

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

vs.

Case No. 18-3899PL

CLAUDIA PATRICIA OROZCO-FANDINO,
E.O.,

Respondent.

_____ /

RECOMMENDED ORDER

On November 6 and 7, 2018, a hearing was held via teleconference from sites in Tallahassee and Tampa, Florida, before R. Bruce McKibben, an Administrative Law Judge ("ALJ") assigned by the Division of Administrative Hearings ("DOAH"). For reasons explained in the Preliminary Statement below, this Recommended Order was entered by ALJ Lawrence P. Stevenson.

APPEARANCES

For Petitioner: Barbara L. Davis, Esquire
Cynthia Elizabeth Nash-Early, Esquire
Christopher R. Dierlam, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Dale R. Sisco, Esquire
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated section 478.52(1)(m), Florida Statutes (2017),^{1/} by accepting and performing professional responsibilities that she knew or had reason to know she was not competent to perform; and, if so, what penalty should be imposed for the violations proven.

PRELIMINARY STATEMENT

On April 20, 2018, Petitioner, Department of Health (the "Department"), filed a two-count Administrative Complaint against Respondent, Claudia Patricia Orozco-Fandino, E.O. Count I alleged that Respondent violated section 478.52(1)(m) by performing cosmetic procedures such as liposuction, Brazilian Butt Lifts, fat transfers or fat grafting, vampire lifts, plasma injections, and/or other invasive/surgical medical procedures, on one or more patients. Count II alleged that Respondent violated section 456.072(1)(a), Florida Statutes (2017),^{2/} by making misleading, deceptive, or fraudulent representations in or related to the practice of her profession, electrology.

The Administrative Complaint makes the following factual allegations:

5. From in or about June 2014 to in or about September 2017 (treatment period), Respondent represented to one or more patients that she was a licensed physician and/or otherwise qualified to perform cosmetic procedures in the State of Florida.

6. During the treatment period, Respondent performed cosmetic procedures such as liposuction, Brazilian Butt Lifts, fat transfers or fat grafting, vampire lifts, plasma injections, and/or other invasive/surgical medical procedures, on one or more patients.

The Administrative Complaint identifies no specific patients and gives no specific dates when the illicit procedures were allegedly performed. Respondent did not move to dismiss or require amendment of the Administrative Complaint. From the Amended Joint Pre-hearing Stipulation filed on October 26, 2018, it appears that the parties came to agree on a roster of eight patients whose treatment was at issue. This list was subsequently winnowed to the three patients who testified at the final hearing.

On May 18, 2018, Respondent filed an Election of Rights in which she contested the factual allegations of the Administrative Complaint and requested a formal administrative hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes. On July 26, 2018, the Department forwarded the case to DOAH for assignment of an ALJ and the conduct of a formal administrative hearing.

The case was assigned to ALJ R. Bruce McKibben, who set the hearing for October 3 and 4, 2018. On September 26, 2018, the parties filed a joint motion to continue the final hearing, citing their difficulty in agreeing to the terms of a pre-

hearing stipulation and the need to schedule depositions of critical witnesses. By Order dated September 27, 2018, ALJ McKibben denied the joint motion, finding that the parties' failure to timely conduct discovery did not constitute good cause for a continuance.

On September 28, 2018, the Department filed a motion for reconsideration of the Order denying continuance, noting the Department's various efforts to obtain discovery from Respondent during the pendency of the case. By Order dated October 1, 2018, ALJ McKibben denied the Department's motion. ALJ McKibben noted that, under Florida Administrative Code Rule 28-106.210, a litigant seeking a continuance less than five days prior to the scheduled hearing must demonstrate the existence of an emergency, and that the Department had failed to meet the rule's requirement.

The final hearing commenced as scheduled on October 3, 2018. However, based on facts elicited at the outset of the hearing, ALJ McKibben determined that a continuance was warranted. By Order dated October 4, 2018, the hearing was rescheduled for November 6 and 7, 2018.

On October 24, 2018, the Department filed a notice of dismissal in which it dismissed Count II of the Administrative Complaint and stated its intention to pursue only Count I of the Administrative Complaint.

On October 26, 2018, the parties filed an Amended Joint Pre-hearing Stipulation, which included facts for which the parties stated no evidence would be required at hearing. Where relevant, those facts have been incorporated into this Recommended Order.

The final hearing convened on November 6, 2018, and concluded on November 7, 2018. At the hearing, the Department presented the testimony of Patients N.M., R.C., and K.H., and of Frank Steig, M.D., accepted as an expert in plastic and reconstructive surgery. The Department's Exhibits 5, 6, 7, 9, and 11 were admitted into evidence. Respondent presented the testimony of Amina Edathodu, M.D., and offered the Department's Exhibit 12, the deposition testimony of Mark Kantzler, M.D., as part of her case-in-chief. In addition to the Department's Exhibit 12, Respondent offered her Exhibits 14-6, 14-26, 14-40, 14-54, and 14-57, all of which were admitted into evidence.

At the hearing, the Department objected to the presentation of Dr. Edathodu's testimony because it had been unable to serve her for deposition prior to the hearing. ALJ McKibben allowed the testimony but also held the record open until December 31, 2018, to allow the Department to question Dr. Edathodu about her whereabouts on the dates of attempted service and to depose the investigators who attempted to serve Dr. Edathodu, so that both

parties could argue in their proposed recommended orders whether her testimony should be stricken.

On November 7, 2018, ALJ McKibben entered an Order Placing Case in Abeyance that stated as follows:

The parties have entered into a proposed settlement of this matter, but the proposal must be approved by the Board of Medicine, which meets next in February 2019. The parties are to notify DOAH within 10 days after the Board of Medicine meeting as to the status of the settlement. If the settlement proposal is approved, the file in this case will be closed and jurisdiction released to the Department of Health. If the settlement is not approved, the parties will have 20 days after the conclusion of the Board of Medicine meeting to submit proposed recommended orders to DOAH. A recommended order will be entered within 30 days thereafter.

At the conclusion of the final hearing, the parties stated that they had entered into a proposed settlement. The parties understood that ALJ McKibben was retiring from DOAH as of December 31, 2018. ALJ McKibben made certain the parties understood that if the settlement agreement did not come to fruition, then the recommended order in this case would be written by another ALJ. As events transpired, the settlement agreement was not finalized. The undersigned was assigned to review the complete record of the case and write this Recommended Order.

On January 10, 2019, the Department filed as supplemental exhibits the deposition testimony of William DeGroot and Patricia Gold, the two Department employees who attempted to serve Dr. Edathodu with subpoenas to appear for deposition. After reviewing the deposition transcripts, the undersigned finds the Department has not provided sufficient grounds for striking the testimony of Dr. Edathodu.

The two-volume Transcript of the hearing was filed with DOAH on December 14, 2018. By Order dated February 5, 2019, the undersigned approved the parties' agreement to file their proposed recommended orders by the close of business on February 28, 2019. Both parties timely filed Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order.

Unless specifically noted otherwise, all references to the Florida Statutes are to the 2017 edition.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of electrolysis pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

2. At all times material to the Administrative Complaint, Respondent has been licensed as an electrologist in the State of Florida, having been issued license number EO2650.

3. Respondent is also licensed by the State of Florida as an acupuncturist, license number AP 1378. Respondent is a certified surgical assistant, having obtained certification through the American Board of Surgical Assistants.

4. Documents in the record indicate that in 1998, Respondent completed medical school at Universidad Libre in Barranquilla, Columbia. However, Respondent is not a licensed medical doctor in the State of Florida.

5. Respondent's address of record is 8210 West Waters Avenue, Tampa, Florida 33615.

6. At all times material to the Administrative Complaint, Respondent owned and operated Orozco Medical Center ("OMC"), located at 8210 West Waters Avenue, Tampa, Florida 33615.

Patient N.M.

7. Patient N.M. is a female born in 1964. She testified that she was familiar with OMC because she had therapy there following a car accident in 2000.

8. N.M. presented to OMC in early 2015 for consultation regarding a liposuction with fat transfer procedure, commonly called a "Brazilian Butt Lift" ("BBL"). Fat is taken from one part of the body and reinjected into the buttocks.

9. N.M. testified that Blanca Cabrera, who performs massages at OMC, recommended a "doctor" at OMC named Marlon

Barcelo to perform her BBL. Marlon Barcelo worked at OMC as a surgical assistant but was not a medical doctor.

10. N.M. testified that she believed Mr. Barcelo would perform her BBL procedure and that she never knew that he was not a physician. Ms. Cabrera told her that Mr. Barcelo had been a very good doctor in Columbia.

11. N.M. testified that at her initial consultation at OMC regarding the BBL, she met exclusively with Respondent, who showed her where the fat would be removed and where it would be injected. N.M. testified that she met with Respondent three times before her surgery.

12. N.M. testified that, at the conclusion of the initial consultation, she was given an appointment card directing her to return to OMC on January 13, 2015, for an electrocardiogram, lab work, and the medication she would be expected to take before the procedure.

13. The medical records indicate that N.M. was confused as to the dates. It appears from the records that her initial consultation was on January 13, 2015, that her EKG and lab work were performed on March 2, 2015, and the date of her surgery was March 13, 2015.

14. N.M. testified that each time she visited OMC prior to the surgery, she met only with Respondent, who examined her and explained the procedure to her with no other persons present.

15. N.M. testified that on the date of the surgery, her daughter drove her to OMC. After she checked in at the front desk, N.M. was taken to an exam room and told to change into a hospital gown. Respondent then marked her body to identify the locations where fat was to be removed.

16. Respondent gave N.M. a medication to calm her prior to the procedure. The medical record indicates that N.M.'s pre-operative medications included Keflex (cephalexin, an antibiotic), lorazepam (a sedative and anti-anxiety medication), and Benadryl (diphenhydramine, an antihistamine with sedative properties). N.M. described the medication's effect as "like a Xanax." N.M. testified that the medication relaxed her but did not affect her recollection of the procedure. She testified that she was awake throughout the surgery and was allowed to use her cell phone during the procedure.

17. N.M. did not recall meeting Dr. Mark Kantzler and denied ever meeting Dr. Amina Edathodu. She believed that Mr. Barcelo was going to perform the surgery, though up until the morning of the procedure she had not met him.

18. N.M. was taken to the surgical room and placed on a table. She stated that there was a drape that blocked her view of the surgical area, but that it was low enough to allow her to see everyone in the room. She could see two men, Mr. Barcelo and someone identified as "Abel," and Ms. Cabrera, the massage

therapist, who appeared to be assisting. N.M. testified that Mr. Barcelo performed the liposuction. She testified that everyone in the room was wearing surgical gowns and gloves but no surgical masks.

19. N.M. testified that during the liposuction procedure, Respondent told her that she would be performing the fat injections because she was very good at that procedure.

20. N.M. testified that after the liposuction was completed, Mr. Barcelo called on Respondent to perform the fat injections into her buttocks. N.M. stated that she saw Respondent walk into the room carrying a syringe. During this portion of the procedure N.M. was positioned on her stomach but stated that she knew from the conversation in the room that it was Respondent who was placing the injections into her buttocks.

21. Upon conclusion of the procedure, Respondent gave N.M. pain medication for post-surgical pain. N.M. returned to OMC for a follow-up visit regarding the lack of drainage from her incision. During this visit, Respondent examined N.M. and gave her medication to reduce the swelling she was experiencing.

22. Dr. Edathodu testified that she has been a licensed physician in the State of Florida for over 25 years. From 2015 through 2017, she worked as a contract physician at OMC and acted as medical director for the facility. Dr. Edathodu

developed the protocols for OMC's tumescent liposuction procedures and ensured they were followed.

23. Dr. Edathodu remembered N.M. as a patient who had undergone previous surgeries and presented for further liposuction and fat transfer. Dr. Edathodu testified that she performed the liposuction procedure on N.M.

24. Dr. Edathodu's signature is on the cosmetic surgery consent form that was also signed by N.M. on March 3, 2015. The "Liposuction and Autologous Fat Transfer" consent form signed by N.M. on March 3, 2015, specifically names Dr. Edathodu as the surgeon who will perform the procedure and was signed by Dr. Edathodu.

25. Dr. Edathodu testified that she reviewed the procedure with N.M., discussing the risks and benefits. Dr. Edathodu does not speak Spanish and uses Respondent to translate with Spanish speakers such as N.M. She identified herself to N.M. as a surgeon through Respondent's translation. Dr. Edathodu spoke to N.M. about having realistic expectations and cautioned her that she may not obtain an optimal result because of her previous procedures.

26. Dr. Edathodu testified that, aside from her, the persons in the surgical theater were three surgical assistants: Respondent, Mr. Barcelo, and Pavel Cabanes. It is found that Mr. Cabanes must have been the "Abel" referred to by N.M.

27. Dr. Edathodu testified that during the surgery, there is a drape between the surgical field and the patient's face and head, to prevent the patient from being disturbed by the sight of the procedure. The drape is made of disposable paper and is about five feet high. When performing the surgery, Dr. Edathodu is unable to see the patient's face and the patient is unable to see past the drape.

28. Dr. Edathodu testified that she performed the entire surgical procedure on N.M. Dr. Edathodu made the site markings on N.M. while Respondent took photographs. Respondent did not perform any part of the surgical procedure. Respondent performed none of the fat transfer on N.M. Respondent did nothing other than what Dr. Edathodu specifically directed her to do.

29. Dr. Edathodu testified that she met with N.M. on four or five occasions after the surgery.

30. Dr. Edathodu's testimony, as supported by the medical records, is credited. Perhaps because of her inability to speak English, N.M. appeared confused and inconsistent in her testimony, at least as it appeared in the Transcript. N.M.'s credibility was strained by her uncertainty as to dates and medications. She offered improbable details, such as the lack of coverage by the surgical drape and the failure of the surgical team to wear masks. N.M. was certain that Respondent

was performing the fat injection, even though N.M. could not see what was happening. Though N.M. testified that she was awake and alert during the procedure, the undersigned cannot disregard that she had been given a medication that she likened to Xanax, most likely the lorazepam. The undersigned hesitates to rely upon N.M.'s disjointed testimony where it conflicts with the straightforward and credible testimony of Dr. Edathodu.^{3/}

31. Based on the foregoing findings of fact, it is found that the Department has failed to establish by clear and convincing evidence that Respondent performed an invasive/surgical medical procedure on Patient N.M.

Patient R.C.

32. Patient R.C. is a female born in 1988. At the time of the hearing, she worked as a claims specialist. She testified that a friend from her previous job at HealthPlan Services referred her to OMC for a consultation. She first went to OMC on or about June 6, 2016.

33. R.C. testified that this initial consultation was with Respondent. She told Respondent that she wanted liposuction on her back and waist and wanted the fat transferred to her buttocks. They discussed the procedure and pricing. From that point until the day of the surgery, R.C. went to OMC only to drop off periodic payments for the surgery. Her only contact

was with the person at the front desk. She testified that she did not see Respondent again until the day of her surgery.

34. R.C.'s surgery was scheduled for August 5, 2016. R.C. testified that she was dropped off at OMC by her children's father. She went in and met Respondent and a few workers in the front of the facility. When she went to the back to prepare for the procedure, she met a man wearing scrubs whom she had never seen before. Two other staff persons were present, but R.C. stated she only talked with the one staff person who spoke English.

35. R.C. testified that Respondent and the man in scrubs marked her body for the surgery. She believed that Respondent was going to perform the surgery. R.C. stated that she was not familiar with Dr. Edathodu.

36. R.C. stated that she filled out the consent forms on August 5, 2016. An assistant gave her medication, saying it would calm her down. R.C. was not told the name of the medication, but testified that she took a blue pill and half of a white pill. The medical records indicate she was given Ativan (a brand name for lorazepam) and Benadryl. R.C. testified that the medications made her drowsy.

37. R.C. was assisted to the room where the surgery would be performed. R.C. testified that she was placed on her stomach, face down. Everyone in the room was wearing a surgical

mask. In the room were Respondent, the man in the scrubs, and two assistants.

38. R.C. stated that she was awake during the procedure, but was drowsy and did not recall much about it. She could hear Respondent's voice and the noise of the liposuction machine. She could not see who actually performed the procedure. After it was over, one of the assistants phoned R.C.'s driver and helped R.C. get up and walk. Respondent handed her a bag containing pills that R.C. believed were antibiotics. She received post-operative instructions.

39. R.C. testified that she returned to OMC for a follow-up visit about a month after the surgery and met with Respondent.

40. Dr. Edathodu testified that she performed the surgical procedure, called "tumescent liposuction," on R.C. on August 5, 2016. On August 2, 2016, R.C. signed a "liposuction & autologous fat transfer consent" form that specifically named Dr. Edathodu as the surgeon who would perform the surgery. Dr. Edathodu ordered, reviewed, and signed R.C.'s lab results.

41. Dr. Edathodu met with R.C. prior to the procedure and completed a "pre-operative clearance" form to document R.C.'s fitness and willingness to go through the surgery. Both R.C. and Dr. Edathodu signed the pre-operative clearance form. Dr. Edathodu testified that she met with R.C. three or four

times post-surgery. As in the case of N.M., all of the medical records support the version of events described by Dr. Edathodu.^{4/}

42. Dr. Edathodu's testimony, as supported by the medical records, is credited. R.C. frankly conceded that she did not remember much about the surgery and could not see who performed it. Dr. Edathodu clearly and credibly recalled performing the procedure. The greater weight of evidence supports the finding that Dr. Edathodu performed the surgery, assisted by Respondent and Mr. Barcelo. The evidence could not sustain a finding that Respondent performed a surgical procedure on R.C.

43. R.C. was a more credible witness than N.M., and her testimony on some of the details regarding her consultations and pre-operative events was persuasive. However, it must be kept in mind that the only relevant factual question is whether Respondent performed an "invasive/surgical medical procedure" on R.C. The evidence on this question is not persuasive.

44. Based on the foregoing findings of fact, it is found that the Department has failed to establish by clear and convincing evidence that Respondent performed an invasive/surgical medical procedure on Patient R.C.

Patient K.H.

45. Patient K.H. is a female born in 1989. She learned of OMC from a friend at work. She first came into OMC for a

consultation regarding a liposuction and fat transfer on November 29, 2016. K.H. testified that she met only with Respondent at this initial consultation. On November 29, 2016, K.H. signed an "information certification" form accepting Dr. Mark Kantzler as the physician who would be in charge of her liposuction procedure.

46. K.H. came back to OMC on January 9, 2017, to make a \$500 deposit and to schedule the surgery. The procedure was scheduled for February 11, 2017. Again, K.H. testified that she met alone with Respondent, who told her that she would need to come in a couple of days before the surgery to get medication and a list of things she would need for post-operative care.

47. K.H. testified that she believed that Respondent was a physician and that she would be performing the liposuction procedure.

48. The "liposuction and autologous fat transfer consent" form that K.H. signed on February 9, 2017, authorized Dr. Kantzler to perform the liposuction and fat transfer procedure.

49. The "surgery certification" form that K.H. signed on February 9, 2017, indicated that Dr. Kantzler reviewed the entire medical file with her before performing the procedure.

50. On February 11, 2017, K.H. was driven to OMC by her mother. Shortly after arriving, K.H. noted the presence of a tall man with white hair and blue eyes.

51. An OMC assistant escorted K.H. to a room with a bed and a chair. Respondent came in to the room and marked K.H. for surgery. Respondent then called in the tall man with white hair and blue eyes, who looked at the surgical markings and then asked K.H. some questions about her stretch marks. During her direct examination, K.H. testified that she was not given the man's name.

52. During cross-examination, K.H. was forced to concede that during an August 2017 interview, she told Department investigators that she had been introduced to the tall man with white hair and blue eyes and that his name was Dr. Mark Kantzler.

53. K.H. testified that Respondent gave her a pill to take before surgery. She was taken to the surgical suite and was placed on the table. K.H. testified that the surgical drape prevented her from seeing the surgical area. The only people she had noted in the room were Respondent and "Claudia," a woman K.H. recognized as a massage therapist at OMC. She could not be certain whether or not Dr. Kantzler was in the room.

54. K.H. testified that she was awake during the surgery. She stated that she was in pain during the surgery and

complained, in Spanish, to Respondent. K.H. stated that Respondent told her she had "a little stubborn fat" and continued the procedure without doing anything to alleviate her pain. K.H. testified that all conversation during the procedure was in Spanish. She heard no English being spoken.

55. K.H. confirmed that Dr. Kantzler was the physician who signed the letter requesting that she be excused from work immediately after her surgery.

56. Dr. Kantzler testified that he had no specific recollection of K.H. or of her procedure. He stated that he worked on a contract basis with OMC for about three years. He came in about once a week to perform liposuction procedures, conforming to the protocols established by Dr. Edathodu. He saw the patients only briefly before their procedures, relying on Respondent to perform the patient consultations and Dr. Edathodu to prescribe the pre-operative tests in her role as medical director. He was paid by the procedure.

57. Dr. Kantzler testified that he does not speak Spanish, but that his surgical assistants, Respondent and Mr. Barcelo, would often converse in Spanish during surgery.

58. Dr. Kantzler reviewed the medical records and confirmed that he signed the documents and performed the surgery on K.H.:

Q. Is there any doubt in your mind about whether or not you performed these procedures?

A. Not when I'm looking at the files, no.

Q. And if you had not done the procedures, would you have signed off on the documentation?

A. I wouldn't have had them to sign. No.

59. Dr. Kantzler's lack of a clear recollection distinguishes this procedure from those involving Dr. Edathodu. However, an offsetting distinguishing factor is that K.H. had a clear recollection of seeing and speaking with Dr. Kantzler at OMC on the morning of her surgery. She did not see him enter the surgical suite or hear him speak during the procedure, but she was unable to say that he was not in the room. The medical record is replete with indications that Dr. Kantzler performed the liposuction and fat transfer procedure on K.H.

60. Dr. Kantzler testified that he voluntarily relinquished his Florida medical license in 2017 "for my own reasons not relevant to this [case]." The Department's Proposed Recommended Order suggests that this relinquishment was "in response to or in anticipation of disciplinary proceedings." There is no record evidence to support the Department's suggestion, and it is disregarded here.

61. Based on the foregoing findings of fact, the Department has failed to establish by clear and convincing

evidence that Respondent performed an invasive/surgical medical procedure on Patient K.H.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).

63. This is a proceeding whereby the Department seeks to impose discipline against Respondent's license to practice electrology. The Department has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 595 So. 2d 292 (Fla. 1987).

64. In Evans Packing Co. v. Department of Agriculture and Consumer Services., 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

[C]lear 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 evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of 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).

65. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

66. This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

67. Count I of the Administrative Complaint alleges that Respondent violated section 478.52(1)(m) by performing cosmetic procedures, such as liposuction, BBLs, fat transfers or fat grafting, vampire lifts, plasma injections, and/or other invasive/surgical medical procedures, on one or more patients. Section 478.52(1)(m) provides:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(m) Accepting and performing professional responsibilities which the licensee knows, or has reason to know, she or he is not competent to perform.

68. There is no question that the acts alleged in the Administrative Complaint would constitute violations of section 478.52(1)(m). Respondent's licensure is limited to

"electrolysis or electrology," defined by section 478.42(5) as:

The permanent removal of hair by destroying the hair-producing cells of the skin and vascular system, using equipment and devices approved by the board which have been cleared by and registered with the United States Food and Drug Administration and that are used pursuant to protocols approved by the board.

69. However, the Department has failed to carry its burden. Two physicians testified in a straightforward manner that they performed the surgeries in question. Their testimony was fully supported by the medical records offered into evidence by the Department.

70. The Department's case is contingent upon the undersigned finding that the physicians were lying and the medical records were falsified. The undersigned would be fully willing to make this finding if the testimony of the three patients had been at all convincing. Their testimony did not

appear to be deliberately untruthful; it was simply muddled and confused.

71. That some of this confusion may be laid at the feet of Respondent is not in doubt. The patients appeared unsure of who would perform their surgeries or what medications they were receiving. Two of the patients spoke little or no English, whereas the physicians spoke only English. This situation made Respondent the sole conduit for patient information, and she apparently left these patients with the idea that she or Mr. Barcelo would be performing their surgeries.

72. Nonetheless, the record failed to demonstrate, even by a preponderance of the evidence, that Respondent actually performed the surgeries in question. Therefore, Count I of the Administrative Complaint should be dismissed.

73. As noted in the Preliminary Statement, the Department has already dismissed Count II of the Administrative Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a final order dismissing Count I of the Administrative Complaint against Respondent, Claudia Patricia Orozco-Fandino, E.O.

DONE AND ENTERED this 18th day of April, 2019, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of April, 2019.

ENDNOTES

^{1/} Section 478.52 has not been amended since 2005, well before any of the events alleged in the Administrative Complaint.

^{2/} The substance of section 456.072(1)(a) has been effective since at least 1997. See section 69, chapter 97-261, Laws of Florida, which enacted section 455.624, Florida Statutes (1997), subsection (1)(a) of which contained the same language as current section 456.072(1)(a).

^{3/} It is again noted that the undersigned did not have the benefit of seeing either witness testify in person. These findings are based solely on the written record of the case.

^{4/} The Department did not contest the veracity or accuracy of the medical records, which the Department itself entered into the record. When counsel for Respondent showed selected records to the patients, they invariably agreed with their accuracy. The physicians confirmed their correctness. All these factors lead to the conclusion that the medical records for these patients are genuine and accurate.

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(eServed)

Louise Wilhite-St. Laurent, General Counsel
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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.