

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD)
OF MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 05-3646PL
)
ABBEY STRAUSS, M.D.,)
)
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, On December 16, 2005, by video teleconference between West Palm Beach and Tallahassee, Florida, and on January 31, 2006, by video teleconference between Jacksonville and Tallahassee, Florida.

APPEARANCES

For Petitioner: J. Blake Hunter
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Prosecution Services Unit
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For Respondent: Lawrence E. Brownstein, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Abbey Strauss, M.D., committed violations of Chapter 458, Florida Statutes, as alleged in a First Amended Administrative Complaint issued by Petitioner, the Department of Health, on October 5, 2005, in DOH Case Number 2002-15730; and, if so, what disciplinary action should be taken against his license to practice medicine in Florida.

PRELIMINARY STATEMENT

On or about June 28, 2005, the Department of Health filed a three-count Administrative Complaint against Respondent Abbey Strauss, M.D., an individual licensed to practice medicine in Florida, before the Board of Medicine, in which it alleged that Dr. Strauss had committed violations of Section 458.331(1)(m), (q), and (t), Florida Statutes (1997 through 2002).¹ Respondent disputed the allegations of fact contained in the Administrative Complaint and, on or about July 19, 2005, executed an Election of Rights form requesting a formal administrative hearing pursuant to Sections 120.569(2)(a) and 120.57(1), Florida Statutes (2005).

On October 4, 2005, the matter was filed with the Division of Administrative Hearings with a request that an administrative law judge be assigned to conduct proceedings pursuant to Section

120.57(1), Florida Statutes (2005). The matter was designated DOAH Case Number 05-3646PL and was assigned to the undersigned.

On October 6, 2005, a Motion to Amend Administrative Complaint was filed by Petitioner. A First Amended Administrative Complaint, issued October 5, 2005, was filed with the Motion. That Motion was granted by an Order Granting Motion to Amend Administrative Complaint entered October 11, 2005.

The final hearing was scheduled to be held on December 16, 2005, by Notice of Hearing by Video Teleconference entered October 12, 2005. The hearing was scheduled to be conducted between West Palm Beach, Florida, and the offices of the Division of Administrative Hearings in Tallahassee, Florida.

On November 16, 2005, Petitioner's Motion for Official Recognition was granted. Official recognition was taken of Subsections 458.331(1)(m), (q), and (t), Florida Statutes (1997 through 2002).

On November 29, 2005, a Joint Prehearing Stipulation was filed by the parties. The Joint Prehearing Stipulation provides that "those facts that are admitted" are "[t]hose admissions of Respondent to his Responses to Petitioner's Request for Admissions." Those admissions have been incorporated into the Findings of Fact of this Recommended Order.

Prior to the commencement of the final hearing, the following motions were filed for which there was inadequate time

for response and ruling prior to the commencement of the hearing:

1. Respondent's Motion for Partial Summary Judgment/Motion in Limine with Respect to Ativan;

2. Respondent's Motion to Add Billing Ledger to Exhibit List;

3. Respondent's Motion for Official Recognition;

4. Petitioner's Second Motion for Official Recognition;

and

5. Respondent's Motion in Limine to Exclude Testimony of Petitioner's Experts.

Argument on most of the Motions was heard at the commencement of the final hearing but before the court reporter arrived. The following rulings were entered on the first four Motions: Respondent's Motion for Partial Summary Judgment/Motion in Limine with Respect to Ativan was denied; Respondent's Motion to Add Billing Ledger to Exhibit List was granted without objection; Respondent's Motion for Official Recognition was granted without objection; and Petitioner's Second Motion for Official Recognition was granted to the extent ultimately determined relevant.

Argument was heard after the court reporter arrived on Respondent's Motion in Limine to Exclude Testimony of Petitioner's Experts. A ruling on that Motion was reserved to

give the parties an opportunity to make additional argument in their proposed recommended orders. Petitioner addressed the issues raised in Respondent's Motion in Limine to Exclude Testimony of Petitioner's Experts in its Proposed Recommended Order. Respondent did not. After consideration of the Motion, the argument presented at hearing, and the Petitioner's written argument, the Motion is hereby denied.

On December 16, 2005, Petitioner presented the testimony of Joseph T. Worden, M.D., an expert in pain management, and, by deposition, the testimony of James Edgar, M.D., who is hereby accepted as an expert in pain medicine and pain management. Petitioner offered and had admitted Petitioner's Exhibits 1 through 4 and 6 through 7. Petitioner's Exhibit 8 is the Transcript of the deposition testimony of Dr. Edgar. Petitioner's Exhibit 8 is admitted.

Respondent testified on his own behalf. Respondent offered and had admitted Respondent's Exhibits 5 through 6,² 8, and 10. A ruling on the admissibility of Respondent's Exhibit 9 was reserved. That exhibit is hereby rejected. Had it been admitted, it would not have supported any relevant finding of fact.

Having been unable to complete the final hearing on December 16, 2005, the hearing was continued until January 31, 2006. On that date the hearing was reconvened by video

teleconferencing between Jacksonville and Tallahassee, Florida. During this portion of the hearing, Respondent presented the testimony of William Jacobs, M.D.

The Transcript of the portion of the final hearing conducted on December 16, 2005, was filed on February 1, 2006. On February 17, 2006, the Transcript of the portion of the hearing conducted on January 31, 2006, was filed. By Notice of Filing Transcript, entered February 22, 2006, the parties were informed that the Transcripts had been filed and that their proposed recommended orders were to be filed on or by March 20, 2006.

Petitioner filed Petitioner's Proposed Recommended Order on March 20, 2006. Respondent filed Respondent's Proposed Recommended Order on March 21, 2006, along with Respondent's *Unopposed* Motion for One Day Extension of Time to File Proposed Recommended Order. It appearing that Petitioner has not been prejudiced by Respondent having filed his proposed order one day late, the Motion is hereby granted. The proposed orders of both parties have been fully considered in rendering this Recommended Order.

FINDINGS OF FACT

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 medicine in Florida. § 20.43 and Chs. 456 and 458, Fla. Stat. (2005).

2. Respondent, Abbey Strauss , M.D., is, and was at the times material to this matter, a physician licensed to practice medicine in Florida, having been issued license number ME 45950. Dr. Strauss has been licensed in Florida since 1985.

3. Dr. Strauss is board-certified in psychiatry by the American Board of Psychiatry and Neurology.

4. Dr. Strauss has not previously been the subject of a license disciplinary proceeding in Florida.

5. The following description of Dr. Strauss' education and experience, contained in Respondent's Proposed Recommended Order, was uncontroverted by the evidence in this case, and is accepted as accurate:

Respondent has significant background and experience in diagnosing and treating addiction and substance abuse issues. For instance, before becoming a physician, Respondent achieved a Master's Degree in Psychiatric Social Work from New York University in 1972. . . . As a social worker, Respondent gained significant experience in the areas of drug abuse and addiction while working for the South Carolina Department of Mental Health. Part of his duties was to set up a crisis intervention center relating to drug abuse problems. . . . He also took part in the establishment of the County Drug Abuse

Society as a member of a committee, established by the governor of South Carolina, concerning substance abuse issues in that state. . . .

Respondent graduated from the Medical University of South Carolina in 1981 and was Chief Resident at Beth Israel Medical Center in New York City. . . . His academic and clinical experience in addiction and substance abuse related issues continued. Upon completion of medical school, Respondent also taught at New York University in the areas of psychopharmacology which included issues relating to substance abuse. . . . While a psychiatric resident at Beth Israel Medical Center in New York City, Respondent gained more clinical experience in the area of addiction at Beth Israel Medical Center . . . which at that time had one of the largest addiction units in New York City. . . . Respondent treated patients at the Methadone Maintenance Clinic in New York City for dual diagnosis, i.e., people having both psychiatric and substance abuse problems. . . . Respondent has also been retained in the past to study the effects of medications, including cocaine, on behaviors.

6. Dr. Strauss is not certified in pain management or addiction medicine.

B. Patient S.R.

7. At issue in this case is Dr. Strauss' treatment of S.R., a 51-year-old male, from November 1997 through August 2002.

8. S.R. has a history of having sustained severe injuries and having received treatment for those injuries. S.R. was

injured in vehicle accidents in 1987 and 1996. He suffered a fractured pelvis, a closed-head injury, and a left-leg fracture, which required open reduction internal fixation, including the insertion of three steel screws. As a result of the leg fracture and resulting surgery, S.R.'s left leg is shorter than his right leg, causing him to walk with an antalgic gait, which, in turn puts stress on his spine. Additionally, S.R. is becoming arthritic and suffers from herniations in the lumbar and cervical spine.

9. S.R. suffers from chronic pain associated with his injuries and condition.

10. S.R. has a history of abuse and addiction to heroin and alcohol. Prior to coming under Dr. Strauss' care, S.R. had been discharged from a drug rehabilitation facility due to a relapse and had, just eight months prior to his first visit to Dr. Strauss, relapsed for alcohol abuse.

11. At the time that S.R. first saw Dr. Strauss, he was under the care of a Dr. Porter.

12. More than a year before S.R. first saw Dr. Strauss, S.R. had been treated by Joseph Alshon, D.O., who practices physical medicine and rehabilitation, for chronic pain. Among the treatments prescribed by Dr. Alshon were epidural steroid injections, trigger point injections, an exercise program, hydroculator therapy, spinal manipulations and small doses of

pain medications. According to Dr. Alshon's medical records, these treatments helped to control and alleviate S.R.'s pain.

13. S.R. had also previously been under the care of others, including a number of surgeons, who were not identified at hearing. These physicians were responsible for care given to S.R. as a result of the injuries he sustained in 1987 and 1996.

C. S.R.'s First Visit to Dr. Strauss.

14. On November 11, 1997, S.R. presented to Dr. Strauss' office with complaints of chronic back pain and pain of the lower extremities due to arthritis and the fracture of his left leg.

15. S.R. indicated that, but for his pain, his life was adequate and that he understood that he could not function without medications to control his pain.

16. Based upon the then used Visual Analog Scale, which involves a patient giving a subjective measure of his or her pain, with ten being the worst and zero being "without pain," S.R. told Dr. Strauss that he was a "nine" without medication and a "three or four" with medication.

17. S.R. was somewhat candid to Dr. Strauss about his prior addiction history. S.R. also expressed concern about obtaining future treatment for his chronic pain because of his past history. Dr. Strauss' notes, however, to the extent legible, only report that S.R. had been involved in Alcoholics

Anonymous for eight years, but had relapsed "8 months ago"; that he was afraid "that his addiction" history would prevent him from getting necessary medications; and that "methadone" had "worked well for pain." There is no indication in Dr. Strauss' notes what "his addiction history" was or why he was taking methadone.

18. S.R. also reported to Dr. Strauss that he was currently taking OxyContin.

19. OxyContin is a semi-synthetic opiate containing oxycodone hydrochloride, a schedule II controlled substance listed in Chapter 893, Florida Statutes. OxyContin is used to give relief from moderate to severe pain. It has a high potential for abuse, which may lead to severe physical and psychological dependence.³

20. Physical dependence is an expected and natural result of the use of OxyContin. See Fla. Admin. Code R. 64B8-9.013(2)(b) and (f). Physical dependence is defined in Florida Administrative Code Rule 64B8-9.013(2)(f), as follows:

For the purpose of this rule, "physical dependence" on a controlled substance is defined as a physiologic state of neuro-adaptation which is characterized by the emergence of a withdrawal syndrome if drug use is stopped or decreased abruptly, or if an antagonist is administered. Physical dependence is an expected result of opioid use. Physical dependence, by itself, does not equate with addiction.

21. During S.R.'s first visit Dr. Strauss diagnosed him as having "degenerative disc disease." Due to the possible adverse impact on S.R. if he did not continue to take OxyContin, Dr. Strauss prescribed two 40 mg tablets of OxyContin, to be taken twice a day. Dr. Strauss also prescribed Valium and Flexeril.

22. Valium contains diazepam, a schedule IV controlled substance listed in Chapter 893, Florida Statutes. It is used for the management of anxiety disorders and short-term relief of anxiety. Diazepam has a potential for abuse, which may lead to physical and psychological dependence.

23. Dr. Strauss did not perform a physical examination of S.R. during his first visit. Consequently, no medical record of a physical examination was made on November 11, 1997. Not having the medical records, including records of any physical examination, on November 11, 1997, of any other physician from whom S.R. was currently receiving treatment or had in the past received treatment, Dr. Strauss relied solely on S.R.'s representations as to his prior history and condition to diagnose and treat S.R. on November 11, 1997.

D. S.R.'s Continued Treatment Through August 2002.

24. After S.R.'s initial visit, Dr. Strauss saw S.R. on the following dates and prescribed the following medications:

a. December 4, 1997: four 40 mg tablets of OxyContin, to be taken twice a day, and 20 mg to be taken as needed (a total of 160 mg twice a day, plus 20 mg "as needed"), and; 2.5 mg of Valium to be taken three times a day;

b. January 2, 1998: three 80 mg tablets of OxyContin, to be taken twice a day (a total of 240 mg twice a day); and the same amount of Valium previously prescribed;

c. January 22, 1998: five 80 mg tablets of OxyContin, to be taken twice a day (a total of 400 mg twice a day);

d. Between January 22 and March 17, 1998: seven 80 mg tablets of OxyContin, to be taken twice a day (a total of 560 mg twice a day);

e. March 17, 1998: five 80 mg tablets of OxyContin, to be taken three times a day (a total of 400 mg three times a day);

f. April 9, 1998: 960 mg of OxyContin, to be taken twice a day;

g. April 27, 1998: 80 mg tablets of OxyContin, 12 tablets to be taken in the morning, six tablets at mid-day, and 12 tablets at bedtime (a total of 30 tablets or 2,400 mg a day);

h. July 30, 1998: 200 mg tablets MS Contin, 12 tablets to be taken per day. MS Contin contains morphine, a schedule II controlled substance listed in Chapter 893, Florida Statutes. It is indicated for the relief of moderate to severe pain. Morphine has a high potential for abuse, which may lead to

severe physical and psychological dependence. Dr. Strauss failed to discuss with S.R. and, as a consequence, to document any such discussion, the risks and benefits of taking MS Contin instead of OxyContin.

i. July 1998 to August 2002: 200 mg tablets MS Contin, ten to 12 tablets, to be taken two or three times a day (a total of 2,000 to 2,200 mg two or three times a day); 10 mg tablets Valium, one tablet, to be taken three times a day; and one mg tablet of Ativan, one tablet to be taken as needed. Ativan contains lorazepam, a schedule IV controlled substance listed in Chapter 893, Florida Statutes. It is indicated for management of anxiety disorders and short-term relief of anxiety. Lorazepam has a low potential for abuse. Where abuse occurs, it can lead to limited physical and psychological dependence.

E. S.R.'s Medical History.

25. Subsequent to seeing S.R. on November 11, 1997, Dr. Strauss obtained some, but not all, of S.R.'s medical records which had been created by Dr. Alshon. Apparently, Dr. Alshon was giving S.R. trigger-point injections while under Dr. Strauss' care, but Dr. Strauss did not have any medical records concerning those injections.

26. Dr. Strauss did not obtain S.R.'s medical records from Dr. Porter. Although there was argument presented at hearing to suggest that an effort was made to obtain S.R.'s medical records

from Dr. Porter, but that the effort failed because Dr. Porter was no longer in practice, the evidence failed to prove this assertion. Dr. Strauss' testimony in this regard was not convincing, especially in light of the fact that his records fail to reflect that he obtained a signed consent form from S.R. allowing him to obtain his records from Dr. Porter. More importantly, Dr. Strauss was not able to state with certainty whether any effort had been made to obtain Dr. Porter's records:

Q. Why didn't you get Dr. Porter's records?

A. As we sit here, I don't know why we didn't get them. I know that we certainly would have tried to, because it would have been illogical to get records from one doctor and not the next. I don't know when Dr. Porter went out of practice, it was a long time ago, and we were just unable to get them.

Transcript of December 16, 2005, page 197, lines 20 to 25, and page 198, line 1. In essence, Dr. Strauss merely testified about what he believed should have happened. Given the lack of signed consent from S.R. to obtain Dr. Porter's records, Dr. Strauss' testimony that it would have "illogical" to get records from one doctor and not Dr. Porter is rejected.

27. Other than Dr. Alshon's records, Dr. Strauss did not obtain any other relevant medical records, including those related to S.R.'s treatment for heroin addiction or his treatment for injuries and the surgery he had undergone prior to

his treatment by Dr. Alshon. Rather, he relied largely on Dr. Alshon's diagnosis for the cause of S.R.'s chronic pain.

F. Treatment Plan for S.R.

28. Dr. Strauss' testified at hearing that he indeed had a treatment plan, including objectives, for S.R. According to Dr. Strauss his treatment plan included, most significantly, managing S.R.'s chronic pain. He indicated that he intended to achieve this goal through increased exercise, weight control, working on improved personal relationships with, among others, his daughter, mother, father, and girl friend (whom he ultimately married), and his ability to remain employed.

29. While there are indeed references to the objectives outlined by Dr. Strauss during his testimony in his medical notes for S.R., his medical notes do not indicate the type of treatment plan, including objectives, described by Dr. Strauss at hearing. Indeed, his medical records do not include anything which could be considered a well-devised treatment plan.

30. Dr. Strauss failed to prepare a plan which included the source of S.R.'s pain, a copy of the medical records that describe and validate previous treatments of S.R., consultations with specialists which were, at a minimum, at least considered and discussed, or any consideration of how S.R.'s pain could be further controlled and alleviated. Dr. Strauss, whose primary treatment was to continue increasing the amount of pain

medication prescribed to S.R. until S.R. indicated that he was doing okay was not even reflected in Dr. Strauss's notes.

31. Dr. Strauss also failed to document the extent to which psychiatric issues were contributing to S.R.'s chronic pain, if at all. Dr. Strauss also failed to document his conclusions concerning S.R.'s character as it related to his treatment, something which Dr. Strauss did do during his testimony as to why he concluded that S.R. was not abusing his medications.

G. Special Consultations.

32. Throughout the period of S.R.'s treatment by Dr. Strauss from November 1997 to August 2002, and, most importantly, during the first few months of his treatment of S.R., Dr. Strauss did not refer S.R. to any other physician for consultation or additional diagnostic testing. The first few months of his treatment are significant because it was during this period of time that he significantly increased the dosage and frequency that S.R. was to take OxyContin.

H. Justification for S.R.'s Treatment.

33. Based upon that the fact that Dr. Strauss failed to prepare a treatment plan for S.R., to obtain all of the available medical records concerning S.R., and to refer S.R. for special consultations, Dr. Strauss did not have justification

for the rapid increase in the dose of OxyContin and MS Contin Dr. Strauss prescribed for S.R.

34. The foregoing finding is somewhat mitigated, but no less accurate, by the fact that it appears that Dr. Strauss' treatment of S.R. has been effective, with S.R. continuing in Dr. Strauss' care up to the final hearing of this matter. S.R. has been able to improve his personal relationship with his daughter and his mother and father. S.R. also married while under Dr. Strauss' care and was able to study to take a real estate broker's license test. Most significantly, after August 2002, S.R. remained on the same dosage of MS Contin for 35 months and, since then, the dosage has been reduced from 4,800 mg a day to, as of September 2005, 1,400 mg a day. These facts, however, are based upon hindsight, while the finding in paragraph 33 is based upon what Dr. Strauss knew during the time period in question when he was increasing S.R.'s medications.

I. The Standard of Care.

35. Dr. Strauss was required to practice medicine in his care of S.R. 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. . . ." (hereinafter referred to as the "Standard of Care").

36. Dr. Strauss's treatment and care of S.R. as described in this Recommended Order and based upon the credited opinions

of Drs. Worden and Edgar, violated the Standard of Care as hereafter further found.

37. First, Dr. Strauss' failure to perform an adequate physical examination of S.R. during his first visit on November 11, 1997, violated the Standard of Care.

38. An adequate physical examination of S.R. during his first visit to Dr. Strauss on November 11, 1997, should have included observing S.R.'s general demeanor, his speech pattern, including whether or not he was slurring his words, whether he looked overdosed, and the manner in which he walked, including noting whether he evidenced any limp or whether he favored any part of his body. An adequate physical examination should also have included the performance of neurological tests, such as reflex testing and/or straight-leg testing.

39. The purpose for performing and recording a physical examination on the first visit of a patient is to make sure that the patient's description of his or her complaints are corroborated to the greatest extent possible. Additionally, a physical examination may even help the treating physician to discover problems which the patient may not be aware of and other physicians overlooked.

40. Performing a physical examination was crucial on S.R.'s first visit.⁴ S.R. was complaining of chronic pain, admitted having a previous history of drug abuse, and expressed

a concern about obtaining continuing medical care for his pain. As noted in Respondent's Proposed Recommended Order "[t]here is no way to objectively measure pain. . . ." Therefore the physician must "rely on the subjective complaints of pain by the patient." While this is true, given the circumstances of this case, Dr. Strauss was obligated to perform a physical examination of S.R. rather than relying solely on S.R.'s subjective complaints to prescribe OxyContin and Valium, both controlled substances.

41. At hearing, Dr. Strauss and Dr. Jacobs both suggested that "psychiatrist" by and large do not perform physical examinations. Both suggested that this practice is common and that it is within the Standard of Care for psychiatrist to rely upon the physical examination findings of other physicians. This testimony is rejected. First, Dr. Strauss was not simply providing psychiatric care to S.R; he was also treating him for chronic pain. Secondly, and more importantly, Dr. Strauss did not have any medical records reflecting any physical examination for S.R. during his first visit on November 11, 1997, a visit for which he prescribed OxyContin.

42. Secondly, Dr. Strauss violated the Standard of Care by failing to make a treatment plan with objectives for S.R. While Dr. Strauss testified at hearing as to what he believed his plan was, he should have created a written treatment plan, setting

out objectives, and identifying the sources of S.R.'s pain, the medical records that documented and validated treatment by previous physicians, consultations to evaluate how S.R. was feeling, and specifically how S.R.'s pain could be further controlled and alleviated. An adequate plan should have also included the discussion of whether any psychiatric issues were contributing to S.R.'s condition; a description of S.R.'s character as it related to any attempt on S.R.'s part to obtain medications, which were more than he needed to control his pain, his social situation, and any stresses S.R. was experiencing.

43. Thirdly, Dr. Strauss violated the Standard of Care by failing to adequately justify the changes in the medications and dosages/frequency of those medications. This finding is based upon Dr. Strauss' failure to prepare a treatment plan for S.R., to obtain all of the available medical records concerning S.R., and to refer S.R. for special consultations.

44. Finally, Dr. Strauss violated the Standard of Care by failing to use specialized consultations for diagnosis and/or treatment of S.R.

45. Given S.R.'s prior addiction history, the lack of a physical examination, and the lack of S.R.'s medical records other than those of Dr. Alshon, Dr. Strauss should have referred S.R. to a physician specializing in addiction medicine. Dr. Strauss's treatment of S.R. without referral, although with

perfect 20-20 hindsight treatment that turned out to be beneficial to S.R., relied too heavily on what S.R. told him and the assumption, uncorroborated at the time by Dr. Strauss, that there was nothing except Dr. Strauss' course of treatment that would work. Without a physical examination and thorough medical records, Dr. Strauss lacked adequate reliable information to conclude that a referral to a pain management specialist or an expert in addictive medicine would not benefit S.R.

J. Medical Records.

46. Dr. Strauss' notes, especially in light of the more detailed explanation of his treatment of S.R. provided at hearing, lack the kind of specificity necessary to justify his treatment of S.R.

47. Dr. Strauss' notes also do not memorialize any regular review of S.R.'s medical needs that Dr. Strauss performed. Such a review should have included documentation of how S.R. was being monitored to determine whether he was actually taking the medications prescribed for him, including the results of drug urinalysis testing.

48. Regular reviews should have also noted whether S.R. was suffering any specific side effects to the medications he was taking. Simply stating that S.R. reported "no side effects" was inadequate. Dr. Strauss should have noted, especially when increasing the dosage of OxyContin and MS Contin, and when

changing his medication to MS Contin, that he had thoroughly discussed the side effects of the drugs and that S.R. was not experiencing those side effects.

49. Dr. Strauss' notes also failed to reflect that he had discussed with S.R. the dangers of taking OxyContin or MS Contin other than as prescribed. Although the number of occasions when S.R. took more medication than prescribed were few and S.R. apparently candidly reported these incidents to Dr. Strauss, Dr. Strauss still should have made sure S.R. understood the hazards associated with increasing the dosage on his own. This is especially true given S.R.'s past abuse history and the other shortcomings between November 1997 and August 2002 of Dr. Strauss' treatment of S.R. noted in this Recommended Order.

50. Without the detailed medical notes and recorded periodic reviews Dr. Strauss should have made, it appears from the medical records that it was S.R.'s subjective complaints that controlled and formed the basis for the decisions made concerning his treatment with OxyContin and MS Contin.

CONCLUSIONS OF LAW

A. Jurisdiction.

51. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 456.073(5), Florida Statutes (2005).

B. The Charges of the Administrative Complaint.

52. Section 458.331(1), Florida Statutes, authorizes the Board of 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 medicine in Florida if a physician commits one or more acts specified therein.

53. In its First Amended Administrative Complaint in this case, the Department has alleged that Dr. Strauss has violated Section 458.331(1)(m), (q), and (t), Florida Statutes.

C. The Burden and Standard of Proof.

54. The Department seeks to impose penalties against Dr. Strauss through the First Amended Administrative Complaint that include suspension or revocation of his 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. Strauss violated Section 458.331(1)(m), (q), and (t), 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)(j), Florida Statutes (2005)("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.").

55. 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. Count One: Section 458.331(1)(t), Florida Statutes; The Standard of Care.

56. In Count One of the First Amended Administrative Complaint it is alleged that Dr. Strauss violated Section

458.331(1)(t), Florida Statutes (2001), which defines the following disciplinable offense:

(t) . . . [T]he 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. . . .

57. The Department has alleged that Dr. Strauss violated the Standard of Care in "one or more of the following ways":

a) by failing to perform an adequate physical examination for Patient S.R. during his first visit;

b) By failing to make a treatment plan with objectives;

c) by failing to justify changes in medications, dosages or frequency; or

d) by failing to use specialized consultations for diagnosis and/or treatment.

58. The evidence has clearly and convincingly proved that Dr. Strauss has violated the Standard of Care as alleged in the First Amended Administrative Complaint.

E. Count Two: Section 458.331(1)(m), Florida Statutes; Medical Records.

59. In Count two of the First Amended Administrative Complaint it is alleged that Dr. Strauss violated Section 458.331(1)(m), Florida Statutes, which defines the following disciplinable offense:

(m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and 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.

60. The First Amended Administrative Complaint alleges that Dr. Strauss' medical records were inadequate because he failed to keep legible medical records that justify the course of treatment of Patient S.R. in one or more of the following ways:

a) by failing to record or inadequately recording a physical examination during Patient S.R.'s first visit;

b) by failing to make detailed notes and perform regular reviews of patient needs;
or

c) by failing to document a complete and proper history of Patient S.R.

61. Obviously, having failed to perform a physical examination during S.R.'s first visit, Dr. Strauss failed to record one. He also failed to make the kind of detailed notes, including memorializing regular reviews, necessary to justify the course of medication treatment prescribed for S.R. Finally,

Dr. Strauss' medical history of S.R. was inadequate. It is, therefore, concluded that Dr. Strauss failed to keep adequate medical records in violation of Section 458.331(1)(m), Florida Statutes.

F. Count Three: Section 458.331(1)(q), Florida Statutes; Legend Drugs.

62. In Count Three of the First Amended Administrative Complaint it is alleged that Dr. Strauss violated Section 458.331(1)(q), Florida Statutes, which defines the following disciplinable offense:

(q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

63. The Administrative Complaint alleges that Dr. Strauss violated Section 458.331(1)(q), Florida Statutes, with regard to Patient S.R. in that he

prescribed OxyContin, MS Contin, Valium and Ativan, all controlled substances, to S.R. inappropriately or in excessive or inappropriate quantities, in that Respondent

prescribed controlled substances without medical justification, in quantities which endangered the patient's health, and were not in the best interest of the patient and in a manner not in the course of the physician's professional practice.

64. Although the evidence proved that Dr. Strauss used controlled substances to treat S.R. "in the course of the physician's professional practice," given the definition of Section 458.331(1)(q), Florida Statutes, and the findings of this Recommended Order, the Department proved that Dr. Strauss violated Section 458.331(1)(q), Florida Statutes.

G. The Appropriate Penalty.

65. In determining the appropriate punitive action to recommend to the Board in this case, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority under Section 458.331, Florida Statutes. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

66. The Board's guidelines are set out in Florida Administrative Code Rule 64B8-8.001, which provides the following "purpose" and instruction on the application of the penalty ranges provided in the Rule:

(1) Purpose. Pursuant to Section 456.079, F.S., the Board provides within this rule disciplinary guidelines which shall be imposed upon applicants or

licensees whom it regulates under Chapter 458, F.S. The purpose of this rule is to notify applicants and licensees of the ranges of penalties which will routinely be imposed unless the Board finds it necessary to deviate from the guidelines for the stated reasons given within this rule. The ranges of penalties provided below are based upon a single count violation of each provision listed; multiple counts of the violated provisions or a combination of the violations may result in a higher penalty than that for a single, isolated violation. Each range includes the lowest and highest penalty and all penalties falling between. The purposes of the imposition of discipline are to punish the applicants or licensees for violations and to deter them from future violations; to offer opportunities for rehabilitation, when appropriate; and to deter other applicants or licensees from violations.

(2) Violations and Range of Penalties. In imposing discipline upon applicants and licensees, in proceedings pursuant to Section 120.57(1) and 120.57(2), F.S., 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 verbal identification of offenses are descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

67. Florida Administrative Code Rule 64B8-8.001(2), goes on to provide, in pertinent part, the following penalty guidelines for the violations proved in this case:

a. For a violation of Section 458.331(1)(m), Florida Statutes, a range of relevant penalties from a reprimand to two

years' suspension followed by probation, and an administrative fine from \$1,000.00 to \$10,000.00;

b. For a violation of Section 458.331(1)(q), Florida Statutes, a range of relevant penalties from a one-year probation to revocation, and an administrative fine from \$1,000.00 to \$10,000.00; and

c. For a violation of Section 458.331(1)(t), Florida Statutes, a range of relevant penalties from two years' probation to revocation, and an administrative fine from \$1,000.00 to \$10,000.00.

68. Florida Administrative Code Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

(3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:

(a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;

(b) Legal status at the time of the offense: no restraints, or legal constraints;

(c) The number of counts or separate offenses established;

(d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;

(e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;

(f) Pecuniary benefit or self-gain inuring to the applicant or licensee;

(g) The involvement in any violation of Section 458.331, Florida Statutes, of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure;

(h) Any other relevant mitigating factors.

69. In its Proposed Recommended Order, the Department has requested that it be recommended that the following discipline be imposed upon Dr. Strauss' license:

- a. A letter of concern;
- b. An administrative fine of \$15,000.00;
- c. Continuing education classes in the amount and nature to be specified by the Board;
- d. Fifty (50) hours of community service

70. Having carefully considered the facts of this matter in light of the provisions of Florida Administrative Code Rule 64B8-8.001, it is concluded that the Department's suggested penalty, without the fifty hours of community service, is reasonable. No explanation of why Dr. Strauss should be required to provide community service has been given by the Department, and the facts do not support such discipline.

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 Medicine finding that Abbey Strauss, M.D., has violated Section 458.331(1)(m), (q), and (t), Florida Statutes, as described in this Recommended Order; issuing him a letter of concern; requiring that he pay an administrative fine of \$15,000.00; and requiring that he attend continuing education classes in an amount and of a nature to be determined by the Board.

DONE AND ENTERED this 26th day of April, 2006, in Tallahassee, Leon County, Florida.



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 26th day of April, 2006.

ENDNOTES

^{1/} The substantive definitions of wrong-doing contained in Section 458.331(1)(m), (q), and (t), Florida Statutes (1997 through 2002), did not change appreciably. Therefore, references to the year of the statute will be excluded from further citations of those provisions.

^{2/} The Transcript of the December 16, 2005, hearing, at line 22, page 3, incorrectly identifies "Petitioner's" Exhibit 6 being addressed at page 28 of the Transcript. At line 17, page 28, it is Respondent's Exhibit 6 that is admitted.

^{3/} The evidence in this case failed to prove that S.R., at any time during Dr. Strauss' treatment, was addicted to, or abusing OxyContin or any other drug. Petitioner's suggested Finding of Fact number 10, that "[a]t the time Respondent was treating Patient S.R., Patient S.R. may have been addicted and abusing the pain medication that was being prescribed to him by the Respondent" is rejected as too speculative and not supported by the weight of the evidence.

^{4/} There was also evidence presented at hearing as to the need to continue to conduct physical examinations of S.R. on subsequent visits. The First Amended Administrative Complaint does not allege, however, that the failure to conduct subsequent physical examinations constituted a violation of Section 458.331(1)(t), Florida Statutes.

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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.