STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF OSTEOPATHIC MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 07-0511PL
BARRY J. KAPLAN, D.O.,	)	
Respondent.	)	

RECOMMENDED ORDER

On April 19, 2007, a formal administrative hearing in this case was held in Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Blake Hunter, Esquire
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For Respondent: Thomas E. Dukes, III, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated November 21, 2006, the Department of Health, Board of Osteopathic Medicine (Petitioner), alleged that Barry J. Kaplan, D.O. (Respondent), violated certain Florida Statutes related to the practice of osteopathic medicine. The Respondent disputed the allegations and requested a formal administrative hearing. On January 25, 2007, the Petitioner filed a Notice of Scrivener's Error correcting three "typographical errors" in the Administrative Complaint. On January 29, 2007, the Petitioner forwarded the matter to the Division of Administrative Hearings, which scheduled and conducted the hearing.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits numbered 1 through 10 admitted into evidence. The Respondent testified on his own behalf and had Exhibits numbered 1, 5, 6, 10, and 14 admitted into evidence. The hearing Transcript was filed on July 7, 2007. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was an osteopathic physician, holding Florida license number OS 4478, with an address of record of 480 North Orlando Avenue, Suite 118, Winter Park, Florida 32789.

2. On August 10, 2005, Patient B.C. met with the Respondent in his office. Patient B.C. went to the Respondent's office with a friend who was present during the consultation between the Respondent and Patient B.C.

3. At the time of the meeting, Patient B.C., a 42-year-old female and the mother of three children, was seeking a breast lift to correct her "drooping" breasts.

4. Prior to meeting with the Respondent, Patient B.C. completed an information questionnaire. The form directed a patient to "check off" various topics about which the patient wanted information. The form listed two topics specifically related to breasts: "breast augmentation" and "breast reduction." Patient B.C. checked the box for augmentation.

5. At the hearing, Patient B.C. testified that she was familiar with breast lift procedures because a family member had undergone a similar procedure. Patient B.C. testified that during her consultation with the Respondent, she specifically told the Respondent that she was not seeking to have her breasts enlarged, but was unhappy with the drooping appearance and wanted her breasts lifted to correct the droop.

6. According to Patient B.C., the Respondent told her that she was not an appropriate candidate for a breast lift and that he could achieve the result she sought with an implant, with the

possibility of a subsequent "crescent lift" after healing from the augmentation.

7. The medical term for breast droop is "ptosis." Breast ptosis is graded according to the "Regnault" scale into one of three categories based upon the location of the nipple areolar complex relative to the inframmary fold.

8. Although there was some disagreement among testifying experts about the grade assigned to Patient B.C.'s ptosis, the greater weight of the evidence establishes that Patient B.C.'s ptosis was severe and was classified as Grade III.

9. According to the testimony of Dr. Anthony Dardano, a grade one ptosis can be treated with augmentation to increase breast volume. A grade two ptosis should generally be treated with a breast lift. A grade three ptosis should be treated with a mastopexy, of either a full-scar or a vertical type. Augmentation of a grade three ptosis essentially results in a larger drooping breast.

10. Dr. Dardano testified that Patient B.C.'s ptosis was of such severity that a full mastopexy procedure was required to correct it and that an augmentation and crescent lift would not have corrected the ptosis. Dr. Dardano's testimony was persuasive and is accepted.

11. During the initial consultation, the Respondent described the augmentation procedure to Patient B.C., and she

ultimately became convinced that the augmentation and possibly a subsequent crescent lift would correct the ptosis.

12. The Respondent disputes the patient's recollection of the initial consultation. The Respondent testified that he advised Patient B.C., whom he described as a "borderline" patient, to seek the opinion of a plastic surgeon. He testified that he did not tell her that she was not a candidate for a breast lift and that she chose to undergo the augmentation after being fully informed as to the entire range of surgical procedures because she wanted to avoid scars from a mastopexy.

13. Patient B.C. had no recollection that the Respondent had suggested that she seek the opinion of a plastic surgeon. There was no documentation in the Respondent's medical records that he advised her to do so.

14. On cross examination, the Respondent was asked a number of questions related to the specific discussion he had at the initial consultation with Patient B.C., particularly regarding whether procedures other than augmentation were addressed. The Respondent testified that he makes the same presentation at initial consultations between six and ten times daily and that he covers the full range of options at each presentation. He testified that he does not document the specific discussion that occurs during the initial consultation as he does not believe that the person is his "patient" at that

time. He does not create a medical record documenting his interaction with a patient until the patient decides to allow him to perform surgery.

15. On redirect, he was invited by his legal counsel to present the presentation he makes to potential patients during initial consultations. The Respondent's response to the question was almost wholly a discussion of the augmentation procedure and the post-augmentation recovery period. Other than stating that he determines whether someone is a candidate for breast augmentation, no part of his response to the question indicated that there was any discussion of the entire range of mastopexy, which could address the patient's concern or that the Respondent routinely made referrals outside his area of expertise.

16. The greater weight of the evidence establishes that the Respondent discusses with potential patients the procedures that he performs. There is no credible evidence that the Respondent advised Patient B.C. to consult a plastic surgeon about her ptosis. His testimony that he specifically recalled referring Patient B.C. to a plastic surgeon was not persuasive or credible and is rejected.

17. Several months after the initial consultation, Patient B.C. executed consent forms for the breast augmentation. She paid a total of $4,000 in at least two installments in advance of the surgery.

18. At the hearing, Patient B.C. acknowledged having received and read extensive materials provided by the Respondent as part of the informed consent process. She also researched augmentation after the initial consultation and was aware of the procedure prior to the surgery. Informed consent is not at issue in this proceeding. Patient B.C. went to the Respondent seeking a breast lift to correct the ptosis, and it is reasonable to presume that part of the consent process was the fact that the Respondent dissuaded her from the full breast lift procedure (which he does not perform) and advised her that he could achieve the results with the augmentation, perhaps followed at a time uncertain by a crescent lift.

19. On November 25, 2005, the Respondent performed a bilateral breast augmentation on Patient B.C. On the day of the surgery, Patient B.C. was taken to the Respondent's office by the same friend who had accompanied her on the initial consultation.

20. Patient B.C. was given medication to "relax" during the procedure, and the surgical site was numbed, but Patient B.C. was awake throughout the procedure.

21. The Respondent's surgical note says he placed the implants under the patient's pectoral muscle. According to the deposition testimony of Dr. James L. Baker, M.D., a plastic surgeon, Dr. Baker believes that the implants were placed above the pectoral muscle. The evidence establishes that in an appropriate candidate for augmentation, either location would have been an acceptable placement.

22. The Respondent used Mentor High Profile 380cc saline implants, which he filled to the maximum of 450cc with saline.

23. After inflating the implants, but before completing the procedure, the Respondent sat Patient B.C. up and allowed her to view the result. He also allowed Patient B.C.'s friend to come into the room and observe the result, at which time the friend commented on how large the implants appeared to be.

24. After the procedure, Patient B.C. returned for several follow-up visits to the Respondent's office, and, during the visits, she expressed her concern that her augmented breasts were larger than she wanted. She testified that the Respondent told her it would take time for the implants "to drop" and for swelling to subside.

25. During the follow-up period, Patient B.C. had a routine annual gynecological examination and discussed her augmentation with her gynecologist, who referred her to a plastic surgeon, Dr. Baker.

26. Patient B.C. went to consult with Dr. Baker in January 2006, by which time Patient B.C. had decided she wanted the implants removed. She was provided three referrals by Dr. Baker, and she chose to make an appointment to see Dr. Orlando Cicilioni.

27. Patient B.C. met with Dr. Cicilioni in February 2006 and discussed removal of the implants, but Patient B.C. lacked the funds to follow through with the removal. At the time of the hearing, Patient B.C. had not yet had the implants removed.

28. Patient B.C. described her unhappiness with the implant procedure performed by the Respondent. She testified that the implants remained "up higher" with the breast hanging off of the implants. Patient B.C.'s testimony is consistent with photographs taken post-augmentation. Patient B.C. testified that she wanted the implants removed but lacked the funds to do so, and eventually to have the breast lift she sought when she first approached the Respondent.

29. Comparison between pre-operative photos and those taken at various dates following the procedure demonstrate that ptosis is still clearly present. Although the implants have somewhat settled into a lower position, the patient's chest area is essentially thrust forward, the unnatural outline of the implants visible (especially in the side view), with the

patient's breasts sitting over the implant. Portions of the breast skin are shiny and appear to be stretched.

30. In reviewing the photographs, the Respondent asserted that the breasts had been lifted by the augmentation. However, the nipple-areola complex is in essentially the same position on the breast as prior to the surgery. Very little, if any, breast lift was achieved through the augmentation process.

31. The Respondent also testified that although Patient B.C. could possibly benefit from a post-augmentation crescent lift, "in all honesty, the left side might need a little bit of a vertical component," which would require surgery by a plastic surgeon. Dr. Kaplan testified that a crescent lift may achieve a lift of 2 to 3 centimeters, although he testified "I'm usually happy if I get 1 to 2."

32. Dr. Dardano identified the surgical result as a "Snoopy dog defect," in reference to the nose of the cartoon character, and described it as a deformity.

CONCLUSIONS OF LAW

33. 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).

34. The Petitioner is the state agency charged with regulating the practice of osteopathic medicine. Ch. 459, Fla. Stat. (2006).

35. The Administrative Complaint charges that the Respondent violated Subsection 459.015(1)(x), Florida Statutes (2005), which provides as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (x) Notwithstanding s. 456.072(2) but as specified in s. 456.50(2):
>
> 1. Committing medical malpractice as defined in s. 456.50. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event, or act.
>
> 2. Committing gross medical malpractice.
>
> 3. Committing repeated medical malpractice as defined in s. 456.50. A person found by the board to have committed repeated medical malpractice based on s. 456.50 may not be licensed or continue to be licensed by this state to provide health care services as a medical doctor in this state.
>
> Nothing in this paragraph shall be construed to require that an osteopathic physician be incompetent to practice osteopathic medicine in order to be disciplined pursuant to this paragraph. A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross medical malpractice," "repeated medical malpractice," or "medical malpractice," or any combination thereof, and any publication by the board shall so specify.

36. Section 456.50, Florida Statutes (2005), provides, in relevant part, as follows:

> 456.50 Repeated medical malpractice.--
>
> (1) For purposes of s. 26, Art. X of the State Constitution and ss. 458.331(1)(t), (4), and (5) and 459.015(1)(x), (4), and (5):
>
> * * *
>
> (e) "Level of care, skill, and treatment recognized in general law related to health care licensure" means the standard of care specified in s. 766.102.
>
> * * *
>
> (g) "Medical malpractice" means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. . . .

37. Subsection 766.102(1), Florida Statutes (2005), states, in material part, that "[t]he prevailing professional standard-of-care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."

38. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So 2d 932,

935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is that which is credible, precise, explicit, and lacking 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 of conviction, without hesitancy, as to the truth of the allegations. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, the burden has been met.

39. The Respondent takes the position that this matter is simply the result of a patient dissatisfied with the results of the procedure. The Respondent asserts that the patient was fully advised as to the results that could be achieved through the augmentation, but was told that there were no guarantees; that the patient had a sufficient amount of time to consider the risks and benefits of the procedure and decided voluntarily to undergo the elective surgery; and that the patient is now unhappy with the result.

40. The issue in this case is not that the patient is dissatisfied with the results of the procedure. The issue is whether the Respondent violated Subsection 459.015(1)(x), Florida Statutes (2005), by advising the patient that an augmentation, with the possibility of a subsequent crescent lift, would address the issue of her ptosis.

41. The evidence establishes that the Respondent committed medical malpractice in violation of Subsection 459.015(1)(x), Florida Statutes (2005), by failing to properly diagnose the extent of the patient's ptosis prior to performing the augmentation, by utilizing implants that were too large when filled resulting in unnatural stretching of the patient's skin over the implants, by performing an augmentation procedure on a patient who did not seek to have the size of her breasts enlarged, and by incorrectly advising the patient that any remaining ptosis following the augmentation could be remedied with a crescent lift.

42. Florida Administrative Code Rule 64B15-19.002 sets forth the disciplinary guidelines applicable to a violation of Subsection 419.015(1)(x), Florida Statutes (2005). The penalty for a first offense ranges from a minimum of a letter of concern up to one year of probation and a $1,000 fine to a maximum of revocation and a $10,000 fine. The penalty for a second offense ranges from a minimum of two years of probation and a $7,500 fine to a maximum of revocation and a $10,000 fine.

43. The Respondent has been the subject of three prior disciplinary proceedings, which have been resolved through entry of Final Orders.

44. Department of Health Case Number 96-13724 alleged that the Respondent had committed violations of Subsections

459.015(1)(g) and (bb), Florida Statutes (1996). The matter was apparently resolved without an evidentiary hearing, and the Final Order specifically stated that the Respondent neither admitted nor denied the allegations.

45. Department of Health Case Number 2000-02429 alleged that the Respondent had committed violations of Subsections 459.015(1)(x) and (o), Florida Statutes (1999). The matter was apparently resolved without an evidentiary hearing, and the Final Order specifically stated that the Respondent neither admitted nor denied the allegations.

46. Department of Health Case Number 2003-20677 alleged that the Respondent committed violations of Subsections 459.015(1)(x), (o), and (s), Florida Statutes (2002). The matter was apparently resolved without an evidentiary hearing, and the Final Order specifically stated that the Respondent neither admitted nor denied the allegations.

47. Because none of the prior disciplinary proceedings resulted in a determination that a statutory violation had occurred, the instant case is treated as a first offense. As cited above, Florida Administrative Code Rule 64B15-19.002 establishes that the penalty for a first offense ranges from a minimum of a letter of concern up to one year of probation and a $1,000 fine to a maximum of revocation and a $10,000 fine.

48. Florida Administrative Code Rule 64B15-19.003 provides as follows:

> 64B15-19.003 Aggravating or Mitigating Circumstances.
>
> When either the petitioner or respondent is able to demonstrate aggravating or mitigating circumstances to the board by clear and convincing evidence, the board shall be entitled to deviate from the above guidelines in imposing discipline upon an applicant or licensee. Absence of any such evidence of aggravating or mitigating circumstances before the hearing officer prior to the issuance of a recommended order shall not relieve the board of its duty to consider evidence of mitigating or aggravating circumstances. Aggravating and mitigating circumstances shall include, but not be limited to the following:
>
> (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.

49. In this case, the Respondent has been disciplined on three prior occasions, and penalties have been imposed in each instance, most recently in 2003.

50. The Respondent's actions in the instant case ultimately resulted in creating a deformity of the patient's breasts. Additional surgery will be required, at the patient's expense, to resolve the problem exacerbated by the Respondent's performance of an augmentation. The patient had to marshal her financial resources to pay for the Respondent's initial malpractice and will have to do so again to repair the damage.

51. There has been no effort towards rehabilitation; in fact, the Respondent has attempted to shift culpability to the patient by asserting that the case is based merely on the complaint of a patient who was unhappy with the results obtained. The Respondent testified that he believed that Patient B.C. was a "borderline" patient in terms of whether the augmentation would resolve her ptosis, yet he performed the procedure anyway.

52. Prior to the augmentation, he told Patient B.C. that the augmentation would resolve the ptosis with the possible future crescent lift. The evidence establishes that the patient's ptosis was not amenable to correction through the course of action suggested by the Respondent. There is no credible evidence that any medical professional who actually examined the patient concurs that the matter is simply one of an unhappy patient.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Osteopathic Medicine, enter a final order finding Barry J. Kaplan, D.O., in violation of Subsection 459.015(1)(x), Florida Statutes (2005), and imposing a fine of $6,500; a probationary period of three years, with such conditions as determined appropriate by the Department of Health, including additional educational requirements; and requiring that the Respondent refund to Patient B.C. the $4,000 fee she paid to him.

DONE AND ENTERED this 7th day of September, 2007, in Tallahassee, Leon County, Florida.

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WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of September, 2007.

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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.