STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner,	)	
vs.	)	Case No. 07-0688PL
JOHN C. DALI, M.D, Respondent.	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on May 9, 2007, in Shalimar, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Matthew Casey, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Thomas F. Gonzalez, Esquire
Beggs and Lane
Post Office Box 12950
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STATEMENT OF THE ISSUES

The issues are whether Respondent violated Sections 458.331(1)(m) and/or 458.331(1)(t), Florida Statutes (2005), and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On December 11, 2006, Petitioner Department of Health, Board of Medicine (Petitioner) issued an Administrative Complaint against Respondent John C. Dali, M.D. (Respondent). The complaint alleged that Respondent violated Section 458.331(1)(m), Florida Statutes (2005), by failing to keep legible medical records justifying a course of treatment of Patient A.R. The complaint also alleged that Respondent violated Section 458.331(1)(t), Florida Statutes (2005), by failing 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 in his treatment of Patient A.R.

On December 28, 2006, Respondent requested an administrative hearing to contest the charges against him. On February 12, 2007, Petitioner referred the request to the Division of Administrative Hearings.

On February 21, 2007, Administrative Law Judge Charles C. Adams issued a Notice of Hearing, scheduling the case for May 9-10, 2007.

On April 30, 2007, Petitioner filed a Motion for Official Recognition. On May 1, 2007, Judge Adams issued an order granting the motion.

On May 1, 2007, the parties filed a Joint Pre-hearing Stipulation. That same day, Petitioner filed an unopposed Motion to Amend the Administrative Complaint to reflect the language for Section 458.331(1)(t), Florida Statutes (2005). On May 7, 2007, Judge Adams granted the motion.

On or about May 8, 2007, the Division of Administrative Hearings transferred the case to the undersigned.

During the hearing, Petitioner presented the testimony of Patient A.R. and the expert testimony of Robert P. DerHagopian, M.D., F.A.C.S. Petitioner offered Exhibits numbered, P1-P5, that were admitted as evidence.

Respondent testified on his own behalf and presented the factual and expert testimony of Mark E. Schroeder, M.D., and Patrick J. Anastasio, D.O. Of the eight exhibits offered by Respondent, Exhibits numbered R1-R6 were accepted as evidence.

The court reporter filed the Transcript on June 7, 2007. Petitioner filed its Proposed Recommended Order on June 18, 2007. Respondent filed his Proposed Recommended Order on June 15, 2007.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating the practice of medicine.

2. Respondent is a licensed Florida physician. He practices medicine as a board-certified surgeon in Niceville, Florida. His medical license number is ME 82923.

3. At all times relevant here, Mark Schroeder, M.D. shared office space with Respondent in Niceville, Florida. Dr. Schroeder is a primary care physician. He has been board-certified in internal medicine since 1989.

4. At all times relevant here, Patrick J. Anastasio, D.O., was a practicing physician in Fort Walton Beach, Florida. Dr. Anastasio is dual board-certified in internal medicine and infectious disease.

5. In November 2005, Patient A.R. was a 35-year-old female. Her primary care physician was Dr. Schroeder. As part of her medical history, Patient A.R. reported to Dr. Schroeder that she was allergic to Amoxil/Amoxcillian.

6. On November 2, 2005, Patient A.R. had an appointment with Dr. Schroeder. Patient A.R. complained that she suffered from constant nausea and stomach discomfort associated with her meals.

7. On November 4, 2005, Patient A.R. underwent a gallbladder ultrasound to rule out her gallbladder as the cause of her nausea. The ultrasound indicated that Patient A.R.’s gallbladder was normal.

8. On or about November 29, 2005, Patient A.R. had a blood test. The test results showed a positive result for Helicobacter pylori (H. pylori), which is a bacterium that infects the stomach. H. pylori causes gastritis, ulcers, and possibly even gastric cancer in some people. Other people infected with H. pylori may never have these symptoms or problems.

9. On December 6, 2005, Dr. Schroeder prescribed a 14-day regimen of antibiotics to treat Patient A.R.'s gastritis and H. pylori infection. Specifically, Dr. Schroeder prescribed Tetracycline, Flagyl, and Nexium (a proton pump inhibitor).

10. Patient A.R. took the medicine as prescribed for two days. She then called Dr. Schroeder's office, requesting an alternative treatment plan due to severe nausea and sleeplessness.

11. Before providing Patient A.R. with an alternative treatment plan, Dr. Schroeder consulted with Dr. Anastasio. Dr. Schroeder explained that Patient A.R. was allergic to Amoxil and that she had not been able to tolerate the regimen of Tetracycline and Flagyl. After this consultation, Dr. Schroeder prescribed a 7-day regimen of the following: (a) the antibiotic Biaxin to substitute for the Tetracylcine; (b) Tigan to help with Patient A.R.'s nausea; and (c) Xanax to relieve Patient A.R.'s anxiety.

12. On December 13, 2005, Patient A.R. had a follow-up office visit with Dr. Schroeder. Dr. Schroeder understood that Patient A.R. was doing better overall on the Biaxin-based treatment regimen.

13. On December 21, 2005, Patient A.R. reported to Dr. Schroeder that she had almost finished her antibiotics but was still not feeling well. Patient A.R. also reported that she might have oral thrush and needed a prescription to treat it.

14. On December 27, 2005, Dr. Schroeder prescribed Nexium for Patient A.R. Despite missing some days of work, Patient A.R. completed the treatment therapy consisting of Biaxin, Flagyl, and Nexium.

15. On January 3, 2006, Patient A.R. had another follow-up office visit with Dr. Schroeder. Dr. Schroeder's records indicate that Patient A.R. was doing well and that her gastritis had resolved. Dr. Schroeder prescribed continued use of Nexium.

16. On or about January 23, 2006, Patient A.R. called Dr. Schroeder's office to report problems with persistent nausea and to request a referral for a "scope of her stomach." She made the request based on prior discussions with Dr. Schroeder as to the next option if the Biaxin-based treatment regimen was not successful. Dr. Schroeder referred Patient A.R. to Respondent for a possible esophagogastroduodenoscopy (EGD or upper endoscopy).

17. On February 13, 2006, Patient A.R. presented to Respondent with complaints of epigastric and abdominal pain and nausea. Respondent's record of the visit indicates that Patient A.R. had a history of H. pylori infection in a post-treatment status. The record also indicates that Patient A.R. was allergic to Amoxil.

18. On February 22, 2006, Respondent performed an EGD on Patient A.R. After the procedure, Respondent diagnosed Patient A.R. with moderate to severe gastritis. A pathology report dated February 23, 2006, confirmed that Patient A.R. was suffering from a H. pylori stomach infection.

19. On February 28, 2006, Patient A.R. had an office visit with Respondent to discuss the pathology results. During this visit, Respondent inquired about Patient A.R.'s reported and documented allergy to Amoxil. Patient A.R. told Respondent that when she was 15 years old and suffering from mononucleosis, her family physician prescribed Amoxil for her.

20. Patient A.R. took Amoxil for about a week with no indication of a reaction or sensitivity. When she began the second bottle of the antibiotic, Patient A.R. developed a head-to-toe rash and swelling. The delayed onset rash did not present an anaphylactic or life-threatening reaction. The symptoms resolved after cessation of the drug with no need for further medical intervention.

21. There is a known interaction between ingestion of amoxicillin and mononucleosis. The reaction manifests itself in a delayed development of a rash occurring on the patient's trunk and extremities. Children who take amoxicillin while infected with mononucleosis experience this symptomatic interaction in a great percentage, almost 100 percent, of cases.

22. Respondent discussed Patient A.R.'s previous history of allergy to Amoxil with Dr. Schroeder. Respondent's record states as follows:

> . . . She has an allergy to penicillin and failed other non-penicillin based drug regimens for H. pylori treatment, specifically, [T]etracycline/Flagyl and Biaxin/Flagyl both prescribed by Dr. Mark Schroeder. . . .
>
> * * *
>
> I immediately discussed this case with Dr. Schroeder. Ms. [R.] and her husband should both be treated with antibiotics for Heliocobacter pylori infection concurrently. After careful review of her previous history with Dr. Schroeder, there is a possibility that she is not allergic to amoxicillin, as she developed a rash while she had a mononucleosis infection, which is a common side effect. Dr. Schroeder recommended a trial of amoxicillin/Biaxin as she has exhausted all other H. pylori treatments that are not penicillin based. She will take her amoxicillin judiciously, and if she does develop any side effects will stop it immediately and report this to either myself or Dr. Schroeder. Otherwise, she will follow up with me in six months for consideration for repeat upper endoscopy.

23. Based on the determination that Patient A.R. possibly was not allergic to Amoxil, Respondent prescribed her a 14-day treatment regimen of Amoxicillin and Clarithromycin (Biaxin), along with Nexium. As Patient A.R. left Respondent's office, Respondent told Patient A.R. to take the treatment, assuring her that she absolutely was not truly allergic to Amoxcil.

24. Patient A.R. did not begin taking the Amoxil treatment regimen until March 25, 2006. She delayed starting the treatment because she knew the treatment would be "rough." She was concerned that she would miss work and be unable to enjoy a visit from out-of-town family. Patient A.R. began the treatment on a Saturday to give her body "a couple of days to adjust to the medication."

25. Within three hours of taking the Amoxil, Patient A.F. experienced a tingling and stinging sensation in her left middle finger. Because she had been working in the yard, Patient A.R. believed that a bee might have stung her. She did not suspect an allergic reaction because she had not had a localized reaction to Amoxil when she was fifteen years old.

26. On Sunday, March 26, 2006, Patient A.R. continued to take the Amoxil. Her finger continued to tingle, so she soaked it in a saltwater solution.

27. On Monday, March 27, 2006, Patient A.R.'s finger looked terrible; it was red and purple in color and swollen to

twice its normal size. As previously instructed by Respondent, Patient A.R. called his office and spoke with a nurse. The nurse suggested that Patient A.R. call an immediate care facility because Respondent was in the operating room that morning and had a “room full of patients” to see in the afternoon.

28. On March 27, 2006, Patient A.R. ultimately saw a physician or a physician assistant at Gulf Coast Immediate Care. She was diagnosed with cellulites in the finger and prescribed a cream to put on it twice a day. Patient A.R. was advised to continue taking the Amoxil.

29. On March 28, 2006, Patient A.R.’s finger continued to get worse, turning “purplish black” in color. Patient A.R. continued to take the Amoxil-based treatment regimen because she did not have a head-to-toe rash or swelling like she did when she took the drug as a teenager.

30. On Wednesday, March 29, 2006, Patient A.R. woke up with a head-to-toe rash, swelling, and tightness in her chest. Realizing that she was suffering from an allergic reaction to the Amoxil, Patient A.R. went to the emergency room of the Fort Walton Beach Medical Center around 7:00 a.m.

31. The emergency room physician noted his clinical impression of Patient A.R. to be an acute allergic reaction and

cellulites in her third left finger. He immediately treated her intravenously with Benadryl, Pepcid, and Solumedrol.

32. After the trip to the emergency room, Patient A.R. stopped taking the Amoxil. Patient A.R.'s rash and the problem with her finger subsequently resolved.

33. On or about March 31, 2006, Patient A.R. saw Leo Chen, M.D., an orthopaedic surgeon. Dr. Chen examined Patient A.R.'s finger on a referral from Respondent.

34. On or about April 3, 2006, Patient A.R. presented to Respondent for the last time. Regarding that visit, Respondent's notes state as follows:

> Again I discussed this case with Dr. Schroeder while the patient was in my office, and a phone consultation was obtained with Dr. Patrick Anastasio of Infectious Disease. The patient did have an allergic reaction to amoxicillin, and this has now been confirmed. She developed an allergic reaction to amoxicillin approximately twenty years ago while she had mononucleosis, and this was thought to be a side effect due to the combination of mononucleosis and amoxicillin, however this apparently is not the case. She did seek appropriate treatment at the emergency room and was placed on appropriate drug therapy, and seems to be resolving quite well at this time. The patient will be sent for an infectious disease consultation with Dr. Patrick Anastasio, who will take on treating the patient's Helicobacter pylori infection, which will need to be some form of unconventional treatment or desensitization to penicillin. . . .

35. On or about May 4, 2006, Patient A.R. presented to Dr. Anastasio at Emerald Coast Infectious Diseases. Dr. Anastasio prescribed "quadruple therapy" including the antibiotics Biaxin and Flagyl for 14 days, along with Nexium and Bismuth Subsalicylate, commonly known as Pepto Bismol.

36. Patient A.R. completed the treatment prescribed by Dr. Anastasio. An August 2006 stool sample confirmed that the treatment had eradicated the H. pylori stomach infection.

37. Subjecting Patient A.R. to Amoxil in 2006 was a challenge to her reported allergy. Her allergic reaction was more serious than when she was a teenager because it involved a localized reaction in her finger. This time the challenge to the allergy did not lead to anaphylaxis and death.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005).

39. Sections 456.072(2) and 458.331(2), Florida Statutes (2005), authorizes Petitioner to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice in Florida if a physician commits one or more acts specified therein.

40. Petitioner has the burden of proving, by clear and convincing evidence, that Respondent violated Sections 458.331(1)(m) and 458.331(1)(t), Florida Statutes (2005), as alleged in the Amended Administrative Complaint. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996).

41. Count I of the Amended Administrative Complaint alleged that Respondent violated Section 458.331(1)(t), Florida Statutes (2005), which states as follows:

> (t) Notwithstanding Section 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 provision 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 a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. 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 must so specify.

42. Medical malpractice is defined in Section 456.50(1)(g), Florida Statutes (2005), which states as follows in pertinent part:

> (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. . . .

43. The "level of care, skill and treatment recognized in general law related to health care licensure" means the standard of care specified in Section 766.102(1), Florida Statutes (2005), which states as follows in relevant part:

> (1) . . . The 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.

44. As alleged in Count I of the Amended Administrative Complaint, Respondent violated the standard of care in one or more of the following ways: (a) by prescribing Amoxil to Patient A.R. despite being aware of her allergy to the drug; (b) by failing to refer Patient A.R. to another specialist in gastroenterology and infectious disease due to the complexity of her problem; and (c) by failing to treat Patient A.R. with antibiotics other than Amoxil.

45. Clear and convincing evidence indicates that Respondent prescribed Amoxil to Patient A.R. in a non-emergent situation. He did so with knowledge of Patient A.R.'s self-reported allergy when at least one other reasonable treatment regimen was available that did not involve the use of Amoxil.

46. Respondent did not consult with or refer Patient A.R. to an infectious disease specialist like Dr. Anastasio before erroneously deciding that there were no other Amoxil-free treatment regimens available and that Patient A.R. was not truly allergic to Amoxil. Instead, he was willing to take an unnecessary chance, challenging Patient A.R.'s allergy and causing her to suffer the pain associated with an allergic reaction. There is no persuasive evidence to the contrary. Based upon these findings, it is concluded that Respondent committed medical malpractice in violation of Section 458.331(1)(t), Florida Statutes (2005).

47. In Count Two of the Amended Administrative Complaint, Petitioner alleges that Respondent violated Section 458.331(1)(m), Florida Statutes (2005), which defines the following 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.

48. In this case, Respondent's record keeping was legible, describing in detail his flawed reasoning. However, because Respondent's treatment of Patient A.R. was erroneous, it cannot be justified. It follows that Respondent could not document a sufficient legal reason for prescribing Amoxil to Patient A.R.

49. Respondent clearly violated Section 458.331(1)(m), Florida Statutes (2005), by failing to document a justification for his action. Even so, the offense depends entirely and is subsumed by Respondent's violation of the standard-of-care in Count One. The offense does not serve to enhance a penalty for the underlying substantive standard-of-care violation.

50. Florida Administrative Code Rule 64B8-8.001 provides a range of penalties for certain violations. For Sections 458.331(1)(m) and 458.331(1)(t), Florida Statutes (2005), the respective range of penalties is as follows:

> (m) From a reprimand to denial or two (2) years suspension followed by probation, and an administrative fine from $1,000.00 to $10,000.00.

* * *

> (t) From one (1) year probation to revocation or denial and an administrative fine from $1,000.00 to $10,000.

See Fla. Admin. Code R. 64B8-8.001(2).

51. Pursuant to Florida Administrative Code Rule 64B8-8.001(3), Respondent may deviate from the guideline penalties as follows:

> (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 injuring 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.

52. This is a two-count case. Respondent has no prior disciplinary history, but in this instance, he was willing to unnecessarily put Patient A.R.'s health at risk.

RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order finding that Respondent violated the statutes as charged, issuing a letter of concern, imposing a $10,000 fine, and requiring five hours of continuing medical education.

DONE AND ENTERED this 5th day of July, 2007, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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this 5th day of July, 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.