

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



Wisconsin Department of Regulation & Licensing Access to the Public Records of the Reports of Decisions

This Reports of Decisions document was retrieved from the Wisconsin Department of Regulation & Licensing website. These records are open to public view under Wisconsin's Open Records law, sections 19.31-19.39 Wisconsin Statutes.

Please read this agreement prior to viewing the Decision:

- The Reports of Decisions is designed to contain copies of all orders issued by credentialing authorities within the Department of Regulation and Licensing from November, 1998 to the present. In addition, many but not all orders for the time period between 1977 and November, 1998 are posted. Not all orders issued by a credentialing authority constitute a formal disciplinary action.
- Reports of Decisions contains information as it exists at a specific point in time in the Department of Regulation and Licensing data base. Because this data base changes constantly, the Department is not responsible for subsequent entries that update, correct or delete data. The Department is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained from this site is still accurate, current and complete.
- There may be discrepancies between the online copies and the original document. Original documents should be consulted as the definitive representation of the order's content. Copies of original orders may be obtained by mailing requests to the Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935. The Department charges copying fees. *All requests must cite the case number, the date of the order, and respondent's name as it appears on the order.*
- Reported decisions may have an appeal pending, and discipline may be stayed during the appeal. Information about the current status of a credential issued by the Department of Regulation and Licensing is shown on the Department's Web Site under "License Lookup." The status of an appeal may be found on court access websites at: <http://ccap.courts.state.wi.us/InternetCourtAccess> and <http://www.courts.state.wi.us/wscca>.
- Records not open to public inspection by statute are not contained on this website.

By viewing this document, you have read the above and agree to the use of the Reports of Decisions subject to the above terms, and that you understand the limitations of this on-line database.

Correcting information on the DRL website: An individual who believes that information on the website is inaccurate may contact the webmaster at web@drl.state.wi.gov

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

| | | |
|-------------------------------|---|----------------|
| IN THE MATTER OF DISCIPLINARY | : | |
| PROCEEDINGS AGAINST | : | FINAL DECISION |
| | : | AND ORDER |
| CRAIG W. MOON, R.Ph., DDS., | : | LS0601191PHM |
| RESPONDENT. | : | |

Division of Enforcement Case No. 04PHM078

The State of Wisconsin, Pharmacy Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Pharmacy Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 6th day of December, 2006.

Michael Bettiga
Member of the Board
Pharmacy Examining Board

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST:

CRAIG W. MOON, R.Ph., DDS.,

RESPONDENT.

PROPOSED FINAL
DECISION AND ORDER
Case No. LS0601191PHM

Division of Enforcement Case No. 04 PHM 78

PARTIES

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

Craig W. Moon
344 Park Avenue
Pewaukee, WI 53072

Pharmacy 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

PROCEDURAL HISTORY

A complaint in the above-captioned matter was filed on January 11, 2006. Respondent's answer is dated January 24, 2006. A hearing was held on June 19 and 20, 2006.¹ The Division of Enforcement, Department of Regulation and Licensing, appeared at the hearing by attorney Arthur Thexton, P.O. Box 8935 Madison, WI 53708-8935. Respondent Craig Moon appeared in person and by his attorney, Oakton Law Offices S.C., by Daniel P. Fay, 200 Oakton Avenue, Pewaukee, WI 53072.

At the outset of the hearing Respondent's motion was granted to amend the answer to affirmatively deny part of paragraph 3. of the complaint. Respondent denies the allegation that, when he returned to his place of employment after lunch, he intended to resume his employment.

¹ References to the record are noted as follows: Pages of the transcript for June 19, 2006 are identified as "T1:page" and for June 20, 2006, and "T2:page."

At the conclusion of the hearing the Division of Enforcement moved to amend the complaint to conform to the proof, by adding allegations that: (1) respondent was impaired when he practiced pharmacy in the morning of November 4, 2004; and, (2) respondent's conduct, in returning to the pharmacy in the afternoon of November 4, 2004, is unprofessional conduct not otherwise specified under Wis. Adm. Code § Phar 10.03 (intro). This motion was granted in part to permit the allegation (1) that respondent was impaired when he practiced pharmacy in the morning. That part of the motion to add allegation (2) was denied.

FINDINGS OF FACT

1. Respondent Craig W. Moon (dob 12-27-57) was at all times relevant to this proceeding duly licensed under the provisions of Chapter 450, Wis. Stats., to practice as a registered pharmacist in the State of Wisconsin, under license number 10536, originally granted on May 30, 1984. He is also licensed to practice dentistry in Wisconsin.

2. In November 2004, Respondent lived in Pewaukee and worked in Tomah, Wisconsin, where he was the managing pharmacist of the Wal-Mart Pharmacy. While working in Tomah, Respondent slept at the EconoLodge, located across Highway 12 from the Wal-Mart store.

3. During the month of August, 2004, Respondent began to consume beverage alcohol as a sleep aid.

4. On Wednesday, November 3, 2004, Respondent attended a continuing education program in Wisconsin Dells. With dinner he had one or two drinks. Following the event, Respondent drove back to Tomah to his motel room and spoke by telephone with his sister in California, who told him that his grandmother had been hospitalized. Respondent is close to his grandmother. Following the telephone call, Respondent purchased a 12 pack of beer from a convenience store, and drank six cans of beer between 11:00 PM and 1:00 AM.

5. On Thursday, November 4, 2004, Respondent telephoned his sister in California. He did not eat any breakfast before going to work. At the Wal-Mart store Respondent engaged in the practice of pharmacy as the store's managing pharmacist. During the morning of November 4, 2004, three Wal-Mart store employees, including the store's personnel manager, smelled the odor of alcohol on Respondent's breath. Store managers discussed their observations with persons in the Arkansas corporate office and decided to require Respondent to submit a blood sample for testing.

6. Late in the morning on November 4, 2004 and before Wal-Mart store managers talked with Respondent about alcohol on his breath or a blood test, he left the pharmacy and walked to his motel room. There he telephoned his sister and received an update on his grandmother's condition.

7. While in his motel room, and following the telephone call with his sister, Respondent consumed a quantity of whiskey and beer sufficient to raise or maintain his blood

alcohol level such that, when it was later tested at 1:45 PM, his blood contained 0.186% alcohol, by weight.

8. Respondent walked back to the Wal-Mart store pharmacy around noon on November 4, 2004, about 45 minutes after leaving the store, intending to return to pharmacy practice in the store.

9. When he entered the pharmacy at around noon on November 4, 2004, Terri Kunick, the assistant pharmacist, told him that management wanted to see him. Respondent did not tell Terri Kunick that he was ready to go to work, that he intended to leave for the day, or that he was going to leave to visit his grandmother. If Respondent were leaving early for the day, he would have so advised Terri Kunick, the assistant pharmacist, and Jake Morris, the pharmacy district manager.

10. After speaking with staff in the pharmacy, Respondent went to a management office where he talked with David Rischette, store manager, Jason Weber, assistant store manager, and Mark Beyer, district manager, who told Respondent that he smelled of alcohol. Respondent first stated that his breath odor was the result of his diabetic condition. Respondent was advised that he would have to take a blood test. He then stated that he was not going to pass the blood test because he had “a drink” or “a beer” at lunch.

11. After meeting with the store managers, Respondent returned to the store pharmacy where he told the assistant pharmacist, Terri Kunick, that he was not going to pass the test, that he had not eaten all morning, that he thought he was ketoacidotic and that he had had a beer when he went back to the motel.

12. After Respondent returned to the store at around noon on November 4, 2004, he engaged in the practice of pharmacy as the store’s managing pharmacist when he entered the pharmacy, talked with the assistant pharmacist and met with store managers.

13. Respondent was driven to the local hospital, where a sample of his blood was drawn. At 1:45 PM on November 4, 2004, Respondent’s blood contained 0.186% alcohol, by weight.

14. On November 4, 2004, Respondent did not exhibit bloodshot eyes, poor coordination, impaired gait or slurred speech.

15. Respondent was reprimanded by the Pharmacy Examining Board on August 12, 1991, when he removed acetaminophen with codeine from his employing pharmacy without consent or a prescription order; these were said to be for his wife, for postpartum pain.² He was subsequently disciplined on August 12, 1998, for removing oxycodone, hydrocodone, and stimulant products from his employing pharmacy, and consuming them without a prescription; and for being convicted of two counts of misdemeanor theft, contrary to Wis. Stat.

² Case No. LS9102192PHM; Division of Enforcement File no. 86 PHM 58; See: <http://drl.wi.gov/dept/decisions/docs/LS9102192PHM-19910820.pdf>.

§ 943.20(3)(a), and one count of possessing and illegally obtained prescription drugs, contrary to Wis. Stat. § 450.11(7)(h).³ He was found to be drug dependent, and entered treatment at that time. On February 12, 2003, his unlimited license was restored, on the recommendation of his treating physician and supervisors.⁴

CONCLUSIONS OF LAW

I. The Wisconsin Pharmacy Examining Board has jurisdiction over this matter and authority to take disciplinary action against the Respondent pursuant to Wis. Stat. § 450.10(1) and Wis. Admin. Code ch. Phar 10.

II. When Respondent entered the Wal-Mart store pharmacy in Baraboo, Wisconsin, on November 4, 2004, at about noon, intending to resume pharmacy practice, with his blood-alcohol content at 0.186% by weight, as described in Findings of Fact paragraphs 8. – 13., above, Respondent practiced pharmacy as the store's managing pharmacist while his ability to practice was impaired by alcohol and Respondent thereby engaged in unprofessional conduct under Wis. Stat. § 459.10(1)(a)3.

III. When Respondent entered the Wal-Mart store pharmacy, spoke with the assistant manager and met with store managers, as described in Findings of Fact paragraphs 9. - 13., with his blood-alcohol content at 0.186% by weight, Respondent practiced pharmacy as the store's managing pharmacist while his ability to practice was impaired by alcohol and Respondent thereby engaged in unprofessional conduct under Wis. Stat. § 459.10(1)(a)3.

IV. Respondent may be disciplined by the Pharmacy Examining Board under Wis. Stat. § 459.10(1)(b).

ORDER

NOW, THEREFORE, IT IS ORDERED, the license of Craig W. Moon to practice as a pharmacist in the State of Wisconsin #10536 shall be, and hereby is, suspended for an indefinite period according to the terms of the SUSPENSION AND MONITORING ORDER FOR CRAIG W. MOON (2006), attached to and made part of this decision.

IT IS FURTHER ORDERED, that Respondent shall pay the costs of the investigation and prosecution of this matter to the Department of Regulation and Licensing. Payments shall be made by certified check or money order, payable to the Wisconsin Department of Regulation and Licensing and sent to:

³ Case No. LS9808122PHM; Division of Enforcement File no. 97 PHM 52; See <http://drl.wi.gov/dept/decisions/docs/LS9808122PHM-19980812.pdf>.

⁴ See: <http://drl.wi.gov/dept/decisions/docs/0203078.htm>.

Department Monitor
Wisconsin Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Ave.
P.O. Box 8935
Madison, WI 53708-8935
Fax: (608) 266-2264
Telephone: (608) 267-3817
department.monitor@drl.state.wi.us

IT IS FURTHER ORDERED, that in the event that Respondent Craig W. Moon fails to timely submit payment for costs as set forth above, Respondent's license to practice pharmacy #10536 shall be suspended without further hearing and without further order of the Pharmacy Examining Board. The suspension shall continue until the full amount of the costs has been paid to the Department of Regulation and Licensing. Failure to pay the costs and forfeiture is a violation of this order.

IT IS FURTHER ORDERED that this ORDER shall be effective 30 days from the date on which it is signed by a designee of the Pharmacy Examining Board.

OPINION

The practice of pharmacy is a profession regulated by the state under Wis. Stat. ch. 450 to protect the public health, safety and welfare. State licensing requirements for the profession are based on a determination that the public health and safety require protection from "incompetent practitioners."⁵ Disciplinary actions are not for the purpose of punishing a respondent, but to protect the public.⁶

Respondent Craig W. Moon is a licensed in Wisconsin as a pharmacist. In November 2004 Respondent worked as the managing pharmacist at the Wal-Mart store pharmacy in Tomah, Wisconsin. The complaint in this matter is brought under Wis. Stat. § 450.10 and Wis. Adm. Code ch. RL 2. The charges are that on November 4, 2004, Respondent engaged in unprofessional conduct under Wis. Stat. § 450.10(1)(a)3., which prohibits a pharmacist from, *inter alia*, "(p)racticing pharmacy while the person's ability to practice is impaired by alcohol" The specific allegations are: first, that Respondent Moon was impaired by alcohol when he practiced pharmacy as the managing pharmacist at the Wal-Mart Pharmacy during the morning of November 4, 2004. The second allegation is that, following lunch on November 4, 2004, Respondent entered the Wal-Mart Pharmacy in Baraboo, Wisconsin, intending to resume pharmacy practice and that chemical tests conducted shortly after his return to the store showed that his blood-alcohol content was 0.186% by weight.

⁵ See *Strigenz v. Department of Regulation*, 103 Wis. 2d 281, 286 (1981); *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 188 (1984); *Laufenberg v. Cosmetology Examining Board*, 87 Wis. 2d 175, 184, 274 N.W.2d 618 (1979).

⁶ *Krahenbuhl v. Wis. Dentistry Examining Bd.*, 2004 WI App 147; 275 Wis. 2d 626; 685 N.W.2d 591; *In re Disciplinary Proceedings against Hankel*, 126 Wis. 2d 390; 376 N.W.2d 848; (1985)

In this disciplinary proceeding before the Pharmacy Examining Board, the Division of Enforcement has the burden of proving the allegations in the complaint by a preponderance of the evidence.⁷ The “preponderance of evidence” standard is the same standard as is used for ordinary civil actions requiring the quantum of evidence to be “the greater weight of the credible evidence” and the degree of certitude to be “reasonable certainty.”⁸

In the morning on November 4, 2004, management staff at the Tomah Wal-Mart were suspicious that respondent had been drinking alcohol because of the smell of alcohol on his breath. After he returned from a late-morning break, respondent was asked to provide a sample of his blood and urine for testing. The test results were that his blood-alcohol was 0.186% by weight. Respondent testified that he drank alcohol heavily during the late evening and early morning hours of November 3 and 4, 2004, and also during his break from work at around noon on November 4, 2004. He testified that his drinking was due to news he received from his sister concerning the health condition of his grandmother in California. The factual and legal issues raised by the pleadings and the arguments of counsel are whether Respondent was impaired by alcohol when he practiced pharmacy as the managing pharmacist at the Wal-Mart store pharmacy during the morning of November 4, 2004; and second, whether he actually practiced pharmacy in the afternoon of November 4, 2004 and, if so, whether he was impaired when he practiced.

The greater weight of the credible evidence in the record does not support the first allegation that Respondent Moon was impaired by alcohol when he practiced pharmacy as the managing pharmacist at the Wal-Mart Pharmacy in the morning of November 4, 2004. However, the preponderance of the evidence does support the second allegation that, following lunch on November 4, 2004, Respondent entered the Wal-Mart Pharmacy in Baraboo, Wisconsin, intending to resume pharmacy practice, that he did resume practice as the managing pharmacist and that chemical tests conducted shortly after his return to the store showed that his blood-alcohol content was 0.186% by weight. Under the law, Respondent’s conduct around noon on November 4, 2004, when he consumed alcohol in his hotel room sufficient to raise his blood-alcohol content to 0.186% and then returned to the pharmacy, constituted unprofessional conduct, specifically, under Wis. Stat. § 450.10(1)(a)3., practicing pharmacy while his ability to practice was impaired by alcohol.

Wednesday, November 3, 2004

There is no dispute that Respondent drank a considerable amount of alcohol on November 3 and 4, 2004. On Wednesday, November 3, 2004, Respondent attended a dinner and continuing education lecture in Wisconsin Dells sponsored by a pharmaceutical company. Respondent had “a drink or two with dinner” that was “probably wine.” (T2:159). Following the event, Respondent returned to his motel room in Tomah, spoke with his sister by telephone, who told him that his grandmother in California had become ill and had been hospitalized. Respondent is close to his grandmother. Following the telephone call, Respondent purchased a

⁷ Wis. Stat. § 440.20(3).

⁸ 75 Op. Atty Gen. Wis. 76 (1986); *Nommensen v. Am. Cont'l Ins. Co.*, 2001 WI 112, P27, 246 Wis. 2d 132, 629 N.W.2d 301; *Wisconsin Jury Instructions--Civil* 200

12 pack of beer from a convenience store. He drank six cans of beer between 11:00 P.M. and 1:00 A.M. (T2:160, 161).

Thursday Morning, November 4, 2004

Several witnesses who worked at the Tomah Wal-Mart store testified that they smelled alcohol on Respondent's breath during the morning of November 4, 2004. After Respondent arrived at the pharmacy, Ellen Reneau, the store's personnel manager, talked with Respondent and smelled the odor of an alcoholic beverage on his breath. Ellen Reneau testified that,

At first I thought it was like what I thought was the left-over alcohol, but then, as he spoke more, I can smell there was more fresh alcohol beverage smell to him. . . . (T1:12)

Reneau concluded that Respondent had been drinking before work and notified the store manager of her observation. (T1:11, 12). David Rischette, the store manager, and Jason Weber, assistant store manager also observed Respondent in the morning and smelled the odor of alcohol on his breath. (T1:67, 24, 35). Other co-workers who worked in close physical proximity to Respondent testified that they did not notice an odor of alcohol. (T1:52, 146, 152, 154).

Although testimony varies as to the specific time that Respondent left the pharmacy in the morning on November 4, 2004, he left around noon and before Wal-Mart store managers talked with him about alcohol on his breath or taking a blood test. (T1:29, 39, 50, 66 :T2:154, 155, 163). He went to his hotel room and called his sister about his grandmother's condition. Respondent testified that the update he received from his sister on his grandmother's condition left him "panicked" and "shaking like a leaf." (T2:165). He testified further that before returning to the Wal-Mart pharmacy he drank between six and eight ounces of whiskey and three or four beers. (T2:166).

The Division of Enforcement first contends that Respondent was impaired by alcohol while practicing pharmacy in the morning of November 4, 2004. The Division of Enforcement maintains that the under the light of common sense, respondent's testimony about the quantity of alcohol he drank around noon is not credible. The Division argues that the quantity of liquid involved is substantial and it was unlikely respondent drank such a substantial quantity of alcohol in the short time he was in his hotel room after telephoning his sister. The Division seeks a finding that Respondent consumed some alcohol shortly before work on November 4, 2004, arguing further that this finding would account for the smell of alcohol on his breath and also allow for a more reasonable late-morning consumption quantity that would be consistent with a blood-alcohol level of 0.186% at 1:46 P.M. From this finding, the Division asserts that respondent was impaired when he practiced pharmacy in the morning of November 4, 2004.

This first allegation of unprofessional conduct requires proof by the preponderance of the evidence that Respondent practiced pharmacy while his ability was "impaired by alcohol." Evidence of a previous night's drinking binge, "alcohol breath" while working, or that Respondent is an alcoholic, are insufficient alone in convincing power to justify a finding of

impairment. With respect to the morning of November 4, 2004, no evidence was offered of an inability to practice pharmacy, an error in pharmacy practice, or any careless or sloppy deportment by Respondent. No witness said Respondent appeared impaired in any way. When asked, the witnesses testified they did not observe that Respondent's eyes were bloodshot, his coordination was lacking, speech slurred, or gait uneven. (T1:17, 33-35, 44, 75, 145, 152). The greater weight of evidence does not support the allegation of impairment while practicing during the morning of November 4, 2004.

Thursday Afternoon, November 4, 2004

Respondent returned to the Wal-Mart store pharmacy about 45 minutes after leaving. When he appeared at the pharmacy, Terri Kunick, the assistant pharmacist, told him that management wanted to see him. (T1:52; T2:167). Respondent did not state that he was ready to go to work, that he intended to leave for the day, or that he was going to leave to visit his grandmother. (T1:54). After speaking with the assistant pharmacist in the pharmacy, Respondent went to a management office where store managers told him that he smelled of alcohol. Respondent first stated that his breath odor was the result of his diabetic condition, and then stated that he was not going to pass the blood test because he had "a drink" or "a beer" at lunch. He returned to the store pharmacy where he told the assistant pharmacist, Terri Kunick, that he was not going to pass the test, that he had not eaten all morning, that he thought he was ketoacidotic and that he had had a beer when he went back to the motel. (T1:30, 53, 69 - 71, 107, T2:167).

Respondent contends that, although he walked back to the Wal-Mart store, he did not return to pharmacy practice or intend to return to practice after talking with his sister at noon on November 4, 2004 and therefore may not be found to have been impaired while practicing pharmacy in the afternoon. He claims he walked back to the pharmacy from his hotel only for the purpose of letting the assistant pharmacist and the pharmacy district manager know that he was leaving. On this point, both the greater weight of evidence and common sense support the allegation that Respondent's ability to practice pharmacy was impaired by alcohol when he entered the Wal-Mart Pharmacy on November 4, 2004, at about noon, and that Respondent intended to return to practice, and, did return to pharmacy practice as the managing pharmacist at the Wal-Mart pharmacy.

Impairment

The results of Respondent's blood test on November 4, 2004, are reported in Exhibit 4 and show a blood alcohol content of 0.186% alcohol by weight at 1:45 P.M. The validity of the test results are supported by documentation in the report and the testimony of Jason Weber, who accompanied Respondent to the hospital, Stephanie Boardman, the hospital technician who took Respondent's blood sample, and Lance Presley, the forensic toxicologist who was in charge of the laboratory that tested Respondent's blood. The evidence supporting the test result meets the preponderance test and was not plausibly challenged by Respondent. Respondent's blood alcohol level was more than twice the alcohol concentration of 0.08 generally permitted for

Wisconsin drivers.⁹ While this statutory limit does not apply *per se* to pharmacists engage in pharmacy practice, the fact that Respondent's level is more than twice the limit for drivers is relevant evidence tending to prove that Respondent was impaired.

That Respondent was impaired when he returned to the Wal-Mart pharmacy is also evident from other evidence in the record. Respondent admitted he was impaired. At the hearing Respondent testified as follows, regarding resuming pharmacy practice after his hotel room drinking at around noon:

Q . . . If you had resumed the practice of pharmacy, would you have been impaired for the purposes of pharmacy?

A I assume so, yes. (T2:174).

After he met with store management Respondent told assistant pharmacist Terri Kunick he should not be driving:

Q Did you see him again that day?

A I think he came back to the store briefly after he went. I vaguely recall telling him he might as well go home and go see his grandma, and he said he probably shouldn't be driving. (T1:53).

Respondent admitted he was not thinking logically. When asked why he did not telephone the store rather than walk to the store to indicate he was leaving for the day, he testified "Because I was an idiot that day." (T2:166).

Respondent's blood alcohol level, his admissions as to impairment and inability to drive, and his conduct in walking back to the store, constitute the greater weight of credible evidence and establish by a degree of reasonable certainty that respondent's ability to practice pharmacy was impaired by alcohol in the afternoon of November 4, 2004 when he returned to the pharmacy.

Intent to Practice of Pharmacy

Respondent contends that although he drank a considerable amount of alcohol while in his hotel room around noon on November 4, 2004, his conduct was not "unprofessional conduct" because he did not intend to practice pharmacy on return to the store and did not practice pharmacy after returning. Respondent claimed that the reason he walked back to the store was: "To tell Terri I was leaving and call Jake Morris and tell him I was leaving." (T2:166). He testified that after his return to the store, in his meeting with management:

. . . I told them that I had just gone to my hotel room, and I had been drinking with the intent of leaving. I told them it was stupid to come back here, told them I had

⁹ Wis. Stat. § 885.235(1g).

no business being here and I needed to leave, that I had a family issue in California. (T2:167, 168).

However, the preponderance of evidence in the record does not support Respondent's contention, but rather supports the conclusions that Respondent intended to practice pharmacy and that in returning as he did, he practiced pharmacy as the managing pharmacist in the Wal-Mart store pharmacy.

Rebecca Chambers, a pharmacy technician who worked with Respondent testified that when Respondent arrived at work he told the pharmacy staff that his grandmother was ill. The staff told Respondent that he could leave and they would be able to handle the work. If he needed to go, he could go. (T2:155, 166). With respect to this discussion, Respondent testified: "I told them right away I was probably going to be leaving, and they were encouraging me to leave right away. I was just stubborn, and I didn't." (T2:164).

According to Respondent, if he were leaving for the day, he would have so advised Terri Kunick, the assistant pharmacist, and Jake Morris, the pharmacy district manager. Terri Kunick was called as a witness by both parties. Her testimony included the following:

Q When he returned from being back at the motel in the morning, did he make any statement regarding what his intentions were, what he was planning to do next?

A No, not that I recall.

Q Specifically did he say, well, I'm ready to go to work now?

A No, he didn't.

Q Did he say, you know, I got to get out of here, I just came over to tell you I'm leaving to go see my grandma?

A No, he didn't say that either. (T1:54)

Respondent could have telephoned both Morris and Kunick from his hotel. He did not. He had another opportunity to tell Terri Kunick that he was leaving when entered the pharmacy and talked with her before he met with store management. He did not. Until he was confronted with the blood test Respondent did nothing to show an intention to leave for the day.

Ordinarily, a person is held to intend the natural and probable consequences of his or her acts.¹⁰ Respondent was the pharmacy manager. He supervised an assistant pharmacist and technicians who worked in the pharmacy. When he left the store pharmacy, his staff was unaware of management concern over his condition in the morning of November 4, 2004. As far as his staff members were concerned, at about noon Respondent left the pharmacy in the normal course of business. Except for a discussion early in the day, in which only the possibility of leaving was raised, he gave his staff no indication that he was leaving. He remained at the pharmacy in the morning. When David Rischette asked Terri Kunick to let Respondent know

¹⁰ *Pachucki v. Republic Ins. Co.*, 89 Wis. 2d 703, 711, 278 N.W.2d 898, (1979); *State v. Gould*, 56 Wis. 2d 808, 813, 202 N.W.2d 903 (1973).

that store management wanted to see him when he returned, she did not respond or raise a concern to Rischette that Respondent was leaving early. (T1:68). She expected his return. On the basis of Respondent's conduct in the morning, her expectation was reasonable. The natural and probable consequence of his return to the store at about noon, when he entered the pharmacy and talked with the assistant pharmacist without indicating he was leaving for the day, is that he intended to continue working as the pharmacist. Similarly, management staff expected him to return. He admitted he had been "stubborn" about leaving. He knew or should have known that when he opened the door and walked into the pharmacy that in the minds of his staff he was there as the managing pharmacist. The natural and probable consequence of his return to the store and responding to the request to meet with the store managers is the same: Respondent intended to return to the practice of pharmacy. He gave no indication he was leaving until confronted about the odor of alcohol.

Practice of Pharmacy

Respondent is charged with "unprofessional conduct" viz. practicing pharmacy while his ability to practice was impaired by alcohol. The practice of pharmacy is defined by Wis. Stat. § 450.01 to include the following:

- (16) "Practice of pharmacy" means any of the following:
 - (a)
 - (g) Supervision of pharmacist supportive personnel.
 - (h)
 - (j) Performing any act necessary to manage a pharmacy. . . .

Under Wis. Stat. § 450.09(1)(a):

- (a) Every pharmacy shall be under the control of the managing pharmacist who signed the pharmacy license application, the most recent license renewal application or the most recent amended schedule of operations. The managing pharmacist shall be responsible for the professional operations of the pharmacy. . . ."

The Pharmacy Examining Board has defined "managing pharmacist" as ". . . a pharmacist designated by the pharmacy owner to have responsibility for and direct control of pharmaceutical operations in a pharmacy. Wis. Adm. Code § Phar 1.02(6). Respondent held the position of managing pharmacist at the Tomah Wal-Mart pharmacy on November 4, 2004.

On November 4, 2004, after he returned the store pharmacy, Respondent's engaged in the practice of pharmacy as defined in Wis. Stat. § 450.01(16)(g) and (j) when he entered the pharmacy and talked with his assistant pharmacist and also when he met with the store managers. His return to the pharmacy and conversation with Terri Kunick was "supervision of pharmacist supportive personnel" under Wis. Stat. § 450.01(16)(g). Ms. Kunick was aware that Respondent had considered leaving early. Respondent's return to the pharmacy indicated that he was back in the store as the managing pharmacist. In meeting with store managers, Respondent performed an

act necessary to manage the pharmacy under Wis. Stat. § 450.01(16)(j). He met with the store managers in his position as the pharmacy manager, while he was still in work status. The meeting was necessary for the store to determine whether he was able to perform his duties. Both Respondent's return to the pharmacy and his conduct after returning support the conclusion that respondent practiced pharmacy as the managing pharmacist at the Wal-Mart pharmacy in the afternoon of November 4, 2004.

Discipline

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).

The record does not include proof that respondent harmed a patient or made an error in practice. Respondent's assertion that news of his grandmother's illness caused him stress is uncontested. These circumstances mitigate his reckless conduct, as does his testimony that he has returned to twice-weekly attendance at AA meetings, has a sponsor and has not had an alcoholic drink since November 4, 2004. Nevertheless, the Division of Enforcement requests an order placing Respondent under the standard order used for impaired practitioners, which requires suspension, treatment, reports, monitoring and requiring Respondent to pay the costs of these proceedings. The order requested permits the suspension order to be stayed under certain limited conditions if respondent is able to show he may practice safely.

The Division of Enforcement included references in the complaint to Respondent's record showing unprofessional conduct related to substance abuse and requested that notice be taken of this record. References to Respondent's disciplinary record before the Board are included in the Findings. Also noted for the purpose of determining appropriate discipline is the fact that Respondent was not truthful in statements to Weber, Rischette and Kunick about the amount of alcohol he had consumed at the motel.

Based on the facts proven in this matter and the record of Respondent's unprofessional conduct, it is reasonable to conclude that Respondent has a potential to drink and to practice pharmacy while impaired and that public protection warrants the order requested by the Division of Enforcement.¹¹ The Division's request for the standard order is granted with exceptions that: (1) proposed paragraph C.17. is deleted because it makes a change in the burden of proof which is more appropriate under a stipulated order; (2) proposed paragraph C.26. is deleted because it does not appear applicable to this matter; (3) proposed paragraph D.4. is modified because it includes in the final sentence a conclusion of law that would be beyond the authority of the Board; and, (4) the order is made effective 30 days after signed by the Board to permit Respondent reasonable time to submit a petition for a stay of suspension.

¹¹ See *Medical Licensing Board v. Robertson*, 563 N.E.2d 168 (1990) and *O'Brien v Commissioner of Education*, 136 A.D.2d 837; 523 N.Y.S.2d 680 (1988).

Costs

Costs of this proceeding may be imposed under Wis. Stat. § 440.22. Costs are assessed against respondent in fairness to other members of the profession and the parties. The Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding.

This approach to the imposition of costs is supported by the practice of the Wisconsin Supreme Court, which is granted similar discretionary authority by SCR 22.24 to impose costs in attorney disciplinary hearings. The Court acknowledges the logic of imposing the cost of discipline on the offender rather than on the profession as a whole, and routinely imposes costs on disciplined respondents unless exceptional circumstances exist. *In the Matter of Disciplinary Proceedings against M. Joanne Wolf*, 165 Wis. 2d 1, 12, 476 N.W. 2d 878 (1991); *In the Matter of Disciplinary Proceedings against Swartwout*, 116 Wis. 2d 380, 385, 342 N.W. 2d 406 (1984).

Respectfully submitted this 4th day of October, 2006.

A handwritten signature in dark ink, appearing to read 'William Dusso', written over a horizontal line.

William Dusso
Administrative Law Judge
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 52708

SUSPENSION AND MONITORING ORDER FOR CRAIG W. MOON (2006)

SUSPENSION

- A.1. The license of Craig W. Moon to practice as a pharmacist in the State of Wisconsin #10536 shall be SUSPENDED for an indefinite period. Unless the suspension is stayed, Respondent shall not be in the professional area of any pharmacy while his license is suspended.
- A.2 Respondent shall mail or physically deliver all indicia of licensure to the Department Monitor within 14 days of the effective date of this Order.

STAY OF SUSPENSION

- B.1. The suspension shall be stayed upon Respondent petitioning the Board and providing proof, which is determined by the Board or its designee to be sufficient, that Respondent is in compliance with the provisions of Sections C and D of this Order and that Respondent's Treater is of the opinion that Respondent is able to safely practice pharmacy under the restrictions of this Order.
- B.2. The Board or its designee may, without hearing, remove the stay upon receipt of information that Respondent is in substantial or repeated violation of any provision of Sections C or D of this Order. Repeated violation is defined as the multiple violation of the same provision or violation of more than one provision. The Board may, in conjunction with any removal of any stay, prohibit the Respondent for a specified period of time from seeking a reinstatement of the stay under paragraph B.4.
- B.3. This suspension becomes reinstated immediately upon notice of the removal of the stay being provided to Respondent either by:
 - (a) Mailing to Respondent's last-known address provided to the Department of Regulation and Licensing pursuant to Wis. Stat. § 440.11; or
 - (b) Actual notice to Respondent or Respondent's attorney.
- B.4. The Board or its designee may reinstate the stay, if provided with sufficient information that Respondent is in compliance with the Order and that it is appropriate for the stay to be reinstated. Whether to reinstate the stay shall be wholly in the discretion of the Board or its designee.
- B.5. If Respondent requests a hearing on the removal of the stay, a hearing shall be held using the procedures set forth in Wis. Admin. Code ch. RL 2. The hearing shall be held in a timely manner with the evidentiary portion of the hearing being completed within 60 days of receipt of Respondent's request, unless waived by Respondent. Requesting a hearing does not stay the suspension during the pendency of the hearing process.

CONDITIONS AND LIMITATIONS

Treatment Required

- C.1. Respondent shall enter into, and shall continue, in a drug and alcohol treatment with a Treater acceptable to the Board or its designee. Respondent shall participate in, cooperate with, and follow all treatment recommended by Treater.

SUSPENSION AND MONITORING ORDER FOR CRAIG W. MOON (2006)

- C.2. Respondent shall immediately provide Treater with a copy of this Final Decision and Order and all other subsequent orders.
- C.3. Treater shall be responsible for coordinating Respondent's rehabilitation, drug monitoring and treatment program as required under the terms of this Order, and shall immediately report any relapse, violation of any of the terms and conditions of this Order, and any suspected unprofessional conduct, to the Department Monitor (See D.1., below). If Treater is unable or unwilling to serve as Treater, Respondent shall immediately seek approval of a successor Treater by the Board or its designee.
- C.4. The rehabilitation program shall include individual and/or group therapy sessions at a frequency to be determined by Treater, but not less than once weekly for the first year of the stayed suspension. Therapy may end only upon a determination by the Board or its designee after receiving a petition for modification as required by D.4., below.
- C.5. Treater shall submit formal written reports to the Department Monitor on a quarterly basis, as directed by the Department Monitor. These reports shall assess Respondent's progress in the drug and alcohol treatment program. Treater shall report immediately to the Department Monitor any violation or suspected violation of this Order.

Releases

- C.6. Respondent shall provide and keep on file with Treater, all treatment facilities and personnel, laboratories and collections sites current releases complying with state and federal laws. The releases shall allow the Board, its designee, and any employee of the Department of Regulation and Licensing, Division of Enforcement to: (a) obtain all urine, blood and hair specimen screen results and patient health care and treatment records and reports, and (b) discuss the progress of Respondent's treatment and rehabilitation. Copies of these releases shall immediately be filed with the Department Monitor.

AA/NA Meetings

- C.7. Respondent shall attend Narcotics Anonymous and/or Alcoholic Anonymous meetings or an equivalent program for recovering professionals, at the frequency recommended by Treater, but not less than one meeting per week. Attendance of Respondent at such meetings shall be verified and reported monthly to Treater and the Department Monitor.

Sobriety

- C.8. Respondent shall abstain from all personal use of alcohol.
- C.9. Respondent shall abstain from all personal use of controlled substances as defined in Wis. Stat. § 961.01(4), except when prescribed, dispensed or administered by a practitioner for a legitimate medical condition. Respondent shall disclose Respondent's drug and alcohol history and the existence and nature of this Order to the practitioner prior to the practitioner ordering the controlled substance. Respondent shall at the time the controlled substance is ordered immediately sign a release in compliance with state and federal laws authorizing the practitioner to discuss Respondent's treatment with, and provide copies of treatment records to, Treater and the Board or its designee.

SUSPENSION AND MONITORING ORDER FOR CRAIG W. MOON (2006)

- C.10. Respondent shall abstain from all use of over-the-counter medications or other substances which may mask consumption of controlled substances or of alcohol, create false positive screening results, or interfere with Respondent's treatment and rehabilitation.
- C.11. Within 24 hours of ingestion or administration, Respondent shall report to Treater and the Department Monitor all medications and drugs, over-the-counter or prescription, taken by Respondent, shall identify the person or persons who prescribed, dispensed, administered or ordered said medications or drugs, and shall provide the Department Monitor with a copy of the prescription. If Respondent has not provided a release as required by C.9 above, within 24 hours of a request by Treater or the Board or its designee, Respondent shall provide releases in compliance with state and federal laws. The releases shall authorize the person who prescribed, dispensed, administered or ordered the medication to discuss Respondent's treatment with, and provide copies of treatment records to, the requester.

Drug and Alcohol Screens

- C.12. Respondent shall enroll and begin participation in a drug and alcohol monitoring program which is approved by the Department pursuant to Wis. Admin. Code § RL 7.11 ("Approved Program"). A list of Approved Programs is available from the Department Monitor.
- C.13. At the time Respondent enrolls in the Approved Program, Respondent shall review all of the rules and procedures made available by the Approved Program. Failure to comply with all requirements for participation in drug and alcohol monitoring established by the Approved Program – including any positive test for any controlled substance or alcohol - is a substantial violation of this Order. The requirements shall include:
 - (a.) Contact with the Approved Program as directed on a daily basis, including vacations, weekends and holidays.
 - (b.) Production of a urine specimen at a collection site designated by the Approved Program within five (5) hours of notification of a test.
- C.14. The Approved Program shall require the testing of urine specimens at a frequency of not less than 96 times per year, for the first year of this Order. After the first year, the frequency may be reduced only upon a determination by the Board or its designee after receiving a petition for modification as required by D.4., below.
- C.15. 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 Treater or the Board or its designee shall determine to be appropriate to clarify or confirm the positive or suspected positive test results.
- C.16. In addition to any requirement of the Approved Program, the Board or its designee may require Respondent to do any or all of the following: (a) submit additional urine specimens, (b) submit blood, hair or breath specimens, (c) furnish any specimen in a directly witnessed manner.
- C.17. Proposed order paragraph C.17. not applicable.

SUSPENSION AND MONITORING ORDER FOR CRAIG W. MOON (2006)

- C.18. The Approved Program shall submit information and reports to the Department Monitor in compliance with the requirements of Wis. Admin. Code § RL 7.11.

Practice Limitations

- C.19. Respondent shall not practice as a pharmacist in any capacity unless Respondent is in full compliance with the rehabilitation and treatment programs as specified and approved under this Order. Respondent shall not practice as a pharmacist in any capacity other than in the presence of another pharmacist without approval of the Board.
- C.20. Respondent shall not be employed as or work in the capacity of a "managing pharmacist" as defined in Wis. Admin. Code § Phar 1.02(6) without approval of the Board.
- C.21. Respondent shall not be employed as or work in the capacity of a "pharmacy technician" as defined in Wis. Admin. Code § Phar 7.015(1) without approval of the Board.
- C.22. Respondent shall not be employed as or work in the capacity of a "pharmacist in charge" as defined in Wis. Admin. Code § Phar 1.02(9) while under the terms of this Order, except as otherwise allowed herein. Respondent may petition the Board for modification of this prohibition against practice as a pharmacist in charge pursuant to the terms of paragraph D.4. In addition to complying with the conditions of paragraph D.4., any such petition shall be accompanied by written request of the managing pharmacist, which shall include a complete work schedule of all pharmacists employed in the pharmacy indicating the proposed work schedule and supervision pattern for Respondent. The Board in its discretion may at any time modify any of the terms regarding practice by Respondent as a pharmacist in charge, including removal of authorization under this Order of Respondent to practice as a pharmacist in charge, as the Board deems appropriate in the circumstances. Grounds for modification or removal of the authorization to practice as a pharmacist in charge may include, but shall not be limited to, change in employer, managing pharmacist or residence address of the Respondent.
- C.23. Respondent shall provide a copy of this Final Decision and Order and all other subsequent orders immediately to supervisory personnel (including the managing pharmacist) at all pharmacies where Respondent is engaged in the practice of pharmacy as defined at Wis. Stat. § 450.01(16). The Board or the Department in its discretion may conduct unannounced inspections and/or audits, and make copies, of pharmacy records and inventory where Respondent is employed as a pharmacist.
- C.24. It is Respondent's responsibility to arrange for written reports from supervisors to be provided to the Department Monitor on a quarterly basis, as directed by the Department Monitor. These reports shall assess Respondent's work performance, and shall include the number of hours of active pharmacist practice worked during that quarter.
- C.25. Respondent shall obtain agreement from his managing pharmacist to monitor Respondent's access to and accountability for handling of controlled substances and other abusable prescription drugs in order to reasonably detect loss, diversion, tampering, or discrepancy relating to controlled substances and other abusable prescription drugs.

SUSPENSION AND MONITORING ORDER FOR CRAIG W. MOON (2006)

Respondent's supervisor shall include in the quarterly reports a description of Respondent's access to controlled substances and other abusable drugs and the monitoring thereof. Any loss, diversion, tampering, or discrepancy shall be immediately reported to the Board.

- C.26. Proposed order paragraph C.26. not applicable.
- C.27. Respondent shall arrange for agreement by his managing pharmacist to immediately report to the Board and to the Treater any conduct or condition of Respondent that may constitute a violation of this Order or a danger to the public.
- C.28. Respondent shall not own in whole or in part any interest in a pharmacy during the period of time this Order remains in effect.
- C.29. 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.

MISCELLANEOUS

Department Monitor

- D.1. Any requests, petitions, reports and other information required by this Order shall be mailed, e-mailed, faxed or delivered to:

Department Monitor
Wisconsin Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Ave.
P.O. Box 8935
Madison, WI 53708-8935
Fax: (608) 266-2264
Telephone: (608) 267-3817
department.monitor@drl.state.wi.us

Required Reporting by Respondent

- D.2. Respondent is responsible for compliance with all of the terms and conditions of this Order, including the timely submission of reports by others. Respondent shall promptly notify the Department Monitor of any failures of the Treater, treatment facility, Approved Program or collection sites to conform to the terms and conditions of this Order. Respondent shall promptly notify the Department Monitor of any violations of any of the terms and conditions of this Order by Respondent. Additionally, every three (3) months the Respondent shall notify the Department Monitor of the Respondent's compliance with the terms and conditions of the Order, and shall provide the Department Monitor with a current address and home telephone number.

Change of Treater or Approved Program by Board

- D.3. If the Board or its designee determines the Treater or Approved Program has performed inadequately or has failed to satisfy the terms and conditions of this Order, the Board or

SUSPENSION AND MONITORING ORDER FOR CRAIG W. MOON (2006)

its designee may direct that Respondent continue treatment and rehabilitation under the direction of another Treater or Approved Program.

Petitions for Modification of Limitations of Order

- D.4. Respondent may petition the Board for modification of the terms of this Order, however no such petition for modification shall occur earlier than one year from the date of this Order, and no such petition shall be made any earlier than three months from the date the Board has acted on the last such petition. Any such petition for modification shall be accompanied by a written recommendation from Respondent's Treater expressly supporting the specific modifications sought.

Costs of Compliance

- D.5. 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. Being dropped from a program for non-payment is a violation of this Order.

Additional Discipline

- D.6. In addition to any other action authorized by this Order or law, violation of any term of this Order may be the basis for a separate disciplinary action pursuant to Wis. Stat. § 450.10.