. In its Proposed Recommended Order, the Department has correctly suggested that Dr. Wolland should be treated as a first offender. The Department has recommended that her license

be suspended for one year, followed by three years of probation, and that she be required to pay a \$7,500.00 fine.

63. Having carefully considered the facts of this matter in light of the provisions of Florida Administrative Code Rule 64B15-19.003, it is concluded that the Department's suggested penalty is excessive. The Department's suggested penalty fails to take into account the following factors:

a. The evidence failed to prove that Dr. Wolland's actions placed the public, and in particular, E.K. and B.K. in danger;

b. The evidence failed to prove that there was any damage, physical or otherwise, caused by her failure to comply with the ERO;

c. Her license and, consequently, her ability to freely practice has been restricted for almost two and one-half years; and

d. A further suspension of her license will cause her further financial hardship.

64. Based upon the foregoing, it would be appropriate to place Dr. Wolland's license on probation for a period of three years and she should be required to pay a fine in the amount of \$5,000.00.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the a final order be entered by the Board of Osteopathic Medicine finding that Shelly O. Wolland, D. O., has violated Section 456.072(1)(q), Florida Statutes, as described in this Recommended Order; requiring that she pay a fine in the amount of \$5,000.00; placing her license on probation for a period of three years; and requiring that she complete continuing education in subjects as directed by the Board of Osteopathic Medicine.

DONE AND ENTERED this 22nd day of August, 2005, in Tallahassee, Leon County, Florida.



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LARRY J. SARTIN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of August, 2005.

ENDNOTES

<sup>1/</sup> An Order Denying Motion to Strike Count(s) entered April 20, 2005, was rescinded on April 28, 2005, to allow further consideration of the Motion.

<sup>2/</sup> Dr. Wolland, who had not timely filed a response to the Motion as of the date of the final hearing of this matter, filed

Respondent's Reply [sic] to Petitioner's Motion for Attorneys Fees and Costs on June 29, 2005.

<sup>3/</sup> §456.072(4), Fla. Stat.

<sup>4/</sup> Both parties also filed addenda to their pre-hearing statements. Dr. Wolland's addendum indicated that she intended to call counsel for Petitioner as a witness. An objection to Dr. Wolland's effort to call counsel for Petitioner was sustained.

<sup>5/</sup> Dr. Wolland filed Respondent's Proposed Recommended Order on July 25, 2005; Respondent's Corrected Proposed Recommended Order on July 27, 2005; and Respondent's Errata Sheet on August 8, 2005.

<sup>6/</sup> Several factual allegations of the Administrative Complaint have little bearing on the outcome of this case. Those allegations, even if proved at the final hearing of this matter, have not been included as a findings of fact in this Recommended Order because they are deemed "material." For example, the descriptions of the medications administered and dispensed by Dr. Wolland have little, if any, bearing on the outcome of this matter. Ultimately, all that matters is whether Dr. Wolland administered, dispensed, or injected any type medication, which would constitute a violation of the Order of Emergency Restriction of License.

<sup>7/</sup> See §20.43, and Chs. 456 and 459, Fla. Stat.

<sup>8/</sup> An Administrative Complaint which arose out of the events which were the impetus for issuance of the ERO was signed April 12, 2002, and is now the subject of DOAH Case No. 05-1238PL.

<sup>9/</sup> In numbered paragraph 3 of Respondent's Corrected Proposed Recommended Order, Dr. Wolland has argued incorrectly that the ERO "prohibited Respondent from dispensing or administering any medication by injection . . ." [Emphasis added]. If this represents Dr. Wolland's belief about the proscription of the ERO, it may explain her failure to comply with the ERO. Dr. Wolland, however, did not explain at hearing how she interpreted the ERO.

<sup>10/</sup> These paragraphs were incorrectly numbered "3" and "4" in the original ERO. They were correctly renumbered "2" and "3" by

Notice of Scrivener's Error entered by the Department on March 18, 2002.

<sup>11/</sup> Botox, which contains Botulinum Neurotoxin, is a legend drug requiring a physician's prescription for its use. Depotestoserone is a Schedule III controlled substance under Section 893.03(3)(d), Florida Statutes (2003-2004).

<sup>12/</sup> Depotestoserone is a Schedule III controlled substance under Section 893.03(3)(d), Florida Statutes (2003-2004).

<sup>13/</sup> Trigger point injections should only be administered by an osteopathic or medical physician.

<sup>14/</sup> "Prolotherapy" involves the injection of a dextrose solution into a ligament or tendon where it attaches to the bone. The injection causes a localized inflammation in these weak areas which then causes an increase in the blood supply and flow of nutrients and stimulates to the tissue which will assist in repairing the area.

<sup>15/</sup> Although the medical notes for this visit cause some doubt as to whether the visit took place on March 18 or 19, the weight of the evidence supports the finding that the visit occurred on March 19, given the fact that Dr. Wolland's usual practice was to work on Tuesdays and Thursdays. March 18, 2004, was a Wednesday, a day that Dr. Wolland did not work at Advanced.

<sup>16/</sup> It was suggested, but not proved, at the final hearing of this matter that Dr. McComb's license to practice had been suspended and, therefore, it has been suggested that Dr. McComb did not give the injections at issue in this case or see E.K. on his own on September 1, 2004. The evidence in this case simply did not prove any of these suggested "facts." The only direct credited evidence on this point was Dr. Wolland's testimony that she did not work on Wednesdays and, more specifically, that she did not see E.K. on September 1, 2004.

The fact that her name appears on the billing record for the September 1, 2004, visit does not prove she actually saw E.K. It is more likely that someone at Advanced was aware that Dr. McComb's license was suspended (assuming it was) and, therefore, listed the billing under Dr. Wolland's name, especially in light of the fact that E.K. was her patient.

COPIES FURNISHED:

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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 these cases.