STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 06-4906PL
CHARLES FINN, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 25, 2007, in St. Petersburg, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Irving Levine, Esquire
Department of Health
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Tallahassee, Florida 32399-3265

For Respondent: Paula Rousselle, Esquire
Sieva, Rousselle & Stine, P.A.
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STATEMENT OF THE ISSUES

Whether Respondent violated Subsections 458.331(1)(m) and 458.331(1)(t), Florida Statutes (2002),[1] and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On June 13, 2006, Petitioner, the Department of Health (Department), filed with the Board of Medicine a two-count Administrative Complaint against Respondent, Charles Finn, M.D., alleging that Dr. Finn violated Subsections 458.331(1)(m) and 458.331(1)(t), Florida Statutes. Dr. Finn requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on December 5, 2006, for assignment to an Administrative Law Judge to conduct the final hearing.

The final hearing was scheduled for February 13 and 14, 2007. Respondent requested a continuance two times, and each request was granted.

On June 7, 2007, Petitioner filed Petitioner's Motion for Official Recognition, which was granted. Official recognition was taken of Subsections 458.331(1)(m) and 458.331(1)(t), Florida Statutes.

The parties submitted a Joint Pre-hearing Stipulation and agreed to certain facts contained in Section E of the Joint Pre-

hearing Stipulation. To the extent relevant, those stipulated facts have been incorporated in this Recommended Order.

At the final hearing, the parties submitted Joint Exhibit 1, which was admitted in evidence. Petitioner presented no live testimony at the final hearing, but submitted the deposition of Martin Hale, M.D., which was admitted as Petitioner's Exhibit 1. Additionally, Petitioner's Exhibit 2 was admitted in evidence.

At the final hearing, Respondent testified in his own behalf and presented the testimony of Harold B. Reeder, M.D. Respondent's Exhibits 1, 2, and 4 were admitted in evidence. Respondent's Exhibit 3 was not admitted in evidence.

The one-volume Transcript was filed on August 14, 2007. On August 27, 2007, an order was entered ruling on the objections made during the deposition of Dr. Hale. The parties were given until September 7, 2007, to file their proposed recommended orders. The parties timely filed their Proposed Recommended Orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. The Department is charged with the regulation of the practice of medicine pursuant to Chapters 20, 456, and 458, Florida Statutes.

2. At all times material to this proceeding, Dr. Finn was a licensed physician within the State of Florida, having been issued license number 60278. Dr. Finn is board-certified by the American Orthopedic Association.

3. On March 14, 2003, R.B., a 65-year-old male, was riding his motorcycle when he lost control and jammed his right leg into the ground. The following day, R.B. went to the MacDill Air Force Base emergency room, where the medical records indicated joint effusion/swelling, limited range of motion, and pain in all ligament stresses in the knee. X-rays showed no acute, but some degenerative changes in the calcification of cartilage. The recorded impression was right knee sprain.

4. On March 19, 2003, R.B. went to the Advance Orthopedic Associates and was seen by Dr. Finn, who performed a physical examination on R.B. and evaluated X-rays of R.B. Dr. Finn ordered an MRI scan to assess, among other things, internal derangement that may have been caused by the accident.

5. R.B. returned to see Dr. Finn on April 16, 2003, and reported that the MRI had been performed, but he did not have the report or films for review. R.B. was rescheduled to see Dr. Finn on April 18, 2003.

6. The MRI report and films are part of R.B.'s patient chart. The MRI report prepared by the radiologist states the following, under the portion of the report titled "Impression."

> 1. Acute complex fracture of the proximal tibia as described in detail above.
> 2. There is an associated knee effusion/hemarthrosis.
> 3. Tear of the posterior horn of the medial meniscus.
> 4. Mild bone edema within the lateral femoral condyle consistent with a bone bruise.
> 5. Possible partial tear of the anterior cruciate ligament.

The MRI report further states that the findings of the MRI are consistent with "an acute or recent complex tibial plateau fracture."

7. Dr. Finn saw R.B. on April 18, 2003, and prepared the following letter to MacDill 6 Medical Group. This letter is the written record of R.B.'s office visit on April 18, 2003.

> The patient comes in today. He has had his MRI scan and the report, which I have reviewed. There is a degenerative chondral calcinosis and degenerative meniscal tear and also question of a tibial plateau fracture.
>
> He has had no recent trauma whatsoever and he has no clinical symptoms of a fracture. There are arthritic changes and the chondral calcinosis.
>
> I am recommending a Cortisone shot. We will do this when this can be authorized and set up.

8. According to Dr. Finn, he did perform a physical examination of R.B. during the April 18, 2003, visit and concluded that there were no clinical signs of a fracture. He indicated at the final hearing that what he meant when he wrote

that R.B. “had no recent trauma whatsoever” was that R.B. had not had any trauma since the time of R.B.'s office visit on March 19, 2003. Based on the testimony of Dr. Finn, it is concluded that Dr. Finn was aware that R.B. did have a tibial plateau fracture, but that the fracture was healing and the pain that R.B. was experiencing resulted from other problems. However, a common sense reading of his office note would not lead one to believe that R.B. had a tibial plateau fracture as a result of his motorcycle accident.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2006).

10. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). The Department has alleged that Dr. Finn violated Subsections 458.331(1)(m) and 458.331(1)(t), Florida Statutes, which provide:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *

> (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.
>
> * * *
>
> (t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. . . . As used in this paragraph, . . . "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances," shall not be construed so as to require more than one instance, event, or act. Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph.

11. The Department alleged that Dr. Finn failed 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 by the following:

a. by failing on April 18, 2003, to perform an adequate physical examination on Patient R.B.;
b. by failing to adequately record a physical exam at the April 18th visit other than noting that Patient R.B. had no clinical symptoms of a fracture;
c. by noting that there was a question of tibial plateau fracture which was inconsistent with the MRI report of an acute complex fracture of the proximal tibia.

12. The Department failed to establish by clear and convincing evidence that Dr. Finn failed to perform an adequate physical examination on R.B. on April 18, 2003. Dr. Finn testified credibly that he did perform a physical examination. The Department did establish that Dr. Finn failed to adequately record his physical examination of R.B. on April 18, 2003. The notes do not indicate that Dr. Finn did a visual inspection, that he palpated the knee to determine if there was tenderness or that he checked R.B.'s range of motion.

13. The Department alleged that Dr. Finn failed to keep legible medical records that justified his course of treatment of R.B. in the following ways:

a. by failing to adequately record a physical exam at the April 18th visit other than noting that Patient R.B. had no clinical symptoms of a fracture;
b. by noting that there was a question of a tibial plateau fracture which was inconsistent with the MRI report of an acute complex fracture of the proximal tibia.

14. The Department has established by clear and convincing evidence that Dr. Finn violated Subsection 458.331(1)(m), Florida Statutes. Dr. Finn's office notes stated that there was a question of a tibial plateau fracture and that R.B. had sustained no recent trauma whatsoever. His note is contrary to R.B.'s history that R.B. had sustained a motorcycle accident about month earlier. Dr. Finn testified that he had recalled that R.B. had been in a motorcycle accident and that the note meant that there had been no further trauma. However, a physician reading the note would be led to believe that R.B. had not sustained any trauma, including any trauma resulting from the motorcycle accident. The MRI report clearly showed a tibial plateau fracture; thus, the comment that there was a question of a tibial plateau fracture is inconsistent with the MRI report. From reading the office note, it is not clear whether Dr. Finn disagreed with the MRI report or was of the opinion that there was a tibial plateau fracture. The Department has established by clear and convincing evidence that Dr. Finn violated Subsection 458.331(1)(m), Florida Statutes, by failing to keep medical records that justified his course of treatment for R.B.

15. The Department has alleged that Dr. Finn fell below the standard of care in his treatment of R.B. by failing to adequately record his examination on April 18, 2003, and by noting that there was a question of a tibial plateau fracture.

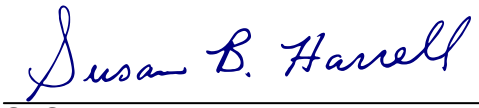
Those allegations are the same that were alleged for a violation of Subsection 458.331(1)(m), Florida Statutes, and do no rise to the level of a violation of Subsection 458.331(1)(t), Florida Statutes. See Barr v. Department of Health, 954 So. 2d 668 (Fla. 1st DCA 2007).

16. Florida Administrative Code Rule 64B8-8.001 contains the disciplinary guidelines for the Board of Medicine. The penalty for a first time violation of Subsection 458.331(1)(m), Florida Statutes, ranges from a reprimand to two years suspension followed by probation, and an administrative fine of $1,000 to $10,000.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Dr. Finn did not violate Subsection 458.331(1)(t), Florida Statutes; finding that Dr. Finn did violate Subsection 458.331(1)(m), Florida Statutes; issuing a reprimand; imposing an administrative fine of $2,500; and requiring Dr. Finn to take continuing medical education classes to be specified by the Board of Medicine.

DONE AND ENTERED this 27th day of September, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of September, 2007.

ENDNOTE

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2002 version.

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 this case.