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STATE OF WISCONSIN

BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF

DISCIPLINARY PROCEEDINGS AGAINST:

FINAL DECISION AND ORDER

MARC LLOYD SMITH, D.O.,
RESPONDENT.

96 MED 74, 94 MED 256, 93 MED 412
LS 9807291 MED

The parties to this action for the purposes of § 227.53, Wis. Stats., are:

Marc Lloyd Smith, D.O.
10804 W. Capitol Dr.
Wauwatosa, WI 53222

Wisconsin Medical Examining Board

P.O. Box 8935

Madison, WI 53708-8935

Department of Regulation and Licensing

Division of Enforcement

P.O. Box 8935

Madison, WI 53708-8935

The parties in this matter agree to the terms and conditions of the attached Stipulation as the final decision of this matter, subject to the approval of the Board. The Board has reviewed this Stipulation and considers it acceptable.

Accordingly, the Board in this matter adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. Respondent Marc Lloyd Smith (dob 5/23/58) is and was at all times relevant to the facts set forth herein a physician and surgeon licensed in the State of Wisconsin pursuant to license #27806, first granted on granted on 7/1/86.

93 Med 412

2. Respondent did, on 5/27/93, have an initial appointment with a patient known to respondent as Andrea Will. The patient was actually an undercover police officer, and the entire office visit was tape recorded. During this visit, the patient stated to respondent that she was healthy and had no complaints, but that she was an exotic dancer and desired Xanax. Xanax® is a controlled substance. She stated that her previous doctor, in South Carolina, had given her Xanax. The only reason given for her desire for Xanax® was that her job involved late nights. Respondent then gave the patient a prescription for 60 Xanax®.

3. Respondent next saw the patient on 6/14/93, when she returned to his office after making an appointment. This visit was also tape recorded. At that time, the patient stated that she was healthy and had no complaints, but was out of Xanax, as she had used them all and given some to a friend. The patient stated that she used them to "come down" off of cocaine or "uppers." Respondent then gave the patient a prescription for 90 Xanax®.

On a third visit, respondent told the patient that he was unable to be her physician, because he did not wish to prescribe as she wished, and discharged her from his care.

96 Med 74

4. Respondent did, on and between 3/1/94 and 2/6/96, work full time as a physician for a clinic in Milwaukee. Starting on 11/6/95 and continuing until 1/3/96, one Vicki M. was also employed by the clinic as a medical assistant. Vicki M. was a patient of respondent's during the time she was employed by the clinic. Respondent and the patient began dating no later than January, 1996, and began living together no later than sometime in March, 1996. During this period and the months following, respondent and other physicians not at the clinic provided the following prescriptions to this patient:

PHARMACY	MEDICATION	AMOUNT	DATE	PRESCRIBER
Wilke's	Fioricet	100	11/2/95	Dr. G.
Walgreens	Fioricet	100	11/8/95	Dr. G.
Wilke's	Fioricet	40 (refill)	11/16/95	Dr. G.
Walgreens	Fioricet	100 (refill)	11/18/95	Dr. G.
Wilke's	Fioricet	20 (refill)	11/22/95	Dr. G.
Wilke's	Fioricet	40 (refill)	11/24/95	Dr. G.
Walgreens	Fioricet	20 (refill)	11/26/95	Dr. G.
Tosa	Fioricet #3	30	11/28/95	Dr. Smith
Tosa	Toradol	15	11/28/95	Dr. Smith
Wilke's	Fioricet	40 (refill)	11/30/95	Dr. G.
Drug Emporium	Fioricet/Codeine	25	12/2/95	Dr. Smith
Walgreens	Fioricet	100 (refill)	12/2/95	Dr. G.
Tosa	Fioricet #3	20	12/4/95	Dr. Smith
Tosa	Macrobid	20	12/4/95	Dr. Smith
Tosa	Fioricet #3	10	12/7/95	Dr. Smith
Tosa	Fioricet #3	25	12/8/95	Dr. Smith
Walgreens	Toradol	20	12/10/95	Dr. L.
Walgreens	Fioricet/Codeine	10	12/10/95	Dr. L.
Wilke's	Fioricet	100 (refill)	12/11/95	Dr. G.
Tosa	Fioricet #3	25	12/12/95	Dr. Smith
Walgreens	Compazine	30	12/12/95	Dr. G.
Tosa	Fioricet #3	25	12/15/95	Dr. Smith
Tosa	Toradol	15	12/19/95	Dr. Smith
Walgreens	Fioricet	100 (refill)	12/20/95	Dr. G.
Drug Emporium	Fioricet/Codeine	25	12/22/95	Dr. Smith
Wilke's	Fioricet/Codeine	40	12/26/95	Dr. Smith
Walgreens	Fioricet	100 (refill)	12/30/95	Dr. G.
Walgreens	Fioricet/Codeine	25	1/1/96	Dr. Smith
Drug Emporium	Fioricet/Codeine	19	1/2/96	Dr. Smith

Drug Emporium	Fioricet/Codeine	25	1/5/96	Dr. Smith
Wilke's	Fioricet	50 (refill)	1/5/96	Dr. G.
Wilke's	Fioricet/Codeine	25	1/8/96	Dr. Smith
Drug Emporium	Fioricet/Codeine	25 (refill)	1/9/96	Dr. Smith
Tosa	Toradol	15 (refill)	1/11/96	Dr. Smith
Wilke's	Fioricet	50	1/11/96	Dr. G.
Drug Emporium	Fioricet/Codeine	25	1/13/96	Dr. Smith
Wilke's	Fioricet	50	1/15/96	Dr. G.
Walgreens	Fioricet	100 (refill)	1/18/96	Dr. G.
Wilke's	Fioricet	50	1/26/96	Dr. G.
Wilke's	Fioricet/Codeine	40	1/29/96	Dr. Smith
Walgreens	Fioricet	100 (refill)	2/12/96	Dr. G.
Walgreens	Compazine	30	2/13/96	Dr. G.
Drug Emporium	Fioricet/Codeine	50	2/28/96	Dr. Smith
Drug Emporium	Hydrocodone/APAP 5/500	40	2/28/96	Dr. Smith
Drug Emporium	Lorcet 10/650	30	2/29/96	Dr. Smith
Wilke's	Fioricet/Codeine	20	3/4/96	Dr. Smith
Wilke's	Hydrocodone10/APAP 650	20	3/4/96	Dr. Smith
Tosa	Hydrocodone APAP 10/650	40	3/6/96	Dr. Smith
Walgreens	Compazine	10	3/7/96	Dr. G.
Tosa	Fioricet #3	20	3/14/96	Dr. Smith
Tosa	Fioricet	20	3/14/96	Dr. Smith
Walgreens	Fioricet	100 (refill)	3/14/96	Dr. G.
Wilke's	Fioricet/Codeine	30	3/18/96	Dr. Smith
Wilke's	Hydrocodone10/APAP 650	30	3/18/96	Dr. Smith
Tosa	Hydrocodone APAP 10/650	8	3/21/96	Dr. Smith
Tosa	Cephalexin	20	3/21/96	Dr. Smith
Walgreens	Compazine	30	3/22/96	Dr. G.
Tosa	Hydrocodone APAP 10/650	15	3/25/96	Dr. Smith
Wilke's	Fioricet/Codeine	10	3/27/96	Dr. Smith
Tosa	Hydrocodone APAP 10/650	12	4/4/96	Dr. Smith
Walgreens	Lorcet 10/650	40	4/7/96	Dr. Smith
Walgreens	Fioricet	100 (refill)	4/12/96	Dr. G.
Walgreens	Lorcet 10/650	30	4/15/96	Dr. Smith
Wilke's	Fioricet/Codeine	10	4/15/96	Dr. Smith
Wilke's	Hydrocodone 10/APAP 650	20	4/15/96	Dr. Smith
Tosa	Hydrocodone APAP 10/650	10	4/17/96	Dr. Smith
Tosa	Fioricet #3	10	4/17/96	Dr. Smith

Tosa	Propox-N/APAP	25	4/20/96	Dr. Smith
Tosa	Hydrocodone/APAP7.5-500	25	4/20/96	Dr. Smith
Wilke's	Hydrocodone 10/APAP 650	25	4/22/96	Dr. Smith
Tosa	Hydrocodone APAP 7.5-500	25	4/23/96	Dr. Smith
Wilke's	Fioricet/Codeine	25	4/24/96	Dr. Smith

Dr. G was not an employee of the Clinic. Respondent states that during this entire time, he had no idea that the patient was receiving any medications from any other physician, and that when he first saw the patient she denied seeing any other physician (although Dr. G's chart reflects that she was, in fact, seeing Dr. G at that time). During this time, the only chart note kept by respondent on this patient at the Clinic was a note dated 11/27/95, which diagnosed the patient with pyelonephritis (although there was no urine sample analysis, only a statement that the urine was "clear"), headache (which description was not elaborated or specified) and backache.

Respondent kept another chart at his residence with entries dated 11/15/95, 11/28/95, 12/4/95, 12/8/95, 12/15/95, 12/22/95, 1/2/96, 1/29/96, and 2/15/96. Substantially all of these entries include notations that Fiorinal with codeine was prescribed for the patient. The final note reads: "Still headaches--discussion of counseling, relaxation, biofeedback. Pt states trouble with Inderol in the past. + somatic dysfunction cervicals (?), OMT, needs new approach, should get different physician."

A review of the patient's subsequent records and other information reveals that the patient and respondent lived together on at least an intermittent basis through October 14, 1997, at which time respondent took the patient to a hospital emergency room where she was found to weigh 91 lbs (her height being at least 5'3"), and to be in acute respiratory distress associated with her 4-pack a day smoking habit and chronic obstructive pulmonary disease. At that time, respondent gave the medical history to the admitting physician, and failed to mention any of the patient's history of chronic drug abuse, or her recent emergency room visit to another local hospital for a bleeding gastric ulcer resulting in wedge resection. The patient was subsequently found to have pneumonia, and died eight days later of pseudomonas sepsis and pneumonia with complications.

94 Med 256

5. A review of respondent's outpatient charts revealed some charts which reflect inappropriate prescribing of controlled substances for pain relief, in that some patients were prescribed long term opioids without adequate controls to ensure patient compliance and to prevent. Respondent failed to obtain appropriate consults on these patients, and failed to refer them to pain clinics or other therapies.

6. A review of respondent's inpatient charts revealed several charts which reflect difficulty in diagnosing and treating vascular disease states with heparin boluses and by frequent monitoring of clotting factors. In another case, a patient was incorrectly diagnosed as having chronic anemia, and other possible causes of the patient's condition including colon cancer were not adequately considered. In 1994, respondent resigned his staff privileges from St. Michael's Hospital, Milwaukee, during an investigation of his practice there, and his departure was reported to the National Practitioners Data Bank as an Adverse Action by that institution.

7. In response to the litigation of the formal Complaint filed in this matter, respondent has taken and successfully completed the following:

"Intensive Course in Controlled Substance Management," 40 Category 1 CME hours, Case Western Reserve University School of Medicine, September, 1998.

"Professionals at Risk: Boundaries in Human Service," 6 hours, University of Wisconsin--Madison, Division of Continuing Studies, Professional Development, and Applied Studies, October, 1998

8. Respondent has provided the Board with a statement under the penalty of perjury which establishes that respondent has not practiced medicine in any manner on and between the dates of October 1-8, 1998, October 29-November 9, 1998, November 26-December 6, 1998, and December 12-22, 1998, in that he was involuntarily laid off from his position as an urgent care practitioner and did not see any patient for any reason or otherwise practice medicine on those 43 days.

CONCLUSIONS OF LAW

A. The Wisconsin Medical Examining Board has jurisdiction to act in this matter pursuant to §448.02(3), Wis. Stats. and is authorized to enter into the attached Stipulation pursuant to §227.44(5), Wis. Stats.

B. The conduct of prescribing controlled substances as described in paragraphs 2-4, above, violated § Med 10.02(2)(p), Wis. Adm. Code. This conduct constitutes unprofessional conduct within the meaning of the Code and statutes.

C. Respondent's failure to act more promptly in October, 1997, in the face of an obviously severe medical crisis, and his failure to state relevant medical history known to him at the time of the patient's admission, all as stated in paragraph 4, above, constitute violations of § Med 10.02(2)(h), Wis. Adm. Code. This conduct constitutes unprofessional conduct within the meaning of the Code and statutes.

D. The conduct described in paragraphs 5-6, above, violated § Med 10.02(2)(h), Wis. Adm. Code, and constitute negligence in treatment pursuant to § 448.02(3)(b), Wis. Stats. This conduct constitutes unprofessional conduct and negligence in treatment within the meaning of the Code and statutes.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that the attached Stipulation is accepted.

IT IS FURTHER ORDERED, that the registration to practice medicine and surgery of Marc Lloyd Smith, D.O., is SUSPENDED for thirty days, which suspension shall be deemed to have been served on the dates specified in paragraph 8 of the Findings of Fact, above.

IT IS FURTHER ORDERED, that respondent's license to practice medicine and surgery in the State of Wisconsin is LIMITED in the following respect:

Respondent shall undergo an assessment to evaluate respondent's current abilities to practice medicine at his current practice, given his current patient population (including his nursing home patients) and the facts of this case. The assessment shall be performed under the direction of the University of Wisconsin Continuing Medical Education Program (UW-CME), and may include a cognitive screening assessment, peer interview, and/or physical examination. Respondent shall initiate the assessment process within fifteen (15) days of the date of this order and shall timely complete all portions of the process for which he is responsible (including payment of all required fees), as requested by UW-CME.

If the results of this assessment process show a deficiency in respondent's abilities, respondent shall participate in and successfully complete an educational program established through the UW-CME and based upon on the results of the assessment. The educational program shall include a post-intervention assessment which may be 6-18 months following the completion of the didactic portion of the program. Respondent shall complete this program within the time parameters established by the UW-CME, but no later than two years from the date of the report to the Board of the results of the assessment process.

In the event that UW-CME states that it is unable to develop an educational program which adequately addresses the issues identified in the assessment, the program shall notify the Board of this fact, and the matter shall be returned to the Division of Enforcement for further action. The results of the assessment shall be admissible as evidence in any subsequent proceedings in this action.

Respondent shall be responsible for all costs incurred for the assessment and training under the terms of this Order, and shall timely pay all fees when due.

The UW-CME shall certify to the Board the results of the assessment and educational program upon their completion, and may certify separately the didactic portion of the program and the post-intervention assessment. Upon receipt of certification of completion of the terms and conditions set forth above, the Medical Examining Board shall inform respondent that his obligations under this portion of this order have been satisfied, and that his license is no longer limited in this respect.

If respondent does not successfully complete the program or does not successfully achieve the objectives of the program, this matter shall be referred to the Board to determine any other appropriate discipline for the conduct set out in the Findings of Fact. Respondent and the Division will have the opportunity to present argument to the Board on that issue. The Board and respondent will receive the results of the assessment and respondent's performance in the program, including the post-intervention assessment, as evidence in determining appropriate discipline.

IT IS FURTHER ORDERED, that effective immediately and continuing until (A) two years from the date of the certification by UW-CME of the successful completion of the educational program outlined above (this does not mean the post-intervention assessment), or the certification to the Board that respondent does not need any educational program, and (B) such time as respondent has successfully passed with a score of 75 or more the SPEX or its osteopathic counterpart (respondent may not attempt the exams more than twice without Board permission; this means one attempt on each exam or two attempts on either exam) or has passed a board specialty examination for certification or recertification for a board recognized by the American Board of Medical Specialties, the license to practice medicine and surgery of Marc Lloyd Smith, D.O., is LIMITED as provided in § 448.(3)(e), Wis. Stats., and as follows:

1. Respondent shall practice only under the supervision of a designated Professional Mentor approved by the Board.

2. Respondent shall obtain a Professional Mentor acceptable to the Board. The Professional Mentor shall be the individual responsible for supervision of Respondent's practice of medicine and surgery during the time this Order is in effect. Supervision shall include weekly meetings, review of charts selected by the Professional Mentor (which shall include charts of any nursing home patients), and any other actions deemed appropriate by the Professional Mentor to determine that respondent is practicing in a professional and competent manner. The Professional Mentor may designate another qualified physician or other health care provider acceptable to the Board to exercise the duties and responsibilities of the Professional Mentor in an absence of more than three weeks. In the event that the Professional Mentor is unable or unwilling to continue to serve as Respondent's professional mentor, the Board may in its sole discretion select a successor Professional Mentor. The Professional Mentor shall have no duty or liability to any patient or third party, and the Mentor's sole duty is to the Board.

3. Respondent shall arrange for his Professional Mentor to provide formal written reports to the Department Monitor in the Department of Regulation and Licensing, Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708-8935 on a quarterly basis, as directed by the Department Monitor. These reports shall assess Respondent's work performance.

4. Respondent's Professional Mentor shall immediately report to the Department Monitor any conduct or condition of the Respondent which may constitute unprofessional conduct, a violation of this Order, or a danger to the public or patient.

5. It is the responsibility of Respondent to promptly notify the Department Monitor of any suspected violations of any of the terms and conditions of this Order, including any failures of the Professional Mentor to conform to the terms and conditions of this Order.

6. Respondent shall report to the Board any change of employment status, residence, address or telephone number within five (5) days of the date of a change.

IT IS FURTHER ORDERED, that pursuant to §448.02(4), Wis. Stats., if the Board determines that there is probable cause to believe that respondent has violated any term of this Final Decision and Order, the Board may order that the license and registration of respondent be summarily suspended pending investigation of the alleged violation.

IT IS FURTHER ORDERED, that respondent shall pay the costs of investigating and prosecuting this matter in the amount of \$3,000, before he may renew his registration again.

Dated this February 24, 1999.

WISCONSIN MEDICAL EXAMINING BOARD, by:

by: s/ Ronald Grossman MD

a member of the Board