

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN W. THOMPSON, M.D.,)
)
 Petitioner,)
)
vs.) Case No. 08-0680F
)
DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
 Respondent.)

)

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on April 23, 2008, by video teleconference in Fort Myers and Tallahassee, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bruce McLaren Stanley, Esquire
Henderson, Franklin, Starnes
& Holt, P.A.
Post Office Box 280
Fort Myers, Florida 33901

For Respondent: Matthew Casey, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is entitled to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes (2007).¹

PRELIMINARY STATEMENT

On November 2, 2006, the Department of Health (Department) filed an Administrative Complaint against Petitioner, Stephen W. Thompson, M.D. (Dr. Thompson), alleging a violation of Subsection 458.331(1)(t), Florida Statutes (2003). Dr. Thompson requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings. On July 13, 2007, the Administrative Complaint was amended to include a count alleging a violation of Subsection 438.331(1)(m), Florida Statutes (2003).

The final hearing was held on July 27, 2007, and the Recommended Order was entered on October 31, 2007, recommending that the Amended Administrative Complaint be dismissed. The Board of Medicine entered a Final Order on December 18, 2007, adopting the findings of fact and conclusions of law of the Recommended Order and dismissing the Amended Administrative Complaint.

On February 8, 2008, Dr. Thompson filed Petitioner's Application for Attorney's Fees under F.S. §56.111. On

February 28, 2008, Respondent filed Respondent's Response to the Petitioner's Application for Attorney's Fees under F.S. §57.111.

The parties filed a Joint Pre-hearing Stipulation, stipulating to certain facts contained in Section E of the pre-hearing stipulation. Those facts have been included in this Final Order to the extent relevant.

At the final hearing, Dr. Thompson offered Petitioner's Exhibits 1 through 24, which were admitted in evidence. Dr. Thompson was given leave to file as late-filed exhibits the requests for admissions and responses in the underlying case. Dr. Thompson filed Petitioner's Response to Respondent's Request for Admissions on April 22, 2008, but did not file the admissions. The response to the request for admissions is admitted as Petitioner's Exhibit 26. Respondent's Composite Exhibit 1 was admitted in evidence. The parties did not present witness testimony. Counsel for the parties made oral arguments at the final hearing.

The Transcript of the final hearing was filed on May 9, 2007. Dr. Thompson filed his proposed final order on May 16, 2008, and Respondent filed its proposed final order on May 19, 2008. The proposed final orders have been considered in the preparation of this Final Order.

On May 23, 2008, counsel for Dr. Thompson filed a letter rebutting certain portions of Respondent's proposed final order.

On May 30, 2008, Respondent filed Respondent's Motion to Strike Petitioner's Counsel's Letter to the Administrative Law Judge. On June 2, 2008, Dr. Thompson filed Petitioner's Opposition to Respondent's Motion to Strike Petitioner's Counsel's Letter to Administrative Law Judge. Respondent's Motion to Strike is GRANTED.

FINDINGS OF FACT

1. On November 2, 2006, the Department filed with the Board of Medicine a one-count Administrative Complaint against Dr. Thompson, alleging that Dr. Thompson violated Subsection 458.331(1)(t), Florida Statutes (2003).

2. The Administrative Complaint was based on a probable cause finding by the Probable Cause Panel of the Board of Medicine (Panel) on October 27, 2006. The Panel included two physicians.

3. Prior to the meeting of the Panel on October 27, 2006, the members of the Panel received the following materials on the cases to be considered: "the complete case files, including any patient medical records, expert opinions, if any, any materials supplied by the licensee or their counsel" and a draft of the Administrative Complaint. The file on Dr. Thompson included the investigator's file; the expert opinions of Thomas F. Blake, M.D., F.A.C.S.; Dr. Blake's curriculum vitae; medical records for the treatment of T.C.; and letters from Bruce M.

Stanley, Sr., counsel for Dr. Thompson, along with a draft of the Administrative Complaint.

4. At the Panel meeting, the members indicated that they had received the materials with sufficient time to review and familiarize themselves with the materials. The Panel members did not find any problems with the materials such as missing pages or illegible copies. Additionally, the panel members indicated that they had no conflict of interest or prior knowledge of the cases before them that would make it inappropriate to deliberate and vote on the issues.

5. In the case of Dr. Thompson, the Panel was supplied with expert opinions from Dr. Blake. Dr. Blake was a diplomat certified by the American Board of Obstetrics and Gynecology, a fellow of the American College of Surgeons, and a fellow of the American College of Obstetricians and Gynecologists. By letter dated December 20, 2004, Dr. Blake rendered the following opinion concerning the care provided by Dr. Thompson:

Thompson, M.D. fell below the standard of care by abandoning a patient under general anesthesia and leaving the facility to attend to another patient. However, there were no complications or injury to either patient.

The potential problem would be that he would unexpectedly be confronted with complications in the delivery. This could detain him for a prolonged period of time and place the patient under anesthesia in jeopardy of having to have the anesthesia

discontinued and subjecting her to further risks.

6. By letter dated December 29, 2004, the Department requested clarification on the issue of whether there were any identifiable deficiencies or problems with the medical records that were maintained by Dr. Thompson. Dr. Blake sent an addendum to his report dated January 11, 2005, in which he gave the following opinion:

Medical records utilized in the treatment of the patient are complete and justify the treatment. There are no identifiable deficiencies or problems with the medical records maintained by the subject.

7. At the Panel meeting, an attorney for the Department summarized the case against Dr. Thompson as follows:

Patient T.C. presented to the surgery center for several gynecological procedures. While T.C. was under general anesthesia, the Respondent physically left the surgery center to attend to another patient in another building. Respondent delivered a baby of that other patient. T.C. was left under the care of a certified registered nurse anesthetist. After returning from delivering the child, Respondent finished the gynecological procedure.

The Department is charging a violation of Section 458.331(1)(t), for violation of the applicable standards of care by leaving T.C. for several minutes in the middle of surgery and in between procedures while she was under a general anesthesia, by failing to notify the patient that Respondent had left and by failing to note in the medical record that Respondent had left the building.

8. The Panel members discussed the case against Dr. Thompson during the meeting and voted on the case, finding there was probable cause to believe a violation had occurred. The findings of the Panel resulted in the issuance of the Administrative Complaint. The case was received by the Division of Administrative Hearings on February 8, 2007, for assignment to an Administrative Law Judge to conduct the final hearing.

9. The Department retained another expert, Jose H. Cortes, M.D., F.A.C.O.G, to provide an opinion concerning Dr. Thompson's actions relating to the treatment of T.C. By letter dated February 27, 2007, Dr. Cortes opined that Dr. Thompson fell below the standard-of-care while attending T.C. by leaving the operating room and going to another building to attend to another patient. Dr. Cortes was also of the opinion that Dr. Thompson did not adequately maintain the medical records for T.C. by the following actions:

The departure from the normal course of surgery such as leaving the operating room was not documented by the attending physician, the outpatient establishment nursing staff, nor the anesthesia attending or nurse anesthetist. A signed consent form not available.

* * *

As the record documents the evaluation of 07/18/03 and 08/05/03 by the Physician Assistant describes the patient's complaint and ultrasound study review respectively. The blood count presented from 07/18/03

shows a Hemoglobin of 13.6 gms and Hematocrit of 40.1 percent with normal indices, a pelvic ultrasound which documented fibroids of less than 2.1 cm in size each. With the above findings a conservative management strategy is usually employed initially and the patient is followed prior to recommending any surgical procedure unless declined by the patient. However, all of this has to be documented as recommended by the literature and agencies which review patient care and guidelines such as KePRO.

10. On July 10, 2007, the Department filed a motion to amend the Administrative Complaint, which motion was granted by Order dated July 13, 2007. The Amended Administrative Complaint added a count alleging a violation of Subsection 458.331(1)(m), Florida Statutes (2003), alleging that Dr. Thompson:

[F]ailed to keep legible medical records justifying the course of treatment by failing to document in T.C.'s medical records that he left the building during the procedures he performed on T.C. on or about September 11, 2003, and/or by failing to document any discussion with T.C. about alternative treatment options such as discontinuing oral contraceptives, a formal dilation and curettage, and/or the use of a Mirena IUD to address T.C.'s problems or concerns.

11. The final hearing was held on July 27, 2007. A Recommended Order was entered on October 31, 2007, recommending that a final order be entered finding that Dr. Thompson did not violate Subsections 458.331(1)(m) and 458.331(1)(t), Florida

Statutes (2003), and dismissing the Amended Administrative Complaint.

12. A Final Order was entered on December 18, 2007, adopting the findings of fact and conclusions of law of the Recommended Order and dismissing the Amended Administrative Complaint against Dr. Thompson.

13. The parties have stipulated to the reasonableness of the fees and costs claimed by Dr. Thompson. Dr. Thompson has incurred \$34,851.00 in attorney's fees and costs.

14. The parties have stipulated that Dr. Thompson is a prevailing small business party and that Respondent is not a nominal party to this action.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 57.111, Fla. Stat.

16. Subsection 57.111(4)(a), Florida Statutes, provides:

Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

17. The parties have stipulated that Dr. Thompson is a prevailing small business party in the administrative proceeding

which was initiated against Dr. Thompson by Respondent. The only issue is whether the Administrative Complaint and Amended Administrative Complaint filed against Dr. Thompson were substantially justified.

18. Subsection 57.111(3)(e), Florida Statutes, provides: "A proceeding is 'substantially justified' if it had a reasonable basis in law and fact at the time that it was initiated by a state agency." Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

19. In Department of Health and Rehabilitative Services v. S.G., 613 So. 2d 1380 (Fla. 1st DCA 1993), the court discussed the meaning of "substantially justified" and stated that the term had similar meaning to the term "substantial justification" in the Federal Equal Access to Justice Act, which the court in McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir 1983), described as meaning that "the government must have a solid though not necessarily correct basis in law and fact for the position it took." In Fish v. Department of Health, Board of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA 2002), the court also discussed the meaning of "substantially justified" as that term is used in Subsection 57.0111, Florida Statutes. The court, citing Kibler v. Department of Professional Regulation, 418 So. 2d 1081, 1084 (Fla. 1982), noted:

Generally, in resolving whether there was a substantial justification for filing an administrative complaint against a licensee, one need only examine the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint. . . . To sustain a probable cause determination there must be some evidence considered by the panel that would reasonably indicate that the violation had indeed occurred.

20. In reviewing the case of Dr. Thompson, the Panel had before it the investigative file, the medical records of T.C., the expert opinions of Dr. Blake, and letters from counsel for Dr. Thompson stating Dr. Thompson's position. Dr. Blake had opined that Dr. Thompson's departure from the operating room to attend to another patient fell below the standard-of-care required of him. Thus, the Panel had sufficient information before it to conclude that there was probable cause to believe that Dr. Thompson had violated Subsection 458.331(1)(t), Florida Statutes (2003).

21. In February 2007, the Department received another expert opinion from Dr. Cortes on Dr. Thompson's actions. Dr. Cortes opined that Dr. Thompson had failed to keep medical records that justified the course of treatment of T.C., which is a violation of Subsection 458.331(1)(m), Florida Statutes (2003). In July 2007, the Department sought leave to amend the Administrative Complaint to include Count II, alleging a violation of Subsection 458.331(1)(m), Florida Statutes (2003).

The Department's motion was granted, and the Amended Administrative Complaint was filed. There was information based on the expert opinion of Dr. Cortes to substantially justify the addition of Count II.

22. There was a difference in the opinions of Dr. Blake and Dr. Cortes on the issue of the adequacy of the medical records. However, as the court noted in Department of Health, Board of Medicine v. Thompson, 890 So. 2d 400, 401 (Fla. 1st DCA 2004), the Department is "free to believe the opinion of one expert despite the existence of two expert opinions to the contrary because a decision to prosecute that turns on a credibility assessment has a reasonable basis in fact and law." Thus, the Department could rely on Dr. Cortes' opinion in making a determination to add a count relating to the violation of Subsection 458.331(1)(m), Florida Statutes (2003).

23. Dr. Thompson is not entitled to an award of attorney's fees and costs because the actions taken by the Panel and the Department to file and amend the Administrative Complaint were substantially justified.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the application for attorney's fees and costs is DISMISSED.

DONE AND ORDERED this 13th day of June, 2008, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of June, 2008.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2007 codification.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.