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STATE OF WISCONSIN

BEFORE THE DENTISTRY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY :

PROCEEDINGS AGAINST :

:

: LS9911191DEN

BRIAN PAINTER, D.D.S. :

RESPONDENT :

AMENDED FINAL DECISION AND ORDER

PARTIES

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

Brian C. Painter, D.D.S.

N7784 State Park Road

Sherwood, WI 54169

Department of Regulation and Licensing

Division of Enforcement

P.O. Box 8935

Madison, WI 53708-9835

State of Wisconsin

Dentistry Examining Board

P.O. Box 8935

Madison, WI 53708-8935

PROCEDURAL HISTORY

On November 10, 1999, the Dentistry Examining Board ordered the summary suspension of Respondent's license to practice dentistry in the State of Wisconsin pursuant to §227.51(3), Wis. Stats. A Hearing to Show Cause was held on December 1, 1999, at which time the Respondent's license was restored. On August 15, 2000, the Complainant moved to dismiss the following counts of the Complaint: Count I, ¶¶10 a and b; Count II ¶¶23 a, b, and c; Count III ¶¶38 a, b, and c; and Count IV ¶¶ 51 a and b. Complainant's motion was granted.

A hearing in the above-captioned matter was held on August 22-25, 2000. A proposed decision was issued by the administrative law judge on December 21, 2000. On March 7, 2001, the Dentistry Examining Board (Board) heard oral arguments on the matter. The Board issued a Final Decision and Order on May 2, 2001. Dr. Painter then appealed the Board's Decision and Order. The circuit court issued an oral decision on May 21, 2002, in which it upheld the finding of unprofessional conduct but remanded the matter for reconsideration of discipline. Based on the entire record in this case, the Dentistry Examining Board makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Brian C. Painter is licensed to practice dentistry in the State of Wisconsin under License Number 4993.

2. The purpose of administering various forms of anesthesia to a patient prior to and/or during the treatment of dental caries is to prevent or obtund pain to the patient.

3. Patient JP, whose date of birth is February 1, 1997, was examined and treated by Dr. Painter on January 7, 1999.

4. In the process of removing dental caries on JP's teeth S and K on January 7, 1999, Dr. Painter did not administer anesthesia to JP.

5. Dr. Painter failed to provide JP's mother with the viable options for the administration of anesthesia to her child.

6. The treatment for dental caries that Dr. Painter provided to JP could have caused pain to him.

7. The treatment for dental caries that Dr. Painter provided to JP caused him pain.

8. Patient TH, whose date of birth is November 11, 1996, was examined and treated by Dr. Painter on January 8, 1999.

9. In the process of removing dental caries on TH's teeth B, E, F, G, and I, on January 8, 1999, Dr. Painter did not administer anesthesia to TH.

10. Dr. Painter failed to provide TH's mother with the viable options for the administration of anesthesia to her child.

11. The treatment for dental caries that Dr. Painter provided to TH could have caused him pain.

12. The treatment for dental caries that Dr. Painter provided to TH caused him pain.

13. Patient CN, whose date of birth is July 16, 1996, was examined and treated by Dr. Painter on May 20, 1999.

14. During Dr. Painter's examination and treatment of CN on May 20, 1999, Dr. Painter did not detect or treat dental caries on CN's teeth I and S.

15. X-rays taken of CN's teeth on August 30, 1999, revealed the existence of dental caries on CN's teeth I and S.

16. The existence and nature of dental caries on CN's teeth I and S as of May 20, 1999, were not proven by a preponderance of evidence.

17. In examining and treating CN, Painter did not depart from the standard of care ordinarily exercised by a dentist.

CONCLUSIONS OF LAW

1. The Dentistry Examining Board has jurisdiction over this matter pursuant to §447.07, Wis. Stats.

2. Dr. Painter's care and treatment of JP as set forth in the Findings of Fact constitutes unprofessional conduct within the meaning of §447.07 (3) (a), Wis. Stats.

3. By having cared for and treated JP as set forth in the Findings of Fact, Dr. Painter practiced in a manner which substantially departed from the standard of care ordinarily exercised by a dentist in violation of secs. DE 5.02 (1) and (5), Wis. Admin. Code.

4. Dr. Painter's care and treatment of TH as set forth in the Findings of Fact constitutes unprofessional conduct within the meaning of §447.07 (3) (a), Wis. Stats.

5. By having cared for and treated TH as set forth in the Findings of Fact, Dr. Painter practiced in a manner which substantially departed from the standard of care ordinarily exercised by a dentist in violation of secs. DE 5.02 (1) and (5), Wis. Admin. Code.

6. In examining and treating patient CN, Dr. Painter has not violated sec. DE 5.02 (5), Wis. Admin. Code.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Brian Painter is **REPRIMANDED**.

IT IS FURTHER ORDERED that Brian Painter's license to practice dentistry is **INDEFINITELY LIMITED** as follows: Dr. Painter shall not treat any patients who are six (6) years of age or younger.

IT IS FURTHER ORDERED that Brian Painter shall participate in and satisfactorily complete a course in pain control and management within one year of the date on which this Order is signed. Said course shall be approved in advance by the Dentistry Examining Board.

IT IS FURTHER ORDERED that Brian Painter shall participate in and satisfactorily complete a course in pediatric dentistry within one year of the date on which this Order is signed. Said course shall be approved in advance by the Dentistry Examining Board.

IT IS FURTHER ORDERED that Brian Painter shall participate in and satisfactorily complete a course in informed consent as it relates to both adult and pediatric patients including both diagnostic and therapeutic options within one year of the date on which this Order is signed. Said course shall be approved in advance by the Dentistry Examining Board.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed upon Brian Painter pursuant to §440.22, Wis. Stats.

IT IS FURTHER ORDERED that Count III of the Complaint is hereby **DISMISSED**.

EXPLANATION OF VARIANCE

In his discussion supporting the dismissal of this matter, the administrative law judge (ALJ), begins with an analysis of section DE 5.02 (5), Wis. Admin. Code, in which he likens that provision to the common law informed consent theory of liability. That theory is premised on the right of recovery of a patient for harm, which occurred as a result of the actions of a practitioner. To succeed under that theory, the patient must show that a dentist breached a duty owed to the patient and that actual harm resulted to the patient. If the patient cannot demonstrate harm, then there is no basis for recovery.

However, that theory is not analogous to the regulatory provisions found in Chapter 447, Wis. Stats.[1], and in DE Chapter 5, Wis. Admin. Code[2] and is therefore rejected. Indeed, the regulatory provisions provide sharp contrast to the informed consent theory of liability. Under the regulatory provisions, a dentist is subject to discipline not only for *actual* harm that is caused, but also for *potential* harm. To be sure, the Dentistry Examining Board (Board) is charged with protecting the health, safety, and welfare of patients seeking and receiving dental care. Accordingly, it is the conduct of dentists that the Board scrutinizes rather than the recovery rights of individual patients. If, for instance, a form of treatment does not meet the standard of care ordinarily exercised by a dentist, it is the Board's responsibility to recognize that conduct and subsequently impose corrective measures to ensure that the dentist's conduct does not pose harm to other patients or to the public.

Here, Dr. Painter treated patients JP and TH for caries. In so doing, he did not use any anesthesia, nor did he inform the parents of those children about the possibility of using either a local or general anesthetic during their treatment. According to Dr. Timothy Kinzel, a pediatric dentist, who provided expert testimony with respect to the standard of care for the use of anesthesia on pediatric patients, Dr. Painter's practices fell below the minimum standards in the profession. On direct examination Dr. Kinzel testified as follows:

Q. Okay. Can you tell me in what way the -- Dr. Painter's care departed from the standard of care with regard to patient JP[3]?

A. I felt that in the treatment of JP and in -- in the H -- I believe it was TH, if I'm not mistaken -- TH–

Q. T.

A. TH -- that the -- the care for those two people deviated from the standard of care by not giving the parents of the patients choices as far as how the procedures could be accomplished, including the use of different anesthetics.

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Q. Doctor, in reviewing the records and articles that you did with regard to these patients, were you able to reach a determination as to whether the failure to give options for anesthesia harmed or could have harmed JP?

A. Failure to give the options for anesthesia, yes.

Q. In what way?

A. The process of doing dental work on anybody has a potential to create pain and discomfort, and if you don't use a local anesthetic, I believe that that increases the chance that that person will feel pain and discomfort.

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Q. Doctor, with regard to not providing the options for anesthesia to the parent, are there other dangers to the patient besides the potential for pain?

A. Well, if someone has a -- let's say a bad dental experience or -- or a traumatic dental experience, that -- we always are concerned about long-lasting effects on those patients, which I think would be going into the developing psychological makeup of those patients. We -- it is maybe hard to determine the extent of those effects on the psychological --

Q. Uh-huh.

A. -- development, although I think that most people would agree that there's a potential for that.

*****

Q. Doctor, I'd like to start with the opinion that you expressed regarding fail -- the failure to provide adequate options for anesthesia. Do you have that mind?

A. Uh-huh.

Q. What -- what are the purposes of providing any form of anesthesia to children under the age of four?

A. To provide a -- what is known as pain control during the procedure so that you can not create -- or not provide a procedure that's causing pain or discomfort for the patient. Also, that using anesthetic will give you chances to further your behavior modification or to – to achieve better cooperation from the patient.

Q. Doctor, what options for anesthesia are available for administration to children under the age of four? And let's -- let's make it under the age of three.

A. Okay. Well, the options would be, first off, to use a local anesthetic if you're going to perform procedures on the teeth. A local anesthetic is – is used to obtund pain or discomfort as you work on the teeth, or physically work on the teeth. Other types of anesthesia which would be considered as possibilities would be the use of sedations or sedative type drugs to -- to achieve cooperation on the patient's part, and then also the use of a general anesthetic where the patient is actually put to sleep so that they can have the work completed without having to have them struggle.

Q. Would one of the options be that you would provide no form of anesthetic at all?

A. Certainly.

Given Dr. Kinzel's testimony, it is clear that the standard of care in the profession is to provide options for anesthesia when a dental procedure may create pain. That was not done in this case. Neither JP's mother nor TH's mother were ever informed that anesthesia was an option for their children. Consequently, they were unable to prevent their children from experiencing pain during the course of their dental procedures. The testimony of both experts, Drs. Kinzel and Rollefson, indicates that the potential for pain exists when the drilling of a tooth extends into the dentin. In the case of both these children, it was necessary to drill into the dentin. Thus, the potential for pain also existed for them.

The testimony makes it clear that the mothers of both JP and TH expected that anesthesia would be administered to their children prior to drilling. When anesthesia was not provided each of them stopped Dr. Painter and asked why. JP's mother recounted the events as follows:

Q. And what happened next?

A. And then he started to drill on the teeth.

Q. Did you say anything to Dr. Painter at this time?

A. Once he started to drill, I had asked what about numbing his mouth?

Q. Okay. What caused you to ask the question at that time?

A. I was shocked and had, you know, expected the numbing prior to the drilling.

Q. When the drilling began, what did J do?

A. He was screaming.

Q. When you asked, aren't you going to numb the teeth, what did Dr. Painter tell you?

A. I don't believe if it was Dr. Painter or if the assistant, somebody had told me that he was too young.

Q. And what did you say in response to that?

A. Nothing.

Q. Did you ask him to stop the procedure?

A. No, I did not. I was pretty much in shock.

Q. Was there any other reason that you didn't stop the procedure at that time?

A. I guess because he was a doctor, I just was trusting that he knew what he was doing.

TH's mother provided similar testimony concerning her son's dental procedure:

Q. Okay. At some point in time, Dr. Painter came into the room; is that right?

A. Yes.

Q. Okay. And what, if anything, did he say to you at that time?

A. He did explain to me that he was not going to use any -- any anesthetic. I asked him why, and he told me the risks of the child biting the inside of his cheek or his tongue. And he explained to me that they used to have the kids treated in the hospital, put under, but kids were coming back with the same problem.

Q. What did that statement, kids are coming back with the same problem, mean to you?

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Q. Go ahead, Ms. F.

A. Can you repeat the question, please?

Q. Sure. What did the statement the kids are coming back with the same problems mean to you?

A. To me, it meant that it was a waste of time.

Q. Prior to Dr. Painter beginning any treatment, did he provide you with any options for treatment?

A. No.

Q. Did he provide you with any information about the treatment he was going to use?

A. He said that he wasn't going to use the – the anesthetic. He did say that T would feel some pain. And that's all I remember.

Q. He said that T would feel some pain?

A. Yeah. Yes.

*****

Q. Prior to beginning treating the teeth, did Dr. Painter provide you with any information about the options for anesthesia, as far as the risks and benefits?

A. No. Just -- yes, he did. The -- the numbing -- numbing his mouth, there would be a risk of him biting his cheek, tongue.

Q. Did he give you any other information about what the benefits of numbing his teeth might have been?

A. No.

Q. Did Dr. Painter talk to you about the use of any kind of sedation?

A. No. Just the information that he gave me about the past procedures, the kids going into the hospital and --

Q. Okay. Did he talk to you about any benefits of taking T to the hospital to have the treatment under general anesthesia?

A. No.

Q. After you'd had this discussion with Dr. Painter, what happened next?

A. He had me sit T on my lap facing me, and me and Dr. Painter were knee to knee and T -- he had me lay T back so that his head was on Dr. Painter's lap. And he -- the hygienist put a -- a rubber stopper in T's mouth, and drilled his teeth.

Q. Before Dr. Painter started drilling on the teeth, how was T reacting?

A. Fine.

Q. Okay. What happened after he started drilling on the teeth?

A. He started -- T started crying and screaming. And I -- I stopped -- I stopped Dr. Painter and I asked him, are you sure it should be done like this? And he said this was the only way that he was going to do it.

Q. Ms. F, did you have any reason to believe at that point in time that you could have had local anesthetic?

A. No. He said that he wasn't going to use any.

Q. After he said, this is the only way I'm going to do it, what did you do at that point in time?

A. I let him continue.

Q. Why?

A. Because I was told that -- I was told that T had cavities and they needed to be fixed.

These mothers did not believe that they had any other option for their children, though their later testimony indicates that they would have selected an anesthesia option had it been available. Dr. Painter's failure to provide alternative options to the mothers of JP and TH prevented them from selecting an anesthetic for their

children. As such, Dr. Painter did nothing to avoid or lessen the actual or potential pain to his patients. In so doing, he practiced dentistry in a manner that substantially departed from the standard of care ordinarily exercised in the profession.

Moreover, Dr. Painter's failure to provide options for anesthesia caused actual harm to both TH and JP. The mothers of both these patients testified that their children suffered pain during the dental procedures. On this issue, JP's mother testified:

Q. Ms. P, I'm going to ask you whether or not you can tell the difference in your son, J, when he is screaming because he's upset or if he's screaming because he's in pain?

A. Can I tell the difference?

Q. Uh-huh.

A. Yes.

*****

Q. I'll repeat the question, Ms. P. Can you tell the difference when J is screaming because he is upset or because he is in pain?

A. Yes.

Q. And how can you tell that, Ms. P?

A. Just from my experiences as his mother.

Q. Okay. Does he react differently if he's screaming in pain or screaming when he's upset?

A. Yes.

Q. And how does he react that's different?

A. His pain cry is -- us an extreme, loud cry.

Q. Okay. Does he exhibit any other signs that you would let you believe that it is a response to pain as opposed to just being upset?

A. From my experience, when he's been hurt, there's more of a, you know, resisting or moving his motions.

Q. When Dr. Painter was drilling on J's teeth, was he screaming, in your opinion, a reaction to pain or a reaction to being upset?

*****

A. Pain.

TH's mother also provided testimony about the pain her son experienced:

Q. Okay. Ms. F, do you believe that you're able to tell the difference between T screaming when he is upset and T screaming when he is in pain?

A. Yes.

Q. And why do you believe you can tell that?

A. Because I'm his mother. I'm with him 24 hours a day.

Q. Does he react differently, outwardly react differently, when he's in pain or when he's just upset and screaming?

A. Yes.

Q. And how is that different?

A. Well, if it's just a tantrum, there's no tears there, he's not crying. When he's hurt, he's – has tears, he's crying.

Q. When Dr. Painter was drilling on T's teeth and he was screaming, was he screaming, in your opinion, because he was in pain or because he was throwing a tantrum?

*****

Q. Go ahead. Was -- was he in pain or was he just throwing a tantrum?

A. He was in pain.

The ALJ did not find the testimony of either mother persuasive and therefore concluded that neither child had suffered any pain as a result of not being anesthetized. The Board disagrees with that conclusion for several reasons. To begin, there is no evidence to suggest that either child's behavior was problematic prior to Dr. Painter drilling their teeth. It is only when he began drilling their teeth that they began reacting negatively by crying and screaming. These mothers are clearly in a position to know when their children are in distress versus when they are in the throes of a temper tantrum. Here, their children's demeanor was fine prior to the dental procedure. But once the procedure began, they began to react in a manner that very plainly indicated they were in pain. The fact that TH's mother did not appear to be "reliving a vivid traumatic experience" while recounting her child's treatment in no way serves to undermine her testimony. Well over a year had passed between the time her child underwent this dental procedure and the time of her testimony. It is reasonable to presume that she has had sufficient time to process this trauma so that she can now retell the experience in a manner that is straightforward, but not necessarily fraught with emotion. Accordingly, the Board finds the testimony of JP's and TH's mothers to be both persuasive and convincing and further finds that both JP and TH suffered pain during their dental procedures performed by Dr. Painter.

With respect to the allegation involving Patient CN, the Board agrees with the ALJ that there is insufficient evidence to support a definitive finding that Dr. Painter's conduct fell below the minimum standard of care in his treatment of CN and that allegation is therefore dismissed.

Because the Board has found that Dr. Painter substantially departed from the standard of care ordinarily exercised by a dentist, we must now consider what discipline to impose. It is well established that the objectives of professional discipline include the following: (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, 209, 237 N.W.2d 689 (1976). Punishment of the licensee is not an appropriate consideration. *State v. MacIntyre*, 41 Wis. 2d 481, 485, 164 N.W.2d 235 (1969).

It is particularly troubling that Dr. Painter failed to discuss the option of providing anesthesia to two minor children with the mothers of those children prior to beginning a dental procedure that might, and in this case, did, cause pain to these patients. Dr. Painter did not offer the possibility of anesthesia. Instead, he simply chose not to provide it to these patients. It is apparently his belief that, in certain pediatric cases, no anesthesia is necessary. Though that may be true in some instances, it is not for the dentist to decide that matter. Rather it is up to the parent to make that determination. However, the parent must first be given the options that are available for the administration anesthesia. That did not happen in this case.

Furthermore, children under the age of six have not yet developed the necessary cognitive skills to be able to effectively communicate with their health care providers, including dentists. Youngsters within this age range do not have the ability to clearly communicate with their dental provider about their specific needs or about the manner in which those needs are best met. They do not know, for instance, that pain medication is available to them, nor do they know how to ask for it. And, in the majority of cases, children of this age would not be able to tell their dentists that they wanted a particular procedure stopped because it had became painful or uncomfortable. Their primary means of communicating such information is generally through their parents. Parents recognize distress in their children's cries. Unfortunately, Dr. Painter chose not only to disregard the children's obvious signs of discomfort and pain, but also their parents' inquiries about what might be done to alleviate them.

Given that Dr. Painter has adopted a certain philosophy towards treating young patients, it is imperative that he take and successfully complete coursework in pediatric dentistry, pain control and management, and informed consent as it relates to both adult and pediatric patients including both diagnostic and therapeutic options. It is critical that he take these courses so that he may learn what the current standard of care is for treating these children, including being able to discuss with their parents the options that are available for treatment and pain management. Unless compelled to take such course work, there is no reason to believe that Dr. Painter will cease or change his existing practices with regard to this group of patients. Indeed, it is unthinkable that any other child would have to suffer pain simply because his or her parent was not given the option of utilizing anesthesia. By taking these courses, the Board believes that Dr. Painter will receive essential information about the current standard of care within the profession and will therefore be deterred from continuing his former conduct.

It is also essential that others in the profession be deterred from engaging in similar conduct. By imposing a reprimand on Dr. Painter, not only will that goal be accomplished but it will also help to ensure that his future patients receive competent care. All practitioners who treat such young patients must realize that they have an obligation to discuss the full range of treatment options with each child's parent or guardian. Practitioners may not decide, of their own accord, which option to use. They must first consult with the child's parent or guardian before beginning a particular treatment. Failure to do so falls below the minimally acceptable standard of care within the dental profession.

The Board further believes that Dr. Painter's license must be limited so that he does not treat pediatric patients under the age of six years old unless and until he complies with the conditions set forth above and can demonstrate to the Board's satisfaction that he is competent to practice pediatric dentistry. Both TH and JP were mere youngsters when they had their initial dental visit with Dr. Painter. During that first visit they both experienced pain that could have been prevented. The goal of dentistry is to create a pain free environment and that goal was not met here. Therefore, in order to prevent both short and long-term harm to these and other children, it is critical that these patients be protected from exposure to such practices. By imposing conditions on Dr. Painter's license to practice dentistry, it is believed that such an end will be accomplished.

With respect to the costs that have been submitted in this case, the Board has determined that a twenty-five percent (25%) reduction should be applied to that portion which is attributable to the administrative law judge. In doing so, the Board will be reducing the amount attributable to Count III of the Complaint, which was dismissed. Such a reduction is therefore deemed appropriate. The Board had previously accepted the recommendation of the Complainant to similarly reduce its costs by approximately one-third, that is, those costs that were attributable to Count III of the Complaint. That reduction remains in place. Accordingly, an Amended Order Fixing Costs is attached.

Dated this 11th day of September, 2002, in Madison, Wisconsin.

STATE OF WISCONSIN

DENTISTRY EXAMINING BOARD

Bruce J. Barrette, D.D.S.

Chairperson

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[1] At issue in this case is §447.07 (3), Wis. Stats.:

Subject to the rules promulgated under s. 440.03 (1), the examining board may make investigations and conduct hearings in regard to any alleged action of any dentist or dental hygienist, or of any other person it has reason to believe is engaged in or has engaged in the practice of dentistry or dental hygiene in this state, and may, on its own motion, or upon complaint in writing, reprimand any dentist or dental hygienist who is licensed or certified under this chapter or deny, limit, suspend or revoke his or her license or certificate if it finds that the dentist or dental hygienist has done any of the following:

(a) Engaged in unprofessional conduct.

[2] At issue in this case are §§ DE 5.02 (1) and (5), Wis. Admin. Code:

Unprofessional conduct of a dentist or dental hygienist includes:

(1) Engaging in any practice which constitutes a substantial danger to the health, welfare, and safety of a patient or the public.

(5) Practicing in a manner which substantially departs from the standard of care ordinarily exercised by a dentist or dental hygienist which harms or could have harmed a patient.

[3] The Dental Examining Board's Order dated September 11, 2002, contained complete patient names as found in the hearing transcript. For purposes of publication on the Internet, those names have been abbreviated.