

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
BOARD OF MEDICINE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 10-7289PL  
 )  
ROBERT BURNS, M.D., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On November 10, 2010, a duly-noticed hearing was held in Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Diane K. Kiesling, Esquire  
Kristen Krueger Griswold, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

For Respondent: Robert Burn, M.D., pro se  
3052 Bidhurst Court  
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated sections 458.331(1)(m) and 458.331(1)(bb), Florida Statutes (2008),<sup>1/</sup> as alleged in the Administrative Complaint and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On April 23, 2010, the Department of Health (Petitioner or the Department) filed a two-count Administrative Complaint against Respondent, alleging that he violated section 458.331(1)(m) and (bb), Florida Statutes. Respondent disputed the allegations in the Administrative Complaint and on August 9, 2010, the case was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

On August 24, 2010, a Notice of Hearing was issued scheduling the case for hearing on November 10, 2010, and the hearing proceeded as scheduled. Petitioner presented the testimony of Linda Dix, R.N., and Petitioner's Exhibits numbered 1 through 6 were admitted into evidence. Respondent testified on his own behalf and Respondent's Exhibit numbered 1 was also admitted into evidence.

The Transcript of the proceedings was filed with the Division on December 1, 2010. Petitioner's Proposed Recommended Order was filed December 10, 2010, and Respondent's Proposed Recommended Order was filed on December 13, 2010. Both submissions have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of medical doctors pursuant to section 20.42 and chapters 456 and 458, Florida Statutes.

2. At all times material to the allegations in the Administrative Complaint, Respondent was a medical doctor licensed in the State of Florida, having been issued license number ME 98868. At the time of alleged incident, Respondent was board certified in anesthesiology. He is now also board certified in pain management.

3. On February 10, 2009, Respondent was working at the Tallahassee Outpatient Surgical Center (TOSC). His duties included performing interventional pain management procedures.

4. Patient C.C. was, at the time of the incident, a 50-year-old male. On February 10, 2009, he was admitted to TOSC for a dorsal medial nerve branch block at the right cervical levels 5/6/7. Respondent was scheduled to perform the procedure.

5. Linda Dix was a nurse at TOSC who was present during C.C.'s procedure. She described the process for admission and preparation for surgery at TOSC, which included each patient receiving a plan, an order for surgery, and an informed consent form.

6. C.C.'s plan, which Respondent signed, indicated that he was to receive a right-side medial nerve branch block at cervical levels 5/6/7.

7. A medial nerve branch block may also be called a dorsal medial branch block. The procedure is a diagnostic block to rule out the level and type of pain the patient is experiencing. In this case, C.C.'s medical records indicate that C.C. had a left-

side medial nerve branch block performed one month prior to this scheduled procedure, and had received relief from pain.

8. When a medial nerve branch block is performed, the patient is placed in the prone position on the procedure table, and prepped with a cleaning solution such as Betadine or chlorhexidene.

9. There is more than one way to perform the procedure itself. However, a c-arm fluoroscope is used to identify the cervical levels. Sometimes, the physician will numb the skin in a subcutaneous needle pathway before inserting the needle that is going to be advanced to the medial branch nerve. The decision to do so, for Respondent, includes consideration of the size of the patient, and how far the final needle will need to be advanced. While the needle for numbing the skin and the needle for the procedure itself are the same size, they may be different lengths depending on how much tissue will be penetrated.

10. The medial branch nerve lies against the lateral, or side, of the vertebral body, and the fluoroscope guides the needle to the vertebral body. Once the needle makes contact with bone, the physician will aspirate to ensure it is not in a blood vessel.

11. In this case, Respondent was aware of the patient plan and the patient was already draped when he entered the procedure room. C.C. had been prepped and the c-arm fluoroscope was positioned consistent with the method used by another surgeon who

had worked at TOSC. Respondent requested that the technician position the fluoroscope in a true lateral position rather than a posterior oblique position.

12. A pause procedure was performed, in which Respondent participated and acknowledged agreement. He used a needle as a marker to show where to inject the numbing medication. However, Respondent placed the needle on the left as opposed to the right side.

13. Respondent began injecting Lidocaine into C.C.'s left side. Before he could finish the injection, Ms. Dix asked him to explain how the medication was going to reach the right-side nerve branches from the location of the injection. Respondent realized at that point that he had injected the Lidocaine into the wrong site for a right-side medial nerve branch block.

14. Respondent immediately stopped injecting the Lidocaine. At that point, .25 ml of Lidocaine had been injected. Lidocaine is a numbing agent.

15. Respondent explained the error to the patient, and then completed the procedure on the correct side.

16. There is no dispute that the correct procedure, and the only procedure intended to be performed, was to be performed on the right side. There is also no dispute that a small amount of Lidocaine was injected into the left side.

17. In the nurse's notes contained in C.C.'s medical records for TOSC, under Intraoperative medication, it is noted that .25 ml of Lidocaine was injected on the left side, and 3 ml of Lidocaine was injected on the right. Also noted are other medications used during the procedure.

18. On the page of the medical records containing the surgical plan (Petitioner's Exhibit 2, page 32) dated February 10, 2009, a list of medications used during the procedure includes .25cc of Lidocaine on the left, and 3cc of Lidocaine on the right, with the notation "local." Respondent signed this page of C.C.'s medical records. In addition, an incident report separate from the medical records was generated.

19. Respondent's procedure notes, which were dictated on February 16, 2009, make no mention of the injection of Lidocaine on the left side. He testified that he did not view the numbing of the left side as part of the procedure itself, but rather part of the preparation of the patient. Specifically, he testified:

Q. And where in here did you document the injection of the lidocaine into the left side?

A. It was not documented in the procedure note. That only reflects the procedure that was performed on the correct side.

Q. And why didn't you document that you injected lidocaine into the incorrect side in this procedure note that you're required to prepare?

A. I have no particular reason for not doing it. We were doing 20-plus procedures a day, and I was just dictating and keeping up with the procedure notes, and I only dictated what was performed on the correct site. The chart had documented the error, and we had done the

appropriate procedures for reporting the medical error, and so I relied on the rest of the chart to the complete the record as a whole.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2010).

21. The Department is seeking to take disciplinary action against Respondent's license as a medical doctor. Because disciplinary proceedings are considered to be penal proceedings, Petitioner has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence.

Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

22. Moreover, disciplinary provisions such as sections 456.072 and 458.331, Florida Statutes, must be strictly construed

in favor of the licensee. Elmariah v. Department of Professional Regulation, 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Department of Professional Regulation, 534 So. 782, 784 (Fla. 1st DCA 1988).

23. Count I of the Administrative Complaint charged Respondent with violating section 456.072(1)(bb), Florida Statutes, which makes it a disciplinary violation for:

(bb) Performing or attempting to perform health care services on the wrong patient, a wrong-site procedure, a wrong procedure, or an unauthorized procedure or a procedure that is medically unnecessary or otherwise unrelated to the patient's diagnosis or medical condition. For the purposes of this paragraph, performing or attempting to perform health care services includes the preparation of the patient.

24. This subsection has been interpreted by the Fourth District Court of Appeal in Abram v. Department of Health, 13 So. 3d 85 (Fla. 4th DCA 2009).<sup>2/</sup> The Fourth District held that section 456.072(1)(bb) is not a violation that presumes a deviation from accepted standards of care:

We agree with the Department that section 456.072(1)(aa)'s plain meaning does not include a presumption that a wrong-site procedure falls below the standard of care. The statute makes no mention of the standard of care, and many of the thirty-plus actions constituting section 456.072(1) violations have nothing to do with a patient's care. Abram has not cited any authority supporting his assumption that the Legislature included a wrong-site procedure as a section 456.072 violation because it presumed a wrong-site procedure falls below the standard of care.

13 So. 3d at 88-89.



25. The court emphasized the discretionary nature of the Board's authority to discipline physicians should the Department present evidence that a wrong-site procedure, or in this case a wrong-patient procedure, occurred. The court stated:

In deciding this case, we would be remiss if we did not express our reservations regarding the origin from which this case has arisen, that is, the Board's interpretation that section 456.072(1)(aa) creates strict liability for performing a wrong-site procedure, and Abram's acknowledgement of that interpretation as the springboard for his due process argument. The statute's language, italicized below, plainly suggests a different interpretation. Subsection (1) states: "The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) *may* be taken: . . ." Subsection (2) states, in pertinent part:

"When the board . . . finds any person guilty of the grounds set forth in subsection (1). . . it *may* enter an order imposing one or more of the following penalties. . . ." . . . If the Board had construed the statute as permissive rather than mandatory, the outcome of this case may have been different. See Ayala v. Dep't of Prof. Regulation, 478 So. 2d 1116, 1117-18 (Fla. 1st DCA 1985) (construing statute as permissive rather than mandatory required Board of Medical Examiners to consider evidence in deciding appellant's guilt or innocence of disciplinary charges).

Id. at 89.

26. Ayala required the Board to consider the circumstances attending a plea of nolo contendere when determining whether a physician was guilty of the underlying criminal charge, in order to decide whether the physician was guilty of a crime related to

the practice of medicine. The Department contends that Respondent must negate the evidence that a wrong-site surgery occurred in order to rebut any presumption arising from section 456.072(1)(bb).

27. Evidence of the circumstances giving rise to a wrong-site surgery is not going to negate whether the wrong-site surgery occurred. However, in light of the Fourth District's reference to Ayala, it seems reasonable that, contrary to the Department's contention, the Respondent may explain the circumstances attending the event giving rise to the charge which may be considered, and his explanation may be used by the Board to determine whether it wishes, in its discretion, to find that a violation of section 456.072(1)(bb) has occurred. The Respondent's explanation may also be used in consideration of penalty should a violation be found.

28. That being said, the ultimate determination that a physician has committed a violation of Section 456.072(1)(bb) is that of the Board of Medicine.

29. In this case, clear and convincing evidence exists to support the allegation that indeed, Respondent injected Lidocaine into the wrong site for C.C.'s procedure. Respondent contends that no wrong-site surgery occurred because the injection of Lidocaine to numb the area is preparatory to and not part of the actual procedure.

30. Respondent's position is not consistent with the language of section 456.072(1)(bb), which specifically indicates that "performing or attempting to perform medial services includes the preparation of the patient." It is also inconsistent with the Board's definition of surgery/procedure contained in Florida Administrative Code Rule 64B8-9.007(2).

This rule provides in pertinent part:

(2) This rule is intended to prevent wrong site, wrong side, wrong patient and wrong surgeries/procedures by requiring the team to pause prior to the initiation of the surgery/procedure to confirm the side, site, patient identity, and surgery/procedure.

(a) Definition of Surgery/Procedure. As used herein, "surgery/procedure" means the incision or curettage of tissue or an organ, insertion of natural or artificial implants, electro-convulsive therapy, endoscopic procedure or other procedure requiring the administration of anesthesia or an anesthetic agent. Minor surgeries/procedures such as excision of skin lesions, moles, warts, cysts, lipomas and repair of lacerations or surgery limited to the skin and subcutaneous tissue performed under topical or local anesthesia not involving drug-induced alteration of consciousness other than minimal pre-operative tranquilization of the patient are exempt from the following requirements.

(b) Except in life-threatening emergencies requiring immediate resuscitative measures, once the patient has been prepared for the elective surgery/procedure and the team has been gathered and immediately prior to the initiation of any procedure, the team will pause and the physician(s) performing the procedure will verbally confirm the patient's identification, the intended procedure and the correct surgical/procedure site. The operating physician shall not make any incision or perform any surgery or procedure

prior to performing this required confirmation. . . .

(c) The provisions of paragraph (b) shall be applicable to anesthesia providers prior to administering anesthesia or anesthetic agents, or performing regional blocks at any time both within or outside a surgery setting. (Emphasis supplied).

31. Respondent is an anesthesiologist. Lidocaine is a numbing agent, used in the preparation of the patient for the intended procedure. Based on the evidence presented, it is recommended that the Board conclude that a violation of section 456.072(1)(bb) has been proven.

32. Count II charges Respondent with violating section 458.331(1)(m), Florida Statutes. Specifically, the Administrative Complaint provides:

20. Section 458.331(1)(m), Florida Statutes (2008), provides that failing to keep legible medical records 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 constitutes grounds for disciplinary action by the Board of Medicine.

21. Respondent failed to keep legible medical records that accurately document his treatment of Patient C.C., by failing to document that Patient C.C. had Lidocaine initially injected into his left side, instead of the indeed right side.

33. The Department contends that a violation of section 458.331(1)(m) exists because Respondent did not mention the injection of Lidocaine on the left side in his procedure note.

Respondent contends that the injection on the left side had been documented previously in the medical records for the procedure, including records that he had signed. Respondent's view is consistent with his good faith but mistaken belief that injection of the Lidocaine would not be considered as part of the procedure undertaken.

34. Nothing in section 458.331(1)(m) or in Florida Administrative Code Rule 64B8-9.003, which describes the standards for adequacy of medical records, requires that all records maintained by a physician be generated by the physician personally. Moreover, records which Respondent signed did indicate the administration of Lidocaine on the left side. While it would have been preferable for Respondent to include mention of the left-side administration of Lidocaine in his procedure note, he is correct in saying that the record as whole adequately documented the drug administered on the left side. Therefore, Count II has not been proven by clear and convincing evidence and should be dismissed.

35. Florida Administrative Code Rule 64B8-8.001 constitutes the Board of Medicine's Disciplinary Guidelines, adopted pursuant to the mandate in section 456.079, Florida Statutes. The recommended penalty for a first-time violation of section 456.072(1)(bb) ranges from a \$1,000 fine, a letter of concern, a minimum of five hours of risk management education and a one-hour lecture on wrong-site surgery, to a \$10,000 fine, a letter of

concern, a minimum of five hours of risk management education, a minimum of 50 hours of community service, a risk management assessment, a one-hour lecture on wrong-site surgery, and suspension to be followed by probation.

36. The Department asserts that the appropriate penalty in this case consists of a letter of concern, a \$5,000 fine, 100 hours of community service, five hours of continuing medical education in risk management, and a one-hour lecture in Florida on performing wrong-site procedures. The Department suggested this penalty as the penalty to be imposed assuming both Counts I and II were proven, and based upon what it considered as an aggravating factor that Respondent did not include the left-side injection of Lidocaine in his procedure note.

37. In view of the conclusion that only one as opposed to two violations were proven, and the fact that the undersigned finds no aggravating factors as recommended by the Department, a lesser penalty is recommended.

#### RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

#### RECOMMENDED:

That the Board of Medicine enter a final order finding that Respondent violated section 456.072(1)(bb), as alleged in Count I of the Administrative Complaint; that it find Respondent did not violate section 458.331(1)(m), as alleged in Count II; and that

as a penalty for Count I Respondent receive a letter of concern, pay a \$2,500 fine, attend five hours of risk management continuing medical education, present a one-hour lecture on wrong-site surgery, and perform 50 hours of community service.

DONE AND ENTERED this 29th day of December, 2010, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of December, 2010.

ENDNOTES

<sup>1/</sup> All references are to the 2008 Florida Statutes, unless otherwise specified.

<sup>2/</sup> The Abrams decision interpreted Section 456.072(1)(aa), Florida Statutes (2004), which, while the text remains the same, has been renumbered as subsection (1)(bb).

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.