

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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IN THE MATTER OF

DISCIPLINARY PROCEEDINGS AGAINST

JAMES SCOTT MARKENSON, D.D.S.,  
RESPONDENT.

FINAL DECISION AND ORDER  
LS0005032DEN

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**99 DEN 085**

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

*James Scott Markenson, D.D.S.*  
*9242 N Pelham Parkway*  
*Bayside, WI 53217*

*Wisconsin Dentistry 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. James Scott Markenson (dob: 05/11/57) is and was at all times relevant to the facts set forth herein a dentist licensed in the State of Wisconsin pursuant to license # 3132 . This license was first granted June 24, 1983.
2. Respondent was the subject of discipline by the Dentistry Examining Board in case 87 DEN 068 for diverting a Schedule II controlled substance from patients for his personal use. Respondent was granted full licensure in July, 1995.
3. For purposes of this disciplinary action Respondent does not admit but does not contest that on 11/03/99, he removed the following Schedule II controlled substances from the home of an acquaintance for his personal use: five 5 mg Roxicet® tablets, three 15 mg morphine sulphate tablets and fourteen 30 mg morphine sulphate tablets.
3. An evaluation of Respondent by Professional Recovery Network on December 8, 1999, resulted in a diagnosis of opioid dependence. Therapy was recommended.
4. Respondent has participated in outpatient treatment for his condition.

CONCLUSIONS OF LAW

5. The Wisconsin Dentistry Examining Board has jurisdiction to act in this matter pursuant to §447.07(3)(a) and (L) Wis. Stats. and is authorized to enter into the attached Stipulation pursuant to §227.44(5), Wis. Stats.

6. The conduct described in paragraphs 2 through 5, above, violated § DE 5.02(1), (4), (6) and (16) Wis. Adm. Code. Such conduct constitutes unprofessional conduct 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 effective on the date of this Order, the license of James Scott Markenson to practice as a dentist in the state of Wisconsin is SUSPENDED for a period of not less than five (5) years.

The suspension is hereby STAYED for a period of three months, conditioned upon compliance with the conditions and limitations outlined below.

- a. Respondent may apply for consecutive three (3) month extensions of the stay of suspension, which shall be granted upon acceptable demonstration of compliance with the conditions and limitations imposed on the respondent for rehabilitation and practice during the prior three (3) month period.
- b. The Board may without hearing deny an application for extension of the stay, or commence other appropriate action, upon receipt of information that respondent has violated any of the terms or conditions of this Order. If the Board denies the petition by the respondent for an extension, the Board shall afford an opportunity for hearing in accordance with the procedures set forth in ch. RL 1, Wis. Adm. Code upon timely receipt of a request for hearing.
- c. Upon a showing by respondent of successful compliance for a period of five years of active practice with the terms of this order and compliance with all other terms of this Order, the Board may grant a petition by the Respondent for return of full licensure. (See ¶25, below.)

IT IS FURTHER ORDERED, that the license to practice of respondent shall be LIMITED as follows:

### **REHABILITATION, MONITORING AND TREATMENT**

#### **Treatment Required**

2. Respondent shall continue successful participation in all components of a drug and alcohol treatment program at a treatment facility acceptable to the Board, as respondent's Supervising Health Care Provider shall determine to be appropriate for respondent's rehabilitation.

Therapy. The treatment program shall include and respondent shall participate in individual therapy sessions for the first year of the stayed suspension upon a schedule as recommended by her supervising physician, but not less than once weekly. Such therapy shall be conducted by the supervising physician or therapist, or another qualified physician or therapist as designated by the supervising physician or therapist and acceptable to the Board. After the first year of stayed suspension, this requirement for therapy sessions may be modified only upon written petition, and a written recommendation by the supervising physician or therapist expressly supporting the modifications sought. A denial of such petition for modification shall not be deemed a denial of the license under §§ 227.01(3) or 227.42, Wis. Stats., or ch. RL 1, Wis. Adm. Code, and shall not be subject to any right to further hearing or appeal.

#### **Sobriety**

3. Respondent shall abstain from all personal use of controlled substances as defined in Sec. 161.01(4), Stats. except when necessitated by a legitimate medical condition and then only with the prior approval of the Supervising Health Care Provider.

4. Respondent shall abstain from all personal use of alcohol.

5. Respondent shall in addition refrain from the consumption of over-the-counter medications or other substances which may mask consumption of controlled substances or of alcohol, or which may create false positive screening results, or which may interfere with respondent's treatment and rehabilitation. Respondent shall report all medications and drugs, over-the-counter or prescription, taken by respondent to the Supervising Health Care Provider within 24 hours of ingestion or administration, and shall identify the person or persons who prescribed, dispensed, administered or ordered said medications or drugs. Within 24 hours of a request by the Supervising Health Care Provider or the Board or its designee, Respondent shall provide releases which comply with state and federal laws authorizing release of all health care records by the person who

prescribed, dispensed, administered or ordered this medication for respondent. These releases shall also authorize the Supervising Health Care Provider, the Board or its designee to discuss the Respondent's health care with the person who prescribed, dispensed, administered or ordered this medication. The terms of this paragraph shall not be deemed to modify or negate Respondent's obligations as set forth in this Order.

### **Department Monitor**

6. The Department Monitor is the individual designated by the Board as its agent to coordinate compliance with the terms of this Order, including receiving and coordinating all reports and petitions, and requesting additional monitoring and surveillance. The Department Monitor may be reached as follows:

Department Monitor

Department of Regulation Division of Enforcement

P.O. Box 8935

Madison, WI 53708-8935

FAX (608) 266-2264

TEL. (608) 261-7938

### **Releases**

7. Respondent shall provide and keep on file with the Supervising Health Care Provider, all treatment facilities and personnel, laboratories and collections sites current releases which comply with state and federal laws authorizing release of all urine, blood and hair specimen screen results and medical and treatment records and reports to, and permitting the Supervising Health Care Provider and all treating physicians and therapists to disclose and discuss the progress of respondent's treatment and rehabilitation with the Board or any member thereof, or with any employee of the Department of Regulation and Licensing acting under the authority of the Board. Copies of these releases shall be filed simultaneously with the Department Monitor.

### **Drug and Alcohol Screens**

8. Respondent shall supply on at least a weekly basis, random monitored urine, blood or hair specimens as the Supervising Health Care Provider shall direct. The Supervising Health Care Provider (or designee) shall request the specimens from Respondent and these requests shall be random with respect to the hour of the day and the day of the week. In addition, the Board or its designee may at any time request a random monitored urine, blood or hair specimen from Respondent by directing the Department Monitor in the Department of Regulation and Licensing, Division of Enforcement to contact Respondent and request Respondent provide a specimen. To prevent the respondent's ability to predict that no further screens will be required for a given period (because the minimum frequency for that period has been met), the program of monitoring shall require respondent to provide in each quarter at least two (2) random screenings in excess of the minimums specified in this Order.

9. Respondent shall keep the Supervising Health Care Provider informed of Respondent's location and shall be available for contact by the Supervising Health Care Provider at all times.

10. All requested urine, blood or hair specimens shall be provided by Respondent within five (5) hours of the request for the specimen. All urine specimen collections shall be a split sample accomplished by dividing urine from a single void into two specimen bottles. The total volume of the split sample shall be at least 45 ml. of urine. All split sample urine specimens, blood specimens and hair specimens shall be collected, monitored and chain of custody maintained in conformity with the collection, monitoring and chain of custody procedures set forth in 49 CFR Part 40. Urine specimen collections shall be by direct observation if:

- a. The Respondent must provide an additional specimen because Respondent's initial specimen was outside of the normal temperature range (32.5 - 37.7 C/90.5 - 99.8 F) and respondent refuses to have an oral body temperature measurement or respondent does provide an oral body temperature measurement and the reading varies by more than 1 C/1.8 F from the temperature of the urine specimen;
- b. Respondent's last provided specimen was determined by the laboratory to have a specific gravity of less than 1.003 and creatinine concentration below 0.2 g/l;
- c. The collection site person observes Respondent acting in such a manner to provide reason to believe that Respondent may have attempted or may attempt to substitute or adulterate the specimen. The collection site person, if he or she believes that the initial urine specimen may have been adulterated or a substitution made, shall direct Respondent to provide an additional observed urine specimen;
- d. The last provided specimen resulted in a positive or suspected positive test result for the presence of controlled substances; or
- e. The Board (or any member of the Board), the Department Monitor, or Respondent's Supervising Health Care Provider directs that the urine specimen collection be by direct observation.

If either of the above conditions (a) or (c) requires collection of an additional observed urine specimen, the collection of the subsequent specimen shall be accomplished within the required five (5) hours of the request for the initial specimen; the collection of the initial specimen shall not satisfy the requirement that the urine specimen be collected within five (5) hours of

the request for the initial specimen.

11. The treatment program in which Respondent is enrolled shall at all times utilize a United States Department of Health and Human Services certified laboratory for the analysis of all specimens collected from Respondent.

12. The treatment program in which Respondent is enrolled shall utilize only those urine, blood and hair specimen collection sites for collection of Respondent's urine, blood or hair specimens as comply with the United States Department of Transportation collection and chain of custody procedures set forth in 49 CFR Part 40.

13. The Supervising Health Care Provider, treatment facility, laboratory and collection site shall maintain a complete and fully documented chain of custody for each urine, blood or hair specimen collected from Respondent.

14. Every urine specimen collected from Respondent shall be analyzed at the time of collection for tampering by measurement of the temperature of the specimen and the oral temperature of Respondent. Every urine specimen collected from Respondent shall be further analyzed at the laboratory for tampering by measuring the creatinine concentration and the specific gravity of the specimen. The laboratory may at its discretion or at the direction of a Supervising Health Care Provider or the Board or any member thereof conduct additional tests to evaluate the urine specimen for tampering including, but not limited to, pH, color and odor.

15. Every urine, blood or hair specimen collected from Respondent shall be analyzed for alcohol, amphetamine, cocaine, opiates, phencyclidine, marijuana, methadone, propoxyphene, methaqualone, barbiturates, benzodiazepines or the metabolites thereof. The Board or its designated agent may at any time direct that screens for additional substances and their metabolites be conducted by scientific methods and instruments appropriate to detect the presence of these substances. The laboratory shall conduct confirmatory tests of positive or suspected positive test results by appropriate scientific methods and instruments including, but not limited to, gas chromatography and mass spectrometry.

16. All urine, blood or hair specimens remaining after testing shall be maintained in a manner necessary to preserve the integrity of the specimens for at least seven (7) days; and all positive or suspected positive urine, blood or hair specimens remaining after testing shall be so maintained for a period of at least one (1) year. The Supervising Health Care Provider or the Board or any member thereof may direct that the urine, blood or hair specimens be maintained for a longer period of time.

17. For the purpose of further actions affecting Respondent's license under this Order, it shall be presumed that all confirmed positive reports are valid. Respondent shall have the burden of proof to establish that the positive report was erroneous and that the respondent's specimen sample did not contain alcohol or controlled substances or their metabolites.

18. If any urine, blood or hair specimen is positive or suspected positive for any controlled substances or alcohol, Respondent shall promptly submit to additional tests or examinations as the Supervising Health Care Provider shall determine to be appropriate to clarify or confirm the positive or suspected positive urine, blood or hair specimen test results.

#### **Required Reporting by Supervising Health Care Provider, and Laboratories**

19. The Supervising Health Care Provider shall report immediately to the Department Monitor in the Department of Regulation and Licensing, Division of Enforcement by FAX or telephonic communication: any failure of Respondent to provide a urine, blood or hair specimen within five (5) hours from the time it was requested; or of any inability to locate Respondent to request a specimen. The laboratory shall immediately report all urine specimens suspected to have been tampered with and all urine, blood or hair specimens which are positive or suspected positive for controlled substances or alcohol to the Department Monitor, and to the Supervising Health Care Provider.

20. The laboratory shall within 48 hours of completion of each drug or alcohol analysis mail the report from **all** specimens requested of Respondent under this Order to the Department Monitor (regardless of whether the laboratory analysis of the specimen was positive or negative for controlled substances, their metabolites or alcohol). Each report shall state the date and time the specimen was requested; the date and time the specimen was collected; the results of the tests performed to detect tampering; and the results of the laboratory analysis for the presence of controlled substances and alcohol.

21. The Supervising Health Care Provider shall submit 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 progress in the drug and alcohol treatment program and summarize the results of the urine, blood or hair specimen analyses. The Supervising Health Care Provider shall report immediately to the Department Monitor [Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708-8935, FAX (608)266-2264, telephone no. (608)267-7938] any violation or suspected violation of the Board's Final Decision and Order.

#### **Required reporting by Respondent**

22. Respondent is responsible for compliance with all of the terms and conditions of this Final Decision and Order. 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 Supervising Health Care Provider, treatment facility, laboratory or collection sites to conform to the terms and conditions of this Order.

#### **Facility approval**

23. If the Board determines that the Supervising Health Care Provider, treatment facility, laboratory or collection sites have failed to satisfy the terms and conditions of this Final Decision and Order, the Board may, at its sole discretion, direct that Respondent continue treatment and rehabilitation under the direction of another Supervising Health Care Provider, treatment facility, laboratory or collection site which will conform to the terms and conditions of this Final Decision and Order.

### **PETITIONS FOR MODIFICATION OF TERMS**

24. Respondent may petition the Board for modification of the terms of this limited license. Any such petition shall be accompanied by a written recommendation from respondent's Supervising Health Care Provider expressly supporting the

specific modifications sought. Denial of the petition in whole or in part shall not be considered a denial of a license within the meaning of Sec. 227.01(3)(a), Stats. and Respondent shall not have a right to any further hearings or proceedings on any denial in whole or in part of the petition for modification of the limited license.

After five years of continuous active professional practice under this Order and without relapse, and upon recommendation of the Supervising Health Care Provider, respondent may petition the Board for a termination of all limitations on the license, and restoration of an unlimited license. Such restoration shall be in the sole discretion of the Board, and denial of the petition in whole or in part shall not be considered a denial of a license within the meaning of Sec. 227.01(3)(a), Stats. and Respondent shall not have a right to any further hearings or proceedings on any denial in whole or in part of the petition for termination of the limitations and restoration of unlimited licensure.

#### **EXPENSES OF TREATMENT AND MONITORING**

25. Respondent shall be responsible for all costs and expenses incurred in conjunction with the monitoring, screening, supervision and any other expenses associated with compliance with the terms of this Order.

#### **PRACTICE LIMITATIONS**

##### **Controlled Substance Access**

26. Respondent shall refrain from access to or the administration of Schedule II and Schedule III controlled substances in his work setting until such time as access or administration is approved by the Board.

##### **Reporting Required**

27. Respondent shall arrange for his employer 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.

##### **Change in Address or Work Status**

28. 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.

29. Respondent shall furnish a copy of this Order to all present employers immediately upon issuance of this Order, and to any prospective employer when respondent applies for employment as a health care provider.

**Violation of any of the terms of this Order shall be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Respondent's license; the Board in its discretion may in the alternative deny a stay of suspension of the license or impose additional conditions and limitations or other discipline.**

This Order shall become effective upon the date of its signing.

WISCONSIN DENTISTRY EXAMINING BOARD

by:

Mark Curran, DDS

May 3, 2000

Board Chair

Date