FILE COPY

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

LS9401261MED

ALAN F. WENTWORTH, M.D.,

Respondent

FINAL DECISION AND ORDER

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Alan F. Wentworth, M.D.
720 Van Buren
Green Bay, WI 54301

State of Wisconsin
Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing was held in the above-captioned matter on October 4, 1994 and October 26, 1994. The respondent, Alan F. Wentworth, M.D., appeared personally and by his attorney, Steven J. Caulum, BELL, METZNER, GIERHART & MOORE, S.C., Lawyers, 44 East Mifflin Street, P.O. Box 1807, Madison, Wisconsin 53701-1807. The complainant appeared by attorney Arthur Thexton, Department of Regulation and Licensing, Division of Enforcement, 1400 East Washington Avenue, P.O. Pox 8935, Madison, Wisconsin 53708. A transcript of the hearing was prepared and filed, the last day of which was received on November 28, 1994. The administrative law judge filed his Proposed Decision on March 13, 1995. The parties appeared before the board on April 26, 1995, for oral arguments on respondent's objections, and the board initially considered the matter on that date. The parties again appeared before the board on May

25, 1995, to present oral arguments on the question of assessment of costs, and the board considered that aspect of the matter on that date.

Based upon the entire record herein, the Medical Examining Board makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Alan F. Wentworth, M.D., (D.O.B. 7/2/31), is licensed to practice medicine and surgery in the state of Wisconsin, pursuant to license number 17186. Dr. Wentworth's most recent address on file with the Department of Regulation and Licensing is 720 Van Buren, Green Bay, Wisconsin 54301.

2. On June 6, 1989, Dr. Wentworth performed an anterior cervical fusion upon Susan, a 44 year old patient. The surgery was intended to be performed at the C5-6 level. Instead, the procedure was performed by Dr. Wentworth at the C4-5 level, through error.

3. There is no evidence that Dr. Wentworth was negligent in preparing the patient's neck site, including marking the appropriate level with a needle and cautery, obtaining the bone graft material, removing the cervical disc and/or encroachments on the spinal canal or peripheral nerve root areas, or the fusion of the interspace with the bone graft, although this was done at the unintended level.

4. Following the fusion process, and while the patient was still under anesthesia and on the operating table, an x-ray was taken of the patient's neck. This is standard procedure in such operations, and allows the surgeon to determine the depth of the fusion plug, the alignment of the vertebral bodies, and that the procedure was performed at the proper level.

5. Dr. Wentworth examined the x-ray taken of the patient, and failed to notice that the procedure was performed at the incorrect level. Later review of the x-ray demonstrates that this could have been determined at the time, but was not. This omission, and only this omission, constitutes negligence in treatment pursuant to sec. 448.02(3), Stats.

6. Since the discovery of the difficulty with Susan's case, Dr. Wentworth has altered his procedure in these kinds of surgeries to mark the interspace to be fused by sharply opening the proper disc with a scalpel while the marking needle is in place, when the neck site is prepared.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this proceeding pursuant to ch. 448, Stats.

2. The failure of Dr. Wentworth to notice that the surgical procedure was performed at an incorrect level upon examination of the post-operative x-ray constituted negligence in treatment pursuant to sec. 448.02(3), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that Alan F. Wentworth be, and hereby is, reprimanded.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed upon the respondent, Alan F. Wentworth, M.D., pursuant to sec. 440.22, Stats.

EXPLANATION OF VARIANCE

The board has accepted the ALJ's proposed Findings of Fact and Conclusions of Law in their entirety. The board has not, however, accepted the ALJ's recommendation that Dr. Wentworth submit to a remedial training program, and instead orders that he be reprimanded.

The evidence in this record clearly establishes that imposition of the recommended discipline is not appropriate. First, Dr. Wentworth, in the procedure in question in this case, utilized a technique which is a standard method used by competent neurosurgeons to mark the correct spinal level in carrying out cervical fusions. Second, it was undisputed that this was the first instance of failure to fuse the correct spinal level in the entire 30 years of Dr. Wentworth's career. Third, after the incident, Dr. Wentworth immediately and voluntarily implemented changes in his procedures to establish a more reliable method of marking the proper spinal level. Fourth, in the six years since the incident in question, there is no evidence that another similar error has occurred. Given these factors, the board concludes that to require as discipline for the admitted negligence in his treatment of the affected patient imposition on Dr. Wentworth of the completion of an extensive risk management assessment program would be superfluous and would therefore serve no useful purpose.

Throughout the course of the formal proceedings in this matter, respondent's position, as set forth in his Objections to the Proposed Decision, was that no discipline should be imposed in this case. Nonetheless, respondent now argues that because he had offered at a time prior to the hearing in the matter a proposed disposition of the matter which paralleled what the board eventually ordered, respondent should be considered the prevailing party for the purposes of determining whether costs of the proceeding should be assessed against him. The specific proposal, as set forth in Mr. Caulum's letter of July 30, 1993, which is a part of the record herein, states in part, "As we discussed a couple days ago, it is my request that you consider the option, where the disposition of this file is concerned, of concluding it with a 'letter of concern'."

Had respondent in fact contended at hearing that a reprimand was the appropriate discipline to be imposed in light of the stipulated finding that Dr. Wentworth had engaged in negligent treatment, then there could be little question but that the board's final decision would establish him as the prevailing party. Even if respondent had expressed a willingness to stipulate to a reprimand prior to hearing, it could at least be argued that he had eventually prevailed. A "letter of concern,"

however is nothing more than an informal notification to a licensee under investigation that, while a pending investigation of alleged misconduct is being closed without formal action, the nature of the alleged conduct is of concern to the board. The board, in issuing a letter of concern, is thus not disciplining the recipient of such a letter, nor could it be so construed. An expression of concern is not a form of discipline which the board has statutory authority to impose, and it could not therefore be deemed as such.

Based on the foregoing, the respondent may not in any sense be concluded to be the prevailing party and, under sec. 440.22(2), Stats. the board may exercise its discretion to assess the costs of the proceeding against him. The board concludes that it is appropriate to do so.

Dated this 5th day of June, 1995.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

by W.R. Schwartz, M.D.
W.R. Schwartz, M.D.
Secretary

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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST ALAN F. WENTWORTH, M.D., RESPONDENT.	: : : : : :	AFFIDAVIT OF COSTS OF OFFICE OF BOARD LEGAL SERVICES (Case No. LS9401261MED)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Donald R. Rittel, being first duly sworn on oath, deposes and states as follows:

1. Your affiant is an attorney licensed to practice law in the state of Wisconsin, and is employed by the Wisconsin Department of Regulation and Licensing, Office of Board Legal Services.

2. In the course of his employment, your affiant was assigned as the administrative law judge in the above-captioned matter.

3. Set out below are the actual costs of this proceeding for the Office of Board Legal Services in this matter:

ADMINISTRATIVE LAW JUDGE EXPENSE
Donald R. Rittel

DATE	ACTIVITY	TIME SPENT
2/21/94	Conducting and preparing memo on prehearing conference	0.50 hours
3/16/94	Conducting and preparing memo on prehearing conference	0.50 hours
10/4/94	Presiding over Hearing	2.50 hours
10/26/94	Presiding over Hearing	2.00 hours
	Reviewing Record; Preparing Proposed Decision	16.00 hours
	TOTAL TIME SPENT	21.50 hours

Total administrative law judge expense for Donald R. Rittel,
21.50 hours @ $ 43.814 per hour, salary and benefits: **$ 942.00**

REPORTER EXPENSE
Magne-Script

ACTIVITY	COST
Attending and transcribing 10/4/94 Hearing	$ 521.00
Attending and transcribing 10/26/94 Hearing	256.50

Total reporter expense for Magne-Script: **$ 777.50**

TOTAL ASSESSABLE COSTS FOR OFFICE OF BOARD LEGAL SERVICES **$ 1,719.50**

Donald R. Rittel
Administrative Law Judge

Sworn to and subscribed before me
this 13th day of March 1995.

John N. Schweitzer
Notary Public, State of Wisconsin
My Commission is Permanent

alj\costs\wentwth

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	**AFFIDAVIT OF COSTS**
ALAN F. WENTWORTH, M.D., RESPONDENT.	:	92 MED 38

STATE OF WISCONSIN)
COUNTY OF DANE)

I, Arthur Thexton, being on affirmation, say:

1. That I am an attorney licensed in the state of Wisconsin and am employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement;

2. That in the course of those duties I was assigned as a prosecutor in the above-captioned matter; and

3. That set out on the attached record are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

Arthur Thexton, Prosecuting Attorney

Subscribed to and affirmed before me this 1st day of June, 1995.

Peter O. Sammata
Notary Public
My Commission is permanent.

akt
202

STATE OF WISCONSIN
Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
Madison, WI 53708-8935

Alan F. Wentworth M.D.
92 MED 48

05/25/95
2N

			HOURS
02/24/92			
	AKT	Screen case for opening.	.30
09/23/92			
	INV	Telephone calls, memos of same, letters requesting records.	1.50
12/02/92			
	INV	Letter to Board Advisor with records and summary.	.50
	INV	Conference with Board Advisor, present case to MEB, memos of same.	1.00
01/25/93			
	INV	Review file, organize materials.	2.00
02/24/93			
	INV	Dictate summary memo for prosecutor, prepare and deliver file.	1.00
	AKT	Review case materials as prepared by investigator, approve PIC status.	.30
03/04/93			
	AKT	Letter to respondent with proposed stipulation.	2.00
03/16/93			
	AKT	Telephone conference with Atty Caulum.	.30
03/19/93			
	AKT	Received and reviewed correspondence from Atty Caulum, file.	.20
03/29/93			
	AKT	Telephone conference with Atty Caulum.	.30
03/30/93			
	AKT	Conference with Atty Caulum, leave message for Dr. Thos. Meyer.	.60
05/05/93			
	AKT	Telephone conference with Atty Caulum.	.30

		HOURS
06/02/93		
	AKT Received and reviewed correspondence from Atty Caulum, file.	.30
06/09/93		
	AKT Letter to Board Advisor.	.50
07/13/93		
	AKT Telephone conference with Board Advisor, leave message for Atty Caulum.	.30
07/15/93		
	AKT Telephone conference with Atty Caulum, letter with new stipulation proposal to Atty Caulum.	1.00
07/30/93		
	AKT Received and reviewed correspondence from Atty Caulum, file.	.40
08/02/93		
	AKT Letter to Board Advisor with materials.	.40
08/20/93		
	AKT Telephone conference with Board Advisor.	.30
09/23/93		
	AKT Telephone conference with Atty Caulum.	.30
10/19/93		
	AKT Telephone conference with Atty Caulum, letter to Board Advisor.	.70
12/17/93		
	AKT Change Board Advisor, letter to new Board Advisor with file materials.	1.00
12/20/93		
	AKT Receive message from Board Advisor.	.10
12/21/93		
	AKT Telephone conference with Atty Caulum, letter to same.	.50
01/13/94		
	AKT Received and reviewed correspondence from Atty Caulum, telephone conference with Board Advisor, draft complaint.	1.00
01/20/94		
	AKT Obtain ALJ assignment information, sign and issue Complaint and Notice of Hearing, submit for	

		HOURS
	service.	.40
01/25/94		
AKT	Received and reviewed correspondence from Atty Caulum (Notice of Appearance), file same.	.10
02/02/94		
AKT	Received and reviewed correspondence from Atty Caulum (Answer), file, mark pleadings.	.50
02/07/94		
AKT	Received and reviewed correspondence from ALJ Rittel, file.	.10
02/14/94		
AKT	Received and reviewed correspondence from Atty Caulum, file.	.10
02/21/94		
AKT	Review file, pretrial conference with ALJ Rittel and Atty Caulum.	.40
AKT	Received and reviewed correspondence from ALJ Rittel (Pretrial memorandum), file.	.10
03/16/94		
AKT	Pretrial conference with ALJ Rittel and Atty Caulum.	.40
03/25/94		
AKT	Telephone conference with Dr. Levin, prepare packet and mail.	.50
03/28/94		
AKT	Telephone conference with Dr. Levin, leave message for Board Advisor.	.30
04/15/94		
AKT	Telephone conference with Dr. Bogdanowicz, prepare letter and packet and mail.	.40
04/21/94		
AKT	Telephone conference with Dr. Bogdanowicz, telephone conference with Board Advisor, leave message for Atty Caulum.	.80
04/27/94		
AKT	Review file, leave message for Atty Caulum.	.20
06/07/94		
AKT	Received and reviewed correspondence from Atty Caulum, telephone conference with Dr.	

			HOURS
		Bogdanowicz's office, draft stipulation for trial.	1.00
06/10/94			
	AKT	Letter to Atty Caulum with proposed trial stipulation.	1.30
06/24/94			
	AKT	Received and reviewed correspondence from Atty Caulum, file.	.10
06/30/94			
	AKT	Receive message from Atty Caulum. Review file. Leave message for Atty Caulum re: Dr. Meyer as witness.	.60
07/27/94			
	AKT	Received and reviewed correspondence from Atty Caulum, file.	.10
08/08/94			
	AKT	Received and reviewed correspondence from Atty Caulum, file.	.10
08/19/94			
	AKT	Received and reviewed correspondence from Atty Caulum, file.	.10
08/25/94			
	AKT	Received and reviewed correspondence from Atty Caulum, file.	.10
09/01/94			
	AKT	Letter to ALJ (Witness List), complete review of file.	1.00
09/07/94			
	AKT	Received and reviewed correspondence from Atty Caulum re: witness list to ALJ Rittel.	.10
09/09/94			
	AKT	Telephone conference with Atty Caulum, make appointment with Dr. Thos. Meyer.	.40
09/14/94			
	AKT	Traveled to Dr. Meyer's office, meet with Dr. Meyer and Atty Caulum, return.	2.00
09/28/94			
	AKT	Telephone conference with Atty Caulum. Pretrial conference with ALJ Rittel and Atty Caulum.	.60

		HOURS
10/03/94		
AKT	Conduct trial.	5.00
10/04/94		
AKT	Letter to Board Advisor re: trial and offer by respondent.	.50
10/07/94		
AKT	(Date approximate) Receive message from Board Advisor re: declining offer by respondent.	.10
10/20/94		
AKT	Received and reviewed correspondence from ALJ Rittel re: continued trial date.	.10
10/26/94		
AKT	Conduct trial.	2.00
03/13/95		
AKT	Received and reviewed proposed decision from ALJ Rittel.	.40
03/23/95		
AKT	Telephone conference with Atty Pliner. Provide transcripts on loan, receive and refile returned transcripts.	.40
04/03/95		
AKT	Received and reviewed Objections to ALJ recommendation from Atty Caulum. Review file, draft response.	2.00
04/05/95		
AKT	Received and reviewed correspondence from Atty Caulum, file, te Caulum, file, telephone conference with Atty Caulum.	.30
04/12/95		
AKT	Received and reviewed correspondence from Atty Caulum to MEB, file.	.10
04/18/95		
AKT	Received and reviewed correspondence from MEB re: Oral Argument time, file.	.10

			HOURS	
04/25/95				
	AKT	Review file, prepare for oral argument.	1.00	
04/26/95				
	AKT	Prepare for and conduct oral argument, convey decision to Atty Caulum.	2.00	
05/03/95				
	AKT	Received and reviewed correspondence from MEB re: costs issue.	.10	
05/09/95				
	AKT	Received and reviewed correspondence from Atty Caulum re: costs argument, letter to MEB.	.40	
05/15/95				
	AKT	Estimate costs at Atty Berndt's request, fax Atty Berndt's memo to Atty Caulum.	.50	
05/22/95				
	AKT	Received and reviewed correspondence from Atty Caulum, file, leave message for Atty Caulum.	.20	
05/24/95				
	AKT	Review file, prepare for costs argument.	1.00	
05/25/95				
	AKT	Conduct costs argument to MEB.	.50	
	AKT	Leave message for Atty Caulum re: costs decision. Prepare costs statement.	2.00	
			---	---
		FOR CURRENT SERVICES RENDERED	47.60	1825.60
11/06/92		Charges for Medical Records		6.50
05/15/94		Expert Witness Bill (Dr. Bogdanowicz)		112.00

		TOTAL COSTS		118.50
		BALANCE DUE		$1,944.10
				========

The above records are kept in the ordinary course of business by the Division and are assessable under s.440.22, Wis. Stats. Hourly rates of $41/attorney and $20/investigator are set by DOE policy.

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review, The Times Allowed For Each, And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

THE STATE OF WISCONSIN MEDICAL EXAMINING BOARD.
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708.

The Date of Mailing this Decision is:

JUNE 7, 1995.

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST ALAN F. WENTWORTH, M.D., RESPONDENT.	: : : : :	NOTICE OF FILING PROPOSED DECISION LS9401261MED

TO: Steven J. Caulum, Attorney
Bell, Metzner, Gierhart & Moore, S.C.
44 East Mifflin Street
P.O. Box 1807
Madison, WI 53701-1807
Certified P 195 982 030

Arthur Thexton, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Medical Examining Board by the Administrative Law Judge, Donald R. Rittel. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Medical Examining Board, Room 178, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before April 3, 1995. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Medical Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Medical Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 13th day of March, 1995.

Donald R. Rittel

Donald R. Rittel
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	PROPOSED DECISION
ALAN F. WENTWORTH, M.D., RESPONDENT.	:	(Case No. LS9401261MED)

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Alan F. Wentworth, M.D.
720 Van Buren
Green Bay, WI 54301

State of Wisconsin
Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing was held in the above-captioned matter on October 4, 1994 and October 26, 1994. The respondent, Alan F. Wentworth, M.D., appeared personally and by his attorney, Steven J. Caulum, BELL, METZNER, GIERHART & MOORE, S.C., Lawyers, 44 East Mifflin Street, P.O. Box 1807, Madison, Wisconsin 53701-1807. The complainant appeared by attorney, Arthur Thexton, Department of Regulation and Licensing, Division of Enforcement, 1400 East Washington Avenue, P.O. Pox 8935, Madison, Wisconsin 53708. A transcript of the hearing was prepared and filed, the last day of which was received on November 28, 1994.

Based upon the entire record herein, the administrative law judge recommends that the Medical Examining Board adopt as its final decision in this proceeding the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Alan F. Wentworth, M.D., (D.O.B. 7/2/31), is licensed to practice medicine and surgery in the state of Wisconsin, pursuant to license number 17186. Dr. Wentworth's most recent address on file with the Department of Regulation and Licensing is 720 Van Buren, Green Bay, Wisconsin 54301.

2. On June 6, 1989, Dr. Wentworth performed an anterior cervical fusion upon Susan, a 44 year old patient. The surgery was intended to be performed at the C5-6 level. Instead, the procedure was performed by Dr. Wentworth at the C4-5 level, through error.

3. There is no evidence that Dr. Wentworth was negligent in preparing the patient's neck site, including marking the appropriate level with a needle and cautery, obtaining the bone graft material, removing the cervical disc and/or encroachments on the spinal canal or peripheral nerve root areas, or the fusion of the interspace with the bone graft, although this was done at the unintended level.

4. Following the fusion process, and while the patient was still under anesthesia and on the operating table, an x-ray was taken of the patient's neck. This is standard procedure in such operations, and allows the surgeon to determine the depth of the fusion plug, the alignment of the vertebral bodies, and that the procedure was performed at the proper level.

5. Dr. Wentworth examined the x-ray taken of the patient, and failed to notice that the procedure was performed at the incorrect level. Later review of the x-ray demonstrates that this could have been determined at the time, but was not. This omission, and only this omission, constitutes negligence in treatment pursuant to sec. 448.02(3), Stats.

6. Since the discovery of the difficulty with Susan's case, Dr. Wentworth has altered his procedure in these kinds of surgeries to mark the interspace to be fused by sharply opening the proper disc with a scalpel while the marking needle is in place, when the neck site is prepared.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this proceeding pursuant to ch. 448, Stats.

2. The failure of Dr. Wentworth to notice that the surgical procedure was performed at an incorrect level upon examination of the post-operative x-ray constituted negligence in treatment pursuant to sec. 448.02(3), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Alan F. Wentworth, M.D., to practice medicine and surgery in the state of Wisconsin shall be, and hereby is limited in the following respect: respondent shall, within 30 days from the date of the Final Decision and Order of the

board, enter the risk management assessment program of the University of Wisconsin School of Medicine, Continuing Medical Education department, as outlined below. Respondent shall cooperate fully and promptly with the program, and complete any educational program recommended during or resulting from the assessment. Respondent shall pay all costs associated with the assessment, and program, and shall complete the program within fifteen months of its commencement.

The risk management assessment program shall include:

A. An on-site assessment of the physician's office practices and procedures (and those of the hospital, in the discretion of the assessors), to include the office's layout, personnel issues, procedures, medical records, informed consent procedures, follow up systems, drug and prescription policies, and such other relevant practices and procedures as the assessors may determine are appropriate for review, in their professional judgment and discretion. Respondent and respondent's staff shall cooperate fully with the assessors in this process, and respondent shall request that colleagues cooperate fully in this process.

B. A report of the assessment shall be written by the assessors, including (if indicated) a reasonable proposed education plan which shall include a review of the objectives, educational requirements, expected behavior changes for both physician and staff, time-line, and budget. Respondent shall forthwith undertake the educational program and implement the other recommendations of the assessors. If respondent disagrees with the reasonableness of the program or recommendations, the board advisor assigned to this case shall determine the reasonableness of the disputed aspects of the program or recommendations, and that decision shall be final.

C. Respondent shall comply with the time line of the program, and will respond within 14 days to the written follow-up questionnaires to be sent approximately 3 and 6 months following the initial site visit. Respondent shall cooperate fully with the final site visit which will take place approximately 12 months after the initial site visit.

D. Following the 12 month site visit, the assessors shall prepare a final assessment which sets forth respondent's compliance with the objectives of the program (including evidence that all recommended changes in office procedures and practices have been implemented) to the extent that respondent has reduced the risk in practice to a level consistent with the public's legitimate expectations of safety and the standards of practice of the profession.

E. Upon successful completion of the program, the UW-CME program shall certify to the board and respondent that respondent has met the objectives of the program. The staff of the board shall then reissue an unlimited license to respondent, without further action by the board.

IT IS FURTHER ORDERED, that 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 an appropriate discipline for the conduct set out in the Findings of Fact.

Respondent will have the opportunity to present argument to the Board on that issue. The Board will receive the results of the assessment as evidence in determining appropriate discipline.

FURTHERMORE, IT IS ORDERED that the assessable costs of this proceeding be imposed upon the respondent, Alan F. Wentworth, M.D., pursuant to sec. 440.22, Stats.

OPINION

The Findings of Fact and Conclusions of Law in this decision are based upon a written stipulation entered into between the parties and submitted at the hearing as Exhibit #1. The only issue contested at hearing and the subject of this opinion is the appropriate discipline, if any, to be imposed against Dr. Wentworth. In this regard, the parties recognized that the interrelated purposes for applying disciplinary measures are: 1) to promote the rehabilitation of the licensee, 2) to protect the public, and 3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. MacIntyre*, 41 Wis. 2d 481 (1969).

The stipulation in this case indicates that Dr. Wentworth was negligent in his reading or interpretation of an x-ray taken after he had performed an anterior cervical fusion upon a patient. The parties agree that had Dr. Wentworth correctly analyzed the x-ray, he would have noted that the operation had been performed at the wrong level.[1] The failure is conceded to have been due to "human error", rather than the result of any lack of professional knowledge or competency. The issue, again, is the appropriate discipline to be imposed, if any, under such circumstances.

The state recommends that Dr. Wentworth's license be limited in such fashion as to require him to participate in a "risk management assessment", as implemented through the University of Wisconsin School of Medicine, Continuing Medical Education Department. Dr. Wentworth opposes such an order on two general bases. First, he contends that the board does not have the authority to order participation in this program, since such an order or program participation does not constitute a "limitation" upon his license as within the meaning of that disciplinary authority granted to the board within the statutes. Second, even if the program participation requirement does constitute a "limitation" under the law, it is unreasonable to impose it in this case as the program bears no reasonable relationship to the precise "practice deficit" found in this case, and does not promote any function which discipline is intended to serve under the facts of this case. Dr. Wentworth represents that the evidence presented warrant dismissal of the proceeding without the imposition of any discipline.

The threshold question to be addressed is whether the board has the statutory authority to unilaterally impose participation within the RMA program, as a component of the power to "limit" a license, over the objection of a licensee. The record indicates that the board has on at least two occasions ordered participation in the program with the licensee's agreement in stipulations. However, stipulations may result in Final Decisions and Orders containing requirements by agreement which could not be imposed through unilateral order of the board.

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[1] The state does not contend that respondent was negligent in having operated at the incorrect level, or that the operation itself, was performed negligently.

The authority of the Medical Examining Board to limit the license of a respondent who has been found to have engaged in negligence is found in sec. 448.02(3)(c), Stats., which states in relevant part as follows:

> "After a disciplinary hearing, the board may . . . when it finds a person guilty of . . . negligence in treatment, do one or more of the following: . . . limit . . . any license granted to that person."

In turn, a "limitation" upon a license is defined in sec. 440.01(1)(d), Stats., as including:

> ". . . to impose conditions and requirements upon the holder of the credential".

From the above citations, it appears that the Medical Examining Board clearly has the statutory authority to impose limitations upon Dr. Wentworth's license to practice medicine and surgery which require his participation within the risk management assessment program.

The more significant question in this case is whether or not respondent should be disciplined for the admitted negligence and, if so, of what that discipline should consist. In this sense, the underlying issue is more subtle and profound. It involves the manner in which to both confront, and appropriately handle, situations in which a physician has been found to have performed a negligent act, but is concededly both professionally knowledgeable and competent.

The state does not question the professional competency or knowledge of Dr. Wentworth as qualified to practice neurosurgery. He has engaged in that field for approximately 30 years. With the exception of this case, he has never been found guilty of medical malpractice or unprofessional conduct. Since the circumstances involving the patient here, Dr. Wentworth has performed 56 anterior cervical fusions, and 1,556 surgical procedures all together. Subsequent to this case, Dr. Wentworth altered the procedure by which he marks the surgical site. Furthermore, the expert testimony presented indicates that the negligent reading of the post-operative x-ray did not result in patient harm or risk. Even had the x-ray been correctly interpreted by Dr. Wentworth, a second operative procedure upon the patient still would have been necessary.

The agreed facts do indicate that Dr. Wentworth performed an anterior cervical fusion upon a patient at an incorrect cervical level. It is not claimed that this occurrence resulted from any negligence committed by Dr. Wentworth. The operation at the incorrect site came about, apparently, because the needle used to mark the appropriate spot for the procedure became dislodged, resulting in Dr. Wentworth's not having operated at the interspace affected by the patient's problem. The testimony in the case is that the method utilized by Dr. Wentworth to mark the operative space is "the standard technique that's used for identifying levels." (Trans., p. 131).

However, Dr. Wentworth did concede that he was negligent in his reading of the postoperative x-ray. This negligence does not appear to have impacted upon patient care, in that the testimony suggested that even had the x-ray been correctly read by Dr. Wentworth, a second operative procedure would still have been required. The specific negligence found in this case, in other

words, did not result in patient harm. It was negligence, nevertheless, which raises the question as to whether "where there's smoke there's fire." This is, simplistically stated, the basis upon which the state has proposed that Dr. Wentworth be ordered to participate in the risk management assessment program.

The program's intent is to handle the difficult question of appropriately responding to singular instances of established negligence which cannot be established as being indicative of either a knowledge deficit or lack of technical proficiency. Respondent, however, objects to the imposition of the program in this case due to: 1) the inconvenience to his partners in practice, 2) the cost of the program, and 3) because it is not an appropriate response to the negligence found in this case.

The argument of inconvenience is not persuasive. The impact of any imposed discipline will be "inconvenient", both upon the respondent and other health care professionals with which he or she may be associated. Absent a showing of a substantial undue or unwarranted burden being placed upon the respondent or his associates, the need to assure that proper steps are implemented to assure against possible public harm through the implementation of inadequate procedures or systems clearly outweigh any inconvenience visited upon respondent or his associates by compliance with the risk management assessment program.

Likewise, the cost of the program does not appear unduly burdensome upon respondent, and indeed, could prove to be a small investment to make in order to avert even one case of patient harm in the future; both from the standpoint of the respondent and his patients. Respondent's participation in the risk management assessment program will cost him approximately $4,800.00. In itself, this would not be exorbitant given the programs intended beneficial effect and respondent's past negligence and possible serious ramifications to patients in the event it were repeated. Respondent was unable to recall the amount of gross receipts which he receives through his practice. Accordingly, there has been no showing that the cost of the program will be likely to cause him substantial financial difficulty.

Respondent also claims that imposing a broad program to search for all possible deficiencies in his practice which may lead to preventable human error is not appropriate in this case. It is contended that any discipline imposed must be more narrowly tailored to addressing the aspect of practice found to be deficient. However, sanctions available in professional discipline need not be strictly telescoped to impact only upon the specific area of a respondent's practice in which the misconduct occurred. For example, a physician might be suspended for illicit prescriptive practices. A suspension withdraws the licensee's right to practice in any area of medicine and surgery, and not just the ability to write prescriptions.[2] Nevertheless, few would argue that a suspension from practice would be an inappropriate discipline for illicit prescriptive practices.

Similar reasoning may be utilized here for imposing a sanction which requires the review of a wider area of respondent's practice. An act of negligence in one area of practice may be representative of a faulty approach or procedure which is systemic in nature. The risk

[2] See, sec. 440.01(1)(h), Stats.

management assessment program is intended to assure that that is not the case, and to correct those areas where it is. It is in the interest of both the public and Dr. Wentworth that he participate in the program.

Dated: March 13, 1995.

Respectfully submitted,

Donald R. Rittel
Administrative Law Judge

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