STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF CHIROPRACTIC MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 11-5163PL
JOHN P. CHRISTENSEN, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

A final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on December 16, 2011, by video teleconference at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Robert A. Milne, Esquire
Department of Health
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For Respondent: Allan L. Hoffman, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On August 25, 2011, Petitioner, Department of Health, Board of Medicine, filed a five-count Administrative Complaint against Respondent, Dr. John P. Christensen, the gravamen of which was that Respondent prescribed medications in excessive and/or inappropriate doses, violated the standards for the use of controlled substances for pain management, maintained inadequate medical records, and engaged in deceptive practices.

Respondent timely requested a formal hearing to contest the allegations, and, on October 7, 2011, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned to Administrative Law Judge John G. Van Laningham. On December 9, 2011, Judge Van Laningham transferred the instant matter to the undersigned.

As noted above, the final hearing in this matter was held on December 16, 2011, during which Petitioner presented the testimony of Respondent and Robert Yastrzemski. Without objection, Petitioner introduced 23 exhibits into evidence, numbered 1-23. Petitioner's exhibits included the deposition transcripts of C.H., S.J., L.J., M.R., J.R.[1/]; Ms. Dailyn

Zambrano[2/]; and Orlando G. Florete, M.D.,[3/] an expert in the field of pain management. Respondent testified on his own behalf, presented the testimony of Marie Altidor, and introduced four exhibits, numbered 1-4. At the conclusion of the hearing, the undersigned granted the parties' request for a deadline of 20 days from the filing of the final hearing transcript for the submission of proposed recommended orders.

The final hearing transcript[4/] was filed with DOAH on January 13, 2012. Subsequently, on February 2, 2012, the parties filed a joint request to extend the deadline for the submission of proposed recommended orders to February 16, 2012. On the following day, the undersigned issued an order that granted the requested extension.

Both parties thereafter submitted proposed recommended orders, which have been considered in the preparation of this Recommended Order.[5/]

FINDINGS OF FACT

A. The Parties

1. Petitioner Department of Health has regulatory jurisdiction over licensed physicians such as Respondent. In particular, Petitioner is authorized to file and prosecute an administrative complaint, as it has done in this instance, when a panel of the Board of Medicine has found probable cause exists

to suspect that the physician has committed one or more disciplinable offenses.

2. At all times pertinent to this cause, Respondent was a medical doctor licensed in the State of Florida, having been issued license number ME 92135. Although not the subject of the instant proceeding, Respondent has also been licensed by the State of Florida as a chiropractic physician.

B. Background / Arrangement with Dr. Wagner

3. In or around 1975, Respondent completed his education at the National University of Health Sciences and began to practice chiropractic medicine shortly thereafter.

4. Some fifteen years later, Respondent and an acquaintance——Dr. Joseph Wagner, also a licensed chiropractor in the State of Florida——matriculated at a medical school in the Dominican Republic. Although both Respondent and Dr. Wagner ultimately earned Doctor of Medicine ("MD") degrees in the mid 1990s, Respondent was not licensed in Florida to practice as an MD until early 2006. Significantly, however, Dr. Wagner never obtained licensure as a medical doctor. Consequently, Dr. Wagner is prohibited by statute (with two exceptions, neither of which is applicable in this case[6/]) from prescribing any medicinal drug.

5. In 2007, Respondent and Dr. Wagner entered into a joint venture designed, in the words of Respondent, to "expand"

Dr. Wagner's chiropractic practice. At that time, and for the duration of their business agreement, Respondent's principal place of business was located in Palm Beach County, while Dr. Wagner practiced chiropractic medicine in Daytona Beach.

6. Under the joint venture (which continued until August 2011, when both their offices were raided by the Federal Bureau of Investigation), Respondent traveled to Daytona Beach several times each month and interacted with Dr. Wagner concerning some, but not all, of Dr. Wagner's chiropractic clients (hereinafter "joint-venture clients" or "JVCs").

7. From what can be gleaned of the credible portions of Respondent's deposition and final hearing testimony, it appears that Respondent's activity with respect to JVCs included a review of client files, and, in some cases, a determination that one or more medications——including narcotics——should be prescribed. Indeed, Respondent's level of participation was so minimal that his face-to-face interaction with JVCs consisted, at most, of an initial introduction, and on no occasion did Respondent personally examine——or perform treatments upon——any JVC.

8. As a consequence of Respondent's phantom-like presence at Dr. Wagner's clinic, it was common for a JVC who presented for routine follow-up appointments, which for some clients occurred as frequently as once time per week, to be seen only by

Dr. Wagner or Dr. Wagner's son, John Wagner, who was also a chiropractor. Troublingly, these visits frequently ended (without Respondent having seen or spoken with the JVC on that day) with Dr. Wagner phoning in a prescription refill.[7/]

9. At the conclusion of a JVC's office visit, Dr. Wagner—— and possibly Respondent, if the JVC was seen on a day when Respondent was actually present in the Daytona office——dictated medical notes that Dr. Wagner usually transcribed at a later time. Subsequently, and with Respondent's blanket authorization, Dr. Wagner would create a claim form (if the JVC had insurance coverage) to submit to the insurance carrier for reimbursement.

10. Incredibly, Respondent also granted Dr. Wagner complete authority to affix his signature to reimbursement claims and submit them——without Respondent looking at the forms beforehand——to insurance carriers. This was accomplished not by the use of a stamp, which medical professionals often provide to their subordinates to expedite business affairs, but by Dr. Wagner manually signing, in cursive, "John P. Christensen" inside the box of the claim form labeled "signature of the physician or supplier.

11. Another unusual aspect of the joint venture was the manner in which Respondent and Dr. Wagner dealt with reimbursement checks from insurance carriers. By agreement,

reimbursement checks for claims that related to JVCs were received by mail at Dr. Wagner's place of business in Daytona Beach. Upon their receipt, Dr. Wagner deposited the checks into a SunTrust checking account for which Respondent had sole signatory authority. At the end of each month, Respondent transferred the entire balance of the SunTrust account into his business account at PNC Bank. Respondent would subsequently draft a check on the PNC account to Dr. Wagner in an amount equal to 50 percent of the monthly proceeds.

12. As Respondent readily admits, his joint venture with Dr. Wagner yielded substantial financial remuneration. Over a four-year period, reimbursement from insurance carriers totaling $800,000——a tidy sum in light of Respondent's nominal participation——was deposited into Respondent's SunTrust account, the proceeds of which were split 50/50 with Dr. Wagner.

13. Against the foregoing backdrop, the undersigned will address, on a client-by-client basis, the specific wrongdoing alleged in the Administrative Complaint.

C. Client K.R.

14. On or about August 25, 2010, K.R. presented to Dr. Wagner's clinic for treatment of a back injury she sustained in an automobile accident approximately eight months earlier. K.R. continued to be seen at Dr. Wagner's clinic, on a weekly basis and as a JVC,[8/] until November 11, 2010.

15. During K.R.'s initial office visit, no examination was conducted, nor did Dr. Wagner order that any diagnostic scans (such as x-rays) be taken. Instead, Dr. Wagner simply asked K.R. about her injuries and "cracked" her back for several minutes. While the evidence does not foreclose the possibility that K.R. was introduced briefly to Respondent during the first appointment, it is clear that no further interaction——of any kind——occurred between them.

16. Although Respondent had no contact whatsoever with K.R., the evidence demonstrates that Respondent permitted Dr. Wagner——on the date of K.R.'s first visit and on every follow-up visit, which generally lasted no more than a few minutes——to telephone a local pharmacy on his behalf and direct that certain prescriptions be filled. Specifically, each week from August 25, 2010, through November 10, 2010, K.R. was prescribed seven-day supplies of the following medications: 40 tablets of Lortab[9/] (the brand name for the formulation of hydrocodone[10/] and acetaminophen); 21 tables of Soma[11/] (the brand name for carisoprodol,[12/] a muscle relaxant); and 21 tablets of Xanax[13/] (a brand name for alprazolam,[14/] which is designed to treat anxiety).

17. Petitioner's expert witness in this proceeding, Dr. Orlando Florete, credibly testified that the dosages of Lortab, Xanax, and Soma prescribed to K.R. were excessive, and that the

combination of the three medications was inappropriate due to an unacceptably heightened risk of respiratory depression and death.

D. Client M.R.

18. In late July or early August 2009, M.R. presented to Dr. Wagner's clinic for treatment of leg, back, and neck pain. M.R. returned for follow-up appointments at least one time per week for the next several months.

19. At no time did M.R. undergo a medical examination during his visits, which consisted of having his back cracked by either Dr. Wagner or his son (and, on occasion, the use of a bed with heat).

20. Notwithstanding that Respondent and M.R. neither met nor had contact of any kind, Respondent considered M.R. to be a JVC.[15/] As a consequence, Respondent allowed Dr. Wagner to phone-in the following medications——with Respondent listed on the prescription bottles as the prescribing physician——for M.R., on a weekly basis, from August 7, 2009, through October 16, 2009: 40 tablets of hydrocodone, with each pill containing 10 milligrams of hydrocodone and 500 milligrams of acetaminophen; and 24 tablets of Xanax, each in two milligram doses

E. Clients L.J., S.J., and J.J.

21. In or around August 2009, S.J., J.J. (S.J's cousin), and L.J. (S.J's mother) were involved in an automobile accident.

Thereafter, in late 2009 and early 2010, S.J., J.J., and L.J. presented themselves on multiple occasions for chiropractic treatment at Dr. Wagner's office in Daytona Beach.

22. Although there is insufficient evidence as to what occurred during J.J.'s office visits (no testimony of J.J. has been introduced), S.J. and L.J. were seen initially by Dr. Wagner's son, and later by Dr. Wagner himself during follow-up appointments.

23. As with patient M.R., both S.J. and L.J. neither met nor had any contact whatsoever with Respondent. Nevertheless, as clients that were within the ambit of Respondent and Dr. Wagner's joint venture,[16/] Respondent allowed Dr. Wagner to phone-in prescriptions for S.J. and L.J. as follows: Lortab (40 tablets) and Soma (20 tablets) for L.J. on January 30, 2010; and Lortab and Soma (40 and 20 tablets, respectively) for S.J. on November 7, 2009, January 2, 2010, and February 27, 2010. As with the JVCs discussed previously, Respondent was listed in the pharmacy records and on the medication bottles as the prescribing physician.

24. Consistent with the terms of the joint venture, Dr. Wagner submitted reimbursement claims to Direct General Insurance Company ("DGIC," a personal injury protection carrier) for services purportedly rendered to S.J., L.J., and J.J during their office visits. In particular, clear and convincing

evidence exists that Dr. Wagner, with Respondent's knowledge and authorization, submitted reimbursement claims to DGIC in connection with S.J., J.J., and L.J. that bear the following dates: January 30, 2010 (S.J.); January 30, 2010, and March 13 and 27, 2010 (L.J.); and April 10 and 24, 2010 (J.J.).[17/]

25. While the exact services billed to DGIC varied by patient and date, the content of each of these claim forms represented unambiguously that the examinations and/or treatments were performed by Respondent and no other. This was unquestionably deceptive in light of Respondent's consistent testimony that he never physically conducted medical examinations or treatments in connection with any JVC.

F. Client C.H.

26. In or around December 2008, C.H. was referred to Dr. Wagner's clinic by her personal injury attorney. Over the next four months, C.H. was treated by Dr. Wagner and/or Dr. Wagner's son during multiple office visits.

27. In stark contrast to Respondent's position with respect to patients discussed above (Respondent admitted during his deposition that K.R., M.R., S.J., L.J., and J.J. were JVCs, yet attempted——unsuccessfully——during the final hearing to retract such testimony), Respondent has consistently maintained that C.H. was not a JVC, that he had no knowledge of C.H., and that any prescription phoned in by Dr. Wagner in connection with

C.H. was without his knowledge or authorization. As the undersigned credits this portion of Respondent's testimony, any events that occurred at the clinic with respect to C.H. cannot serve as a basis to discipline Respondent.

G. Findings of Ultimate Fact

28. The undersigned finds, as a matter of ultimate fact, that Respondent violated section 458.331(1)(q), Florida Statutes, by prescribing controlled substances to K.R., M.R. S.J., and L.J. outside the course of his professional practice as a medical doctor.

29. It is further determined, as a matter of ultimate fact, that Respondent engaged in deceptive conduct related to the practice of medicine, contrary to section 458.331(1)(k), Florida Statutes.

30. Finally, the undersigned finds, as matters of ultimate fact, that Respondent is not guilty of violating subsections 458.331(1)(m), (1)(t), and (1)(nn), Florida Statutes.

CONCLUSIONS OF LAW

A. Jurisdiction

31. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

32. This is a disciplinary proceeding in which Petitioner seeks to discipline Respondent's license to practice medicine. Accordingly, Petitioner must prove the allegations contained in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

33. Clear and convincing evidence:

> [R]equires 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. Petitioner's Authority to Impose Discipline; The Charges Against Respondent

34. Section 458.331(1), Florida Statutes, authorizes the Board of Medicine to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice medicine in Florida if a physician commits one or more acts specified therein.

35. In its Administrative Complaint, Petitioner alleges that Respondent is guilty of: committing medical malpractice

(Count I); prescribing a legend drug other than in the course of his professional practice (Count II); violating the standards for the use of controlled substances for pain control (Count III); failing to keep sufficient medical records (Count IV); and engaging in deceptive or fraudulent practices related to the practice of medicine (Count V). For ease of discussion, the undersigned will begin with Count Two.

D. Count II

36. In Count II of the Administrative Complaint, Petitioner contends that Respondent violated section 458.331(1)(q), which provides:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

(emphasis added).

37. As detailed in the findings of fact above, Respondent issued prescriptions to K.R., M.R., L.J., and S.J. (and in potentially lethal doses and combinations in K.R.'s case) for Lortab, Xanax, and/or Soma, all of which are controlled substances. Accordingly, the central inquiry is whether those medications were issued in the course of Respondent's professional practice——i.e., was Respondent actually engaged in the practice of medicine?

38. Critical to the resolution of this issue is the fact that Respondent never developed legitimate doctor-patient relationships with any of the clients in question. Indeed, the evidence demonstrates that K.R., M.R., L.J., and S.J. had no contact whatsoever with, nor were they examined by, Respondent or any other licensed medical doctor at any time before or after Respondent's issuance of the prescriptions. As the controlled substances were not prescribed to the JVCs as part of a doctor-patient relationship, it is concluded that Respondent was not acting within the course of his medical practice. See Dep't of Health, Bd. of Med. v. Rodriguez, Case No. 10-1835PL, 2010 Fla. Div. Adm. Hear. LEXIS 125 (Fla. DOAH Sept. 29, 2010)(concluding that physician prescribed oxycodone outside the course of his medical practice, contrary to section 458.331(1)(q), due to limited interaction between physician and recipient of the medication). Respondent is therefore guilty of Count II.

E. Counts I and III

39. Turning to Count I of the Administrative Complaint, Petitioner alleges that Respondent's conduct violated section 458.331(1)(t), which provides three grounds for disciplinary action:

> 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.

(emphasis added).

40. Of the three forms of malpractice detailed above, Petitioner asserts only that Respondent is guilty of "medical malpractice," which is defined, in relevant part, as the "failure to practice medicine in accordance with the level of care, skill and treatment recognized in general law related to health care licensure." § 456.50(1)(g), Fla. Stat. (emphasis added).

41. As an interrelated charge, Petitioner contends in Count III that Respondent violated Florida Administrative Code

Rule 64B8-9.013(3), a rule that defines, to the extent of its reach, the standard of care for a physician's use of controlled substances:

> (3) Standards. The Board has adopted the following standards for the use of controlled substances for pain control:
>
> (a) Evaluation of the Patient. A complete medical history and physical examination must be conducted and documented in the medical record. The medical record should document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and history of substance abuse. The medical record also should document the presence of one or more recognized medical indications for the use of a controlled substance.
>
> (b) Treatment Plan. The written treatment plan should state objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function, and should indicate if any further diagnostic evaluations or other treatments are planned. After treatment begins, the physician should adjust drug therapy to the individual medical needs of each patient. Other treatment modalities or a rehabilitation program may be necessary depending on the etiology of the pain and the extent to which the pain is associated with physical and psychosocial impairment.

(emphasis added).

42. As concluded in the preceding section of this Recommended Order, Respondent did not act within the course of his professional practice——i.e., his conduct occurred outside

the practice of medicine——on the occasions when he prescribed controlled substances to M.R., K.R, S.J., and L.J. In light of that determination, Respondent cannot be convicted, in connection with the same underlying behavior, of failing to practice medicine in accordance with the applicable standard of care. This principle has been explained succinctly as follows:

> Thus, Sabates is correct that it would be unfair to punish him for both a [violation of sections 458.331(1)(q) and 458.331(1)(t)] based on the same conduct. The unfairness would stem, however, not from the problem of multiplicitous charges, as Sabates argues, but rather from the impossibility of having committed both offenses at the same time, vis-à-vis the same putative patient. The bottom line is that a t violation and a q violation are mutually exclusive theories of potential liability; either a physician was practicing medicine, which would disprove an element of an alleged q violation, or he was not practicing medicine, which would disprove an element of an alleged t violation.

Dep't of Health, Bd. of Med. v. Sabates, Case No. 10-9430PL (Fla. DOAH Oct. 29, 2010)(Order on Motion to Dismiss); Dep't of Health, Bd. of Med. v. Genao, Case No. 10-3348, 2010 Fla. Div. Adm. Hear. LEXIS 190 (Fla. DOAH Nov. 30, 2010)("The Department cannot, however, as it does here, seek to punish the identical conduct as both being within the practice of medicine and outside the practice of medicine. If the legislature did not consider the acts that constitute a violation of section 458.331(1)(q) to be separate and distinct from, and more serious

than, the negligent acts that constitute medical malpractice pursuant to section 458.331(1)(t) . . . there would be no need for it to identify separate violations"); Dep't of Health, Bd. of Med. v. Tobkin, Case No. 05-2590PL, 2006 Fla. Div. Adm. Hear. LEXIS 273 (Fla. DOAH June 26, 2006)("[T]he act of prescribing a controlled substance for improper purposes or improper reasons is an act that is 'other than in the course of the physician's professional practice.' And inasmuch as such an act is outside the scope of the practice of medicine, section 458.331(1)(t) . . . does not appear to apply to such an act because, by its terms, section 458.331(1)(t) appears to be limited in application to acts performed in the course of the practice of medicine"); Dep't of Health, Bd. of Med. v. Heller, Case No. 00-4747PL, 2001 Fla. Div. Adm. Hear. LEXIS 2686 (Fla. DOAH June 12, 2001).

43. Although not cited by Petitioner, the undersigned is aware that the Board of Medicine has, in recent years, relied intermittently upon two decisions——Scheininger v. Department of Professional Regulation, 443 So. 2d 387 (Fla. 1st DCA 1983) and Waters v. Department of Health, 962 So. 2d 1011 (Fla. 3d DCA 2007)——for the proposition that sections 458.331(1)(t) and 458.331(1)(q) are not mutually exclusive theories. As explained below, however, neither opinion so holds.

44. In Scheininger, the court affirmed the suspension of a physician's license based on findings that he had committed acts punishable under sections 458.331(1)(t) and 458.331(1)(q). The court held that the record supported the hearing officer's finding that the doctor had "on two occasions" prescribed controlled substances to his patients without first giving them physical examinations "as required by the minimum acceptable prevailing community medical standard." Id. at 387-88 (emphasis added). This obvious reference to the standard of care makes clear that the finding in question supported a determination of guilt with regard to the offense defined in section 458.331(1)(t), i.e., medical malpractice. The court further held that the hearing officer's findings supported the conclusion that the doctor had "routinely dispensed said drugs to weight control patients on a continuing basis without appropriate follow-up care contrary to the best interests of the patients." Id. at 388 (emphasis added). This was clearly a reference to the offense defined in section 458.331(1)(q). That statute creates a presumption which (if not rebutted) requires a finding that the doctor was "not [acting] in the best interest of the patient and [was] not [operating] in the course of [his] professional practice" based upon clear and convincing proof that the doctor prescribed controlled substances "inappropriately or in excessive or inappropriate quantities."

The court did not state that the doctor had committed both offenses at the same time, vis-à-vis the same putative patients, and such an interpretation of the case is unwarranted, given that the medical malpractice had occurred only on two occasions, whereas the dispensing of controlled substances other than in the course of the doctor's professional practice had taken place on a continuing basis.

45. In Waters v. Dep't of Health, 962 So. 2d 1011 (Fla. 3d DCA 2007), the court affirmed an order revoking a doctor's license based on charges grounded in sections 458.331(1)(m), 458.331(1)(q), and 458.331(1)(t). The ALJ had recommended that the charge based on subsection (q) be dismissed because the Department's interpretation of that provision was "unsettled." Id. at 1012. The Department had rejected the ALJ's "interpretation of the requirements of subsection (q)," id. at 1013, and the court held that doing was "within the agency's delegated range of discretion." Id. The court did not, however, state what the Department's interpretation of subsection (q) was, much less announce that it agreed with such interpretation. Nor did the court articulate the "judge's legal position with regard to the subsection (q) charges," id. at 1012, which it found the Department had not erred in rejecting. Rather, the court described the ALJ's belief that the Department had issued "two conflicting prior orders," "one seeming to

require proof that the accused doctor was engaged in illicit activity when prescribing the drugs in question while the other merely required proof that the doctor prescribed the drugs inappropriately or in excessive or inappropriate quantities." Id. It is reasonable to infer that the ALJ had agreed with one or the other of these positions.

46. Neither of these "interpretations" of subsection (q) is wholly accurate as stated. First, proof of "illicit activity" is not required to sustain a finding of guilt under subsection (q). What is required is proof that the accused doctor was not practicing medicine when he prescribed the drugs in question. Such conduct, of course, would be illicit by definition——because it is not permitted under subsection (q)—— and perhaps criminal in nature, but the gravamen of the offense is not merely "illicit activity." The gravamen of the subsection (q) offense, rather, is dispensing a legend drug other than in the course of the physician's professional practice. Second, subsection (q) does not require proof of inappropriate prescribing. Subsection (q) permits such proof as the basis for a rebuttable presumption that the physician was acting outside the course of his professional practice. Consequently, Waters establishes nothing more than that the agency did not err in rejecting a flawed interpretation of subsection (q). At any rate, the Waters court did not

explicitly——or implicitly——reject the proposition that subsection (t) and subsection (q) prescribe mutually exclusive theories for imposing administrative discipline.

47. For the reasons expressed above, the undersigned's finding of guilt with respect to section 458.331(1)(q)——that Respondent's issuance of the prescriptions occurred outside the course of his practice——precludes a determination that Respondent violated section 458.331(1)(t) and rule 64B8-9.013, where each charge is predicated upon the same underlying behavior. Accordingly, Counts I and III must be dismissed.

G. Count IV

48. Petitioner further contends, in Count IV of the complaint, that Petitioner has violated section 458.331(1)(m), which proscribes the following conduct:

> 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.

(emphasis added).

49. As reflected by the foregoing language, section 458.331(1)(m) requires a physician to create appropriate records that justify a patient's course of treatment. Therefore, it follows naturally——pursuant to the reasoning expressed above with respect to Counts I and III——that no violation of section 458.331(1)(m) can be sustained in connection with M.R., K.R., L.J., and S.J., as those individuals, although connected to Respondent through the joint venture and prescribed medications in furtherance thereof, were never treated by Respondent as patients in the course of his professional practice. Count IV must therefore be dismissed.

H. Count V

50. Finally, in Count V of the Complaint, Petitioner alleges that Respondent violated section 458.331(1)(k), which provides that a physician is subject to discipline for:

> Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine.

(emphasis added).

51. As detailed in the findings of fact contained herein, there is clear and convincing evidence that Respondent knowingly authorized Dr. Wagner to submit written claims for reimbursement that represented——deceptively and untruthfully——that he (Respondent) provided treatments and services to patients S.J.,

L.J, and J.J. Although Respondent's conduct did not occur in the practice of medicine, see Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164 (Fla. 1st DCA 1990)(holding that physician's submission of false information in connection application for staff privileges did not occur in the practice of medicine, as untruthful representations were not made in the diagnosis, treatment, operation, or prescription for any human disease),[18/] the undersigned concludes that the false representations contained within the claim forms related to the practice of medicine. See Doll v. Department of Health, 969 So. 2d 1103, 1104-05 (Fla. 1st DCA 2007)(holding that submission of fraudulent reimbursement claims related to the practice of medicine; licensee falsely represented in the claims that he had conducted technical components of magnetic resonance imaging testing); cf. Rush v. Dep't of Prof'l Reg., Bd. of Podiatry, 448 So. 2d 26, 27-28 (Fla. 1st DCA 1984)(holding that conviction for conspiracy to import marijuana related to the practice of podiatric medicine). Accordingly, Respondent is guilty of Count V.

I. Penalty

52. In determining the appropriate punitive action to recommend in this case, it is necessary to consult the Board of Medicine's disciplinary guidelines, which impose restrictions and limitations on the exercise of the Board's disciplinary

authority under section 458.331. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

53. The Board's guidelines for violations of section 458.331(1)(q) and (1)(k) are enumerated in Florida Administrative Code Rule 64B8-8.001. As it relates to Respondent's violation of section 458.331(1)(q), rule 64B8-8.001(2)(q) provides for a penalty range (for a first offense) of one year probation to revocation, 50 to 100 hours of community service, and an administrative fine from $1,000 to $10,000. With respect to the violation of 458.331(1)(k), rule 64B8-8.001(2)(k) penalty that ranges from probation to revocation, 50 to 100 hours of community service, and a fine of $1,000 to $10,000.

54. Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigation circumstances may be taken into account:

> (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 inuring to the applicant or licensee;
>
> (g) The involvement in any violation of Section 458.331, F.S., 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) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.
>
> (i) Any other relevant mitigating factors.

(emphasis added).

55. Notwithstanding Respondent's lack of disciplinary history, his egregious conduct in this matter——that exposed at least one individual to a potentially fatal drug interaction——warrants the revocation of his license to practice medicine and the imposition of the maximum fine. See Dep't of Health, Bd. of Med. v. Rodriguez, Case No. 10-1835PL, 2010 Fla. Div. Adm. Hear. LEXIS 125 (Fla. DOAH Sept. 29, 2010)(recommending revocation and maximum fine where physician violated section 458.331(1)(q), among other statutory provisions).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Board of Medicine:

1. Finding that Respondent violated section 458.331(1)(q), Florida Statutes, as charged in Count II of the Administrative Complaint;

2. Finding that Respondent violated section 458.331(1)(k), as charged in Count V of the Complaint;

3. Dismissing Counts I, III, and IV of the Administrative Complaint;

4. Revoking Respondent's license to practice medicine; and

5. Imposing a total administrative fine of $20,000.00.

DONE AND ENTERED this 16th day of March, 2012, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2012.

ENDNOTES

[1/] Although not objected to, the deposition transcripts of C.H., S.J., L.J., M.R., and K.R. are hearsay, see Dinter v. Brewer, 420 So. 2d 932, 933 (Fla. 3d DCA 1982), and, under the circumstances presented, neither Florida Rule of Civil Procedure 1.330 nor the rules of evidence authorize the use of the transcripts beyond the supplementation or explanation of other evidence. See Dep't of Health, Bd. of Chiropractic Med. v. Christensen, Case No. 11-4936 (Fla. DOAH March 16, 2012)(discussing at length, in the companion case to the instant proceeding, the potential application of rule 1.330 and the evidence code to the deposition transcripts). Nevertheless, the nature and extent of Respondent's incriminating admissions in this proceeding, as supplemented by the transcripts of S.J., L.J., M.R., J.R., provide clear and convincing evidence of Respondent's misconduct.

[2/] Pursuant to Florida Rule of Civil Procedure 1.330(a)(3)(B), the deposition transcript of Ms. Zambrano may be used in this proceeding for any purpose.

[3/] Florida Rule of Civil Procedure 1.330(a)(3)(F) permits the use of Dr. Florete's deposition transcript for any purpose.

[4/] Pursuant to the parties' stipulation, the undersigned has also considered the hearing transcript from DOAH Case number 11-4936PL (that relates to Respondent's chiropractic license and was heard on December 15, 2011), which has been included as part of the record.

[5/] Unless noted otherwise, all statutory references are to the codification in effect at the time of Respondent's alleged misconduct.

[6/] See § 460.403(9)(c)2., Fla. Stat. (providing that chiropractic physicians are authorized to administer certain topical anesthetics in aerosol form, and, for emergency purposes, medical oxygen).

[7/] Respondent essentially conceded as much in his deposition testimony. See Pet. Ex. 7, pp. 13 & 41.

[8/] See Pet. Ex. 7, pp. 93-97.

[9/] Each Lortab tablet prescribed to K.R. consisted of 10 milligrams of hydrocodone and 500 milligrams of acetaminophen.

[10/] In the dosage prescribed, hydrocodone is a Schedule III controlled substance, the abuse of which "may lead to moderate or law physical dependence or high psychological dependence." § 893.03(3), Fla. Stat.

[11/] Each tablet contained 350 milligrams of carisoprodol.

[12/] Carisoprodol is a Schedule IV controlled substance, the abuse of which may lead to "limited physical or psychological dependence relative to the substances in Schedule III." § 893.03(4), Fla. Stat.

[13/] Each tablet contained 2 milligrams of alprazolam.

[14/] Alprazolam is a Schedule IV controlled substance. § 893.03(4)(a), Fla. Stat.

[15/] See Pet. Ex. 7, pp. 100-102. To the extent that Respondent attempted during the final hearing to completely disavow any knowledge of M.R., such testimony is rejected.

[16/] See Pet. Ex. 7, pp. 11, 18, 45, & 55.

[17/] See Pet. Ex. 7, pp. 31-32; 43-44; 50-53.

[18/] Elmariah interpreted section 458.331(1)(l), Florida Statutes (1983), which prohibited the making of "deceptive, untrue, or fraudulent representations in the practice of medicine." That section, later redesignated as (1)(k), was amended in 1989 to prohibit the making of "deceptive, untrue, or fraudulent representations in or related to the practice of medicine." (emphasis added). In dicta, the court in Elmariah noted that while the conduct at issue in that case predated the amended statute, the added "or related to" language should "give pause to those who might assume that actions similar to [the physician's] remain unpunishable." 574 So. 2d at 165 n.1.

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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.