

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD)
OF MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 05-2796PL
)
KEITH M. DIETRICK,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee, Florida, on September 28, 2005. The parties, attorneys for the parties, witnesses, and court reporter participated by videoconference in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Irving Levine
Assistant General Counsel
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Dennis A. Vandenberg
Peterson Bernard
1550 Southern Boulevard
West Palm Beach, Florida 33406

STATEMENT OF THE ISSUE

The issue is whether Respondent is guilty of performing wrong-site surgery or performing a procedure without the patient's consent and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint filed December 2, 2003, Petitioner alleged that, on February 28, 2003, Respondent, a licensed physician in Florida, performed a right-sided lumbar facet rhizotomy on Patient K. D., as the Administrative Complaint was later amended. As amended, the Administrative Complaint alleges that Respondent's partner had performed a right-sided lumbar facet rhizotomy on the same patient on February 14, 2003.

The Administrative Complaint states that this procedure, which is designed to eliminate or reduce pain within the spinal facets, is performed by using a needle to place a small electrode next to the facet, under X-ray guidance. The physician then applies an electric current to cauterize the nerves that innervate the facet joint.

The Administrative Complaint alleges that, prior to the procedure, Respondent obtained an informed consent from Patient K. D. for a left-sided lumbar facet rhizotomy. The Administrative Complaint alleges that, after performing the

right-sided procedure and then realizing that he had performed the procedure on the wrong side, Respondent immediately performed a left-sided procedure.

Count I of the Administrative Complaint alleges that Respondent violated Section 456.072(1)(aa), Florida Statutes, by performing a wrong-site procedure. Count II alleges that Respondent violated Section 458.331(1)(p), Florida Statutes, by performing professional services that had not been duly authorized by the patient.

Respondent transmitted the file to the Division of Administrative Hearings on August 3, 2005. Respondent made the above-described amendments to the Administrative Complaint, pursuant to leave granted by the Administrative Law Judge on August 30, 2005.

At the hearing, Petitioner called one witness and offered into evidence two exhibits: Petitioner Exhibits 1-2. Respondent called four witnesses and offered into evidence three exhibits: Respondent Exhibits 1-3. All exhibits were admitted.

The court reporter filed the transcript on October 19, 2005. The parties filed their proposed recommended orders by November 7, 2005.

FINDINGS OF FACT

1. At all material times, Respondent has been licensed as a physician in the state of Florida. His license number is ME

85786. Respondent is Board-certified in anesthesiology and pain management by the American Board of Anesthesiology. Respondent has not previously been disciplined by the Board of Medicine.

2. Patient K. D. suffered a back injury in November 1998. Following a laminectomy, Patient K. D. continued to suffer from chronic low-back pain. She visited Respondent's pain management clinic for pain relief and has been quite satisfied with the treatment that she has received from Respondent.

3. On February 14, 2003, one of Respondent's partners performed a right-side lumbar rhizotomy by pulsed radiofrequency. The purpose of this procedure is to relieve or eliminate pain in the lower back. When performed by pulsed radiofrequency, the rhizotomy would probably not have been successful if the patient still experiences pain two weeks after the procedure.

4. Two weeks later, on February 28, Patient K. D. presented for a left-side lumbar rhizotomy, which Respondent was to perform. Immediately prior to the surgery on February 28, while Patient K. D. was in pre-op, Respondent performed a physical examination and observed that Patient K. D. indicated pain on the right side. In response to questioning, Patient K. D. confirmed that her right side was more painful than her left side. Respondent said that he would therefore perform a right-side lumbar rhizotomy. Patient K. D. did not disagree or

object, but consented to the procedure--in the presence of two nurses, as well as Respondent.

5. Immediately after their pre-op discussion, Patient K. D. was administered Versed, which produces an effect of amnesia. To some extent, this drug may cause some retrograde amnesia, so that Patient K. D. might not recall events immediately preceding the administration of the drug, such as her physical examination and conversation with Respondent in pre-op.

6. Respondent performed a right-side lumbar rhizotomy without incident. However, immediately after the procedure, Patient K. D. said that she also suffered left-side pain and questioned why Respondent had performed the procedure on her right side. When Patient K. D. complained that transportation problems would make it hard for her to re-schedule a left-side procedure, Respondent performed a left-side procedure, on the same day, and he completed this procedure also without incident.

7. Prior to the February 14 and 28 procedures, Patient K. D. signed consent forms. The consent form for the February 14 procedure identifies a right-side procedure, and the consent form (actually, there are two identical forms) for the February 28 procedure identifies a left-side procedure. The forms state:

It has been explained to me that during the course of an operation, unforeseen conditions may be revealed that necessitate an extensive exchange or change of the original procedure or different procedures,

and I therefore authorize and require my physician or surgeon . . . to perform such surgical procedures as are necessary and desirable in the exercise of his and/or their professional judgement. . . .

8. Petitioner's expert witness opined that a change in location, even under the above-described circumstances, "should" have been documented on a consent form, but later conceded that this is not strictly necessary. On cross-examination, Petitioner's expert witness admitted that a patient may give informed consent verbally or by conduct. Petitioner's expert witness properly discredited Respondent's theory that he had some form of ongoing consent because the forms bore no expiration date. However, to the limited extent that Petitioner's expert witness implied a requirement for written informed consent, his opinion is unsupported by Florida law, as set forth below.

9. In contrast to Petitioner's expert witness, Respondent's expert witness did not equivocate on the issue of the required form of informed consent. Relying largely on the testimony of Patient K. D., Respondent's expert witness testified that Respondent had obtained the informed consent of Patient K. D. to perform a second right-side procedure. Aside from the obvious advantages of a written informed consent, Respondent's expert witness convincingly testified that informed consent is a state of mind, not a signature on a piece of paper,

and, by this standard, which is consistent with Florida law, as set forth below, Respondent had Patient K. D.'s informed consent to perform a second right-side procedure on February 28 and thus had been duly authorized to do so.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 456.073(5), Fla. Stat. (2005).

11. Based on the pleadings contained in the Administrative Complaint, Section 456.072(1)(aa), Florida Statutes, prohibits, in relevant part:

Performing or attempting to perform . . . a
wrong-site procedure

12. Section 456.072(2), Florida Statutes, authorizes the Board of Medicine to impose a range of penalties, including revocation, for any violation of Section 456.072(1), Florida Statutes.

13. Section 458.331(1)(p), Florida Statutes, provides that the Board of Medicine may also discipline a license if the licensee has performed professional services not duly authorized by the patient, except as provided by Section 766.103, Florida Statutes.

14. Section 766.103, Florida Statutes, provides in relevant part:

(3) No recovery shall be allowed in any court in this state against any physician licensed under chapter 458, osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, podiatric physician licensed under chapter 461, or dentist licensed under chapter 466 in an action brought for treating, examining, or operating on a patient without his or her informed consent when:

(a) 1. The action of the physician, osteopathic physician, chiropractic physician, podiatric physician, or dentist in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community; and

2. A reasonable individual, from the information provided by the physician, osteopathic physician, chiropractic physician, podiatric physician, or dentist, under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians, osteopathic physicians, chiropractic physicians, podiatric physicians, or dentists in the same or similar community who perform similar treatments or procedures; or

(b) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he or she been advised by the physician, osteopathic physician, chiropractic physician, podiatric physician, or dentist in accordance with the provisions of paragraph (a).

(4)(a) A consent which is evidenced in writing and meets the requirements of subsection (3) shall, if validly signed by the patient or another authorized person, raise a rebuttable presumption of a valid consent.

(b) A valid signature is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

15. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

16. Petitioner has failed to prove that Respondent performed a wrong-site procedure, failed to obtain Patient K. D.'s informed consent for the February 23 right-side procedure, or otherwise performed professional services without the authorization of the patient.

17. The key questions are answered by Section 766.103, Florida Statutes. Section 766.103(3)(a), Florida Statutes, is satisfied here. After examining Patient K. D. and discussing her symptoms, Respondent justifiably changed the procedure from the left-side to the right-side, and Patient K. D. agreed. The provisions of Section 766.103(4)(a), Florida Statutes, merely acknowledge the advantage of proceeding with written informed consent, but do not in any way imply the unavailability in Florida of informed consent by speech or conduct. Even if

Section 766.103(3)(a), Florida Statutes, were unavailable, Respondent would have been able to proceed under Section 766.103(3)(b), Florida Statutes, because, based on the circumstances, Patient K. D. would have consented to the change in sides.

RECOMMENDATION

It is

RECOMMENDED that Petitioner dismiss the Administrative Complaint, as amended, against Respondent.

DONE AND ENTERED this 21st day of November, 2005, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2005.

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 must be filed with the agency that will issue the final order in this case.