STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF VETERINARY MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 07-2415PL
PHILIP JEROME ALEONG, D.V.M.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on September 25, 2007, by video teleconference with sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Drew F. Winters, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Bradford J. Beilly, Esquire
Bradford J. Beilly, P.A.
1144 Southeast Third Avenue
Fort Lauderdale, Florida 33316

STATEMENT OF THE ISSUE

The issue presented is whether Respondent is guilty of the allegations contained in the Administrative Complaint filed against him, and, if so, what disciplinary action should be taken against him, if any.

PRELIMINARY STATEMENT

On September 14, 2006, Petitioner Department of Business and Professional Regulation, Board of Veterinary Medicine, filed an Administrative Complaint against Respondent Philip J. Aleong, D.V.M., alleging that he had violated two statutes regulating his conduct as a veterinarian in the State of Florida. Respondent timely requested an administrative hearing regarding the allegations in that Administrative Complaint, and this cause was transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

Petitioner presented the testimony of John A. Damico and Faith E. Hughes, D.V.M. The Respondent testified on his own behalf. Additionally, Petitioner's Exhibits numbered 1-4 and 6 and Respondent's Exhibits numbered 1 and 2 were admitted in evidence.

The Transcript of the final hearing was filed on November 9, 2007. Both parties requested 20 days from the filing of the transcript by which to file their proposed recommended orders. Petitioner, however, filed its proposed

recommended order on December 10, 2007. On December 11, Respondent filed a Motion for Extension of Time to File Proposed Final [sic] Order, which Motion was granted. Respondent filed his proposed recommended order on December 21, 2007. Both proposed recommended orders have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent Philip J. Aleong has been licensed as a veterinarian in the State of Florida, having been issued license number VM 6466.

2. Respondent has performed an average of 200 pre-purchase examinations of horses per year for the last ten years.

3. In April 2003, John A. Damico, through his trainer Buddy Edwards, requested Respondent to perform a pre-purchase examination of a 2-year-old thoroughbred race horse identified with OBS Hip #512 at the Ocala Breeders Sale. Respondent did so.

4. After the pre-purchase examination was performed, Damico purchased the race horse identified as OBS Hip #512 and named the horse "C. Brooke Run."

5. The pre-purchase examination performed by Respondent consisted of an endoscopic evaluation, an evaluation of the horse jogging, and an examination of radiographs taken by Respondent of C. Brooke Run.

6. As a horse in a pre-purchase examination has a limited veterinarian/patient relationship, limited records are kept by the examining veterinarian. For the purpose of a pre-purchase examination, sufficient medical records could consist of the horse's Hip number, the sale date of the horse, and a few words regarding the endoscopic examination of the horse, the short jogging of the horse, and the results of the radiographs taken of the horse. It is sufficient, therefore, if appropriate that the medical records simply note that the endoscopic examination and the jogging were normal and the radiographs showed no abnormalities.

7. The average time spent reviewing radiographs taken at a pre-purchase examination is less than 30 seconds per film.

8. During his pre-purchase examination of C. Brooke Run, Respondent took the necessary number of radiographs to perform a proper examination, including four radiographs of C. Brooke Run's left knee. During his pre-purchase examination of C. Brooke Run, Respondent contemporaneously created a medical record by noting in a notebook the results of the pre-purchase examination.

9. After examining the radiographs taken, observing the horse jog, and performing an endoscopic examination of C. Brooke Run, Respondent determined that the horse had no medical problems or injuries.

10. Between April 2003, when the pre-purchase examination was performed, and September 10, 2003, Damico, the horse's owner, raced the horse on July 20, August 22, and August 29. In addition to racing the horse three times, the horse's trainer worked out the horse at least six times. The trainer would not have worked out the horse or allowed it to race if he believed the horse had an injury.

11. On September 10, 2003, C. Brooke Run suffered a "breakdown" that was determined to be caused by fractures in the horse's left knee. After the breakdown, Damico alleged that Respondent should have detected the fractures in the horse's left knee five months earlier during the pre-purchase examination performed by Respondent and that, since Respondent did not, Damico was damaged.

12. Without admitting any liability or negligence in performing the April 2003 pre-purchase examination of C. Brooke Run, Respondent, through his insurance carrier, paid Damico in full for all alleged damages incurred by Damico as a result of C. Brooke Run "breaking down."

13. Petitioner's expert witness opined that any injury sustained by C. Brooke Run may very well have been sustained after the pre-purchase examination performed by Respondent and that the radiographs taken of C. Brooke Run might or might not have revealed any medical problems or injuries.

14. Respondent cannot locate his notebook where he created his medical record on C. Brooke Run at the time of the pre-purchase examination. Further, by February 10, 2005, he was only able to produce an invoice for services rendered for the radiographs of the horse's knees, hocks, and front ankles, and for the endoscopic examination he performed.

15. After the horse broke down, Damico requested that Respondent provide him with the radiographs Respondent took on C. Brooke Run. Respondent's secretary pulled out from the files the original radiographs and sent them to Damico, who wrote on the envelope that he received 22 radiographs. After showing those original radiographs to his local veterinarian, Damico forwarded them to the University of Florida. After the envelope was returned to Damico from there, he then sent those originals to Respondent's insurance company, assumedly as part of his claim. No evidence was presented as to where the radiographs traveled from there.

16. By the time of the final hearing in this cause, the envelope still contained 22 radiographs. However, two of them were for a different horse than C. Brooke Run, and one of them was too dark to read.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

18. The Department seeks to take disciplinary action against Respondent in this proceeding. The burden of proof, therefore, is on the Department, and the Department must prove the allegations in its Administrative Complaint by clear and convincing evidence. Dept. of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

19. The Administrative Complaint filed in this cause contains two counts. Count One charges Respondent with violating Section 474.214(1)(r), Florida Statutes, by failing to practice medicine with that level of care, skill, and treatment recognized by a reasonably prudent veterinarian as being acceptable under similar conditions and circumstances. The Department alleges that Respondent fell below the standard of care in that he failed to take the required number of radiographs of C. Brooke Run.

20. Respondent and the Department's witness agree that the minimum number of radiographs for a pre-purchase evaluation of a horse's health, fitness, or soundness is 22: 4 for each knee, 4 for each fetlock, and 3 for each hock. The Respondent, who is a

credible witness, testified that he always takes that number of radiographs in his pre-purchase examinations and that he did so in this instance. On the other hand, the Department's only evidence that Respondent did not take 22 radiographs of C. Brooke Run is that although the envelope contains 22 radiographs, two are for a different horse, and one is not readable. The Department concludes, therefore, that Respondent took fewer than 22 radiographs of C. Brooke Run and, therefore, did not perform a complete examination.

21. That interpretation of the envelope's contents is only one of a number of possible interpretations. Because the envelope passed through the hands of an unknown number of people, including the owner of the horse who was making a claim against Respondent's insurance carrier for damages, a university, and an insurance company before reaching the Department in some undisclosed fashion, the Department has failed to present clear and convincing evidence that Respondent deviated from his routine and failed to take a sufficient number of radiographs. The Department has, therefore, failed to prove the allegations in Count One of the Administrative Complaint.

22. Count Two alleges that Respondent violated Section 474.214(1)(ee) by failing to keep contemporaneously-written medical records as required by rule of the Board of Veterinary Medicine. Florida Administrative Code Rule 61G18-18.002 governs

the maintenance of medical records. Subsection (1) of that Rule requires that an individual medical record on every patient examined be retained for not less than three years after the date of the last entry. Subsections (3) and (4) of that Rule specify the contents of medical records, and Subsection (4) requires that radiographs be maintained as part of the medical record.

23. The Department has proven by clear and convincing evidence that Respondent failed to maintain a medical record on C. Brooke Run for a period of not less than three years. Respondent cannot locate his written medical record of his examination, and the original radiographs Respondent took of C. Brooke Run were sent by his office to the horse's owner. Respondent has violated Florida Administrative Code Rule 61G18-18.002(1) and (4) and has, therefore, violated Section 474.214(1)(ee), Florida Statutes.

24. The Department did not, however, prove that Respondent violated Florida Administrative Code Rule 61G18-18.002(3), which specifies what information should be contained in the medical record. Since there is no medical record in existence at this time, it cannot be ascertained what was or was not in it.

25. In its Administrative Complaint, during its presentation at hearing, and in Petitioner's Proposed Recommended Order the Department overlaps its factual

allegations and statutory and rule citations. For example, the Department argues that the medical record was incomplete since it did not contain certain information, Subsections (3) and (4) of the Rule, and that the medical record does not exist, Subsection (4) of the Rule. Similarly, the Department argues that Respondent violated the standard of care statutory requirement, Section 474.214(1)(r), by violating the record-keeping statutory requirement, Section 474.214(1)(ee). Such overlapping of statutory or rule prohibitions is not permissible. Barr v. Dept. of Health, 32 Fla. L. Weekly 923 (1st DCA 2007). Thus, Respondent's record-keeping violation is not a standard of care violation, and Respondent's lack of a medical record of his evaluation of C. Brooke Run is not an incomplete-record violation.

26. Section 474.214(2), Florida Statutes, establishes the types of penalties the Board may assess upon a finding that a veterinarian has violated any of the prohibitions found in Subsection (1). In Petitioner's Proposed Recommended Order the Department suggests that an appropriate penalty in this case is a fine in the amount of $1,500, investigative costs in the amount of $917.49, probation for 18 months, and a 30-day suspension of Respondent's license. The Department fails to identify which penalty applies to which Count in its Administrative Complaint, but merely assumes that it was

successful in proving everything alleged. The Department also fails to cite or rely on the Board's Disciplinary Guideline found in Florida Administrative Code Rule 61G18-30.001. Lastly, although the Department provides for the first time a figure alleged to represent investigative costs, no evidence regarding any investigative costs, or the amount thereof, was offered during the evidentiary hearing. Therefore, none will be awarded in this proceeding.

27. Florida Administrative Code Rule 61G18-30.001(2)(ee) provides that a failure to keep contemporaneously-written medical records as required by rule of the Board carries a usual penalty of a reprimand, plus 6-months probation, a fine of $1,500, and investigative costs. Further, Subsection (4) of that Rule sets forth the aggravating and mitigating factors that must be considered in assessing a penalty.

28. The Department did introduce in evidence three prior Final Orders in disciplinary actions against Respondent. One involved the administration of a certain drug to a certain horse and resulted in a stipulated settlement. One involved failing to report to the Board action taken by the Stewards at Gulfstream Park and resulted in a stipulated settlement. The third involved failing to timely remit payment pursuant to a Final Order, was tried before the Division of Administrative Hearings, and resulted in a $2,000 administrative fine. All

three involve violations different from the single violation proven in this case.

29. On the other hand, Respondent's Proposed Recommended Order argues the specific mitigating factors applicable to this case which the Board must consider in imposing disciplinary action in this proceeding. First, Respondent's failure to maintain for three years his medical record of C. Brooke Run's pre-purchase examination did not pose a danger to the public. Second, no actual damage was sustained by the horse's owner who collected all of his damages from Respondent's insurance company although there is no evidence that the horse's knee was injured before the pre-purchase examination rather than after the examination. Third, there has been no pecuniary gain to the Respondent from failing to maintain C. Brooke Run's medical record.

30. The several mitigating factors present in this case, considered together with the Board's own disciplinary guidelines, suggest that the appropriate discipline in this case should be issuance of a reprimand and a fine of $1,000.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding Respondent not guilty of the allegations in Count One, guilty of

the allegations in Count Two of the Administrative Complaint, issuing a reprimand, and imposing an administrative fine of $1,000 to be paid by a date certain.

DONE AND ENTERED this 23rd day of January, 2008, in Tallahassee, Leon County, Florida.

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LINDA M. RIGOT
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of January, 2008.

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.