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**Before the
State of Wisconsin
Medical Examining Board**

In the Matter of Disciplinary Proceedings Against
Larry F. Carlyon, M.D., Respondent

FINAL DECISION AND ORDER

Order No. **00055 94**

Division of Legal Services and Compliance Case No. 16 MED 157

The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make 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, Medical 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 at Madison, Wisconsin on the 17th day of ~~December, 2017.~~
January 2018

Member
Medical Examining Board



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of Disciplinary Proceedings Against
Larry F. Carlyon, M.D., Respondent

DHA Case No. SPS-17-0023
DLSC Case No. 16 MED 157

PROPOSED DECISION AND ORDER

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Larry F. Carlyon, M.D.
007 Chilman Lane
Ishpeming, MI 49849

Wisconsin Medical Examining Board
P.O. Box 8366
Madison, WI 53708-8366

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorney Yolanda McGowan
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal Notice of Hearing and Complaint against Respondent Larry F. Carlyon, M.D. (Respondent). The Complaint alleged that Respondent's license was subject to disciplinary action pursuant to Wis. Stat. § 448.02(3) because Respondent engaged in unprofessional conduct under Wis. Admin. Code § Med 10.03(3)(a), (c), (g), and (i).

The Division served Respondent on September 21, 2017 by sending a copy of the Notice of Hearing and Complaint to his address on file with the Department by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. Respondent failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09(4), and failed to appear at the

telephone prehearing conference held before the Division of Hearings and Appeals on October 25, 2017.

The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). In light of Respondent's failure to file an Answer to the Complaint and failure to appear for the prehearing conference, the undersigned Administrative Law Judge (ALJ) found Respondent to be in default and issued a Notice of Default and Order on October 25, 2017. Consistent with the Notice, the Division filed a recommended proposed decision and order on November 20, 2017.

FINDINGS OF FACT

Facts Related to the Alleged Violations

With the exception of Finding of Fact 6, Findings of Fact 1–10 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Larry F. Carlyon, M.D., is licensed by the State of Wisconsin to practice medicine and surgery, having license number 24364-20, first issued on April 23, 1982, with registration current through October 31, 2017.

2. Respondent's most recent address on file with Department is 007 Chilman Lane, Ishpeming, Michigan 49849.

3. Prior to March 16, 2016, Respondent was licensed by the State of Michigan to practice medicine and surgery in that state.

4. On or about March 16, 2016, Respondent entered into a consent agreement (Consent Order) with the State of Michigan Department of Licensing and Regulatory Affairs Bureau of Professional Licensing Board of Medicine Disciplinary Subcommittee (Michigan Board), whereby he permanently surrendered his Michigan medical license.

5. Pursuant to the Consent Order, the Michigan Board found that Respondent violated multiple sections of the Michigan Public Health Code related to the practice of medicine and surgery.

6. Specifically, the Michigan Board found that Respondent violated the following sections of that state's Public Health Code:

- Section 16221(a) - violating a general duty, consisting of negligence or failure to exercise due care, including . . . any conduct, practice, or condition that impairs, or may impair the ability to, safely and skillfully practice the health profession;
- Section 16221(b)(i) - demonstrating incompetence, defined as a departure from, or failure to conform to, minimal standards of acceptable and prevailing

practice for a health profession, whether or not actual injury to an individual occurs; and lastly,

- Section 16221(c)(iv) - selling, prescribing, giving away, or administering drugs for other than lawful diagnostic or therapeutic purposes.

(Exhibit B, attached to Division's Recommended Proposed Decision and Order)

7. On May 11, 2016, Department staff sent a letter to Respondent's address of record requesting information regarding the Michigan licensing action. No response was received from Respondent.

8. On June 10, 2016, Department staff sent an email to Respondent, again requesting information. No response was received from Respondent.

9. On August 5, 9, and 15, 2016, Department staff called Respondent at a telephone number provided by Respondent. On all occasions, Department staff reached an automated voice mail and left a message requesting a return call from Respondent. Respondent failed to respond to all three messages.

10. On April 27, 2017, Department staff sent another email to Respondent. No response was received from Respondent.

Facts Related to Licensure Status

11. Respondent's license expired on October 31, 2017.

12. Since the Division filed its recommended proposed decision and order in this matter, Respondent has failed to renew his Wisconsin license to practice medicine and surgery.

13. Pursuant to Wis. Stat. § 440.08(3), Respondent retains the right to renew his license upon payment of a fee until October 31, 2022.

Facts Related to Default

14. The Complaint and Notice of Hearing in this matter were served on Respondent on September 21, 2017, by both certified and regular mail consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing advised Respondent: "If you do not provide a proper Answer within 20 days, you will be found to be in default and a default judgment may be entered against you on the basis of the Complaint and other evidence. In addition, the Medical Examining Board may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing."

15. Respondent failed to file an Answer to the Complaint within 20 days of the filing of the Notice of Hearing and Complaint as required by Wis. Admin. Code § SPS 2.09(4).

16. Following the expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for October 25, 2017. Notice of this prehearing

conference was sent to both parties, with instructions that Respondent provide the ALJ with a telephone number at which he could be reached no later than October 23, 2017. The Notice further advised Respondent: “The Respondent’s failure to appear at a scheduled conference or hearing may result in default judgment being entered against the Respondent.”

17. Respondent failed to provide a telephone number at which he could be reached for the prehearing conference as required by Wis. Admin. Code § HA 1.07(3)(c).

18. At the prehearing conference held on October 25, 2017, the Division provided a telephone number for Respondent, whereupon the ALJ left a voicemail for Respondent indicating that Respondent should contact the ALJ at the telephone number provided by 11:20 a.m., failing which the ALJ would proceed with the conference without Respondent. Respondent did not contact the ALJ at the telephone number provided by the ALJ.

19. Respondent did not appear for the October 25, 2017 prehearing conference as required by Wis. Admin. Code § SPS 2.11.

20. The Division moved for, and was granted, default judgment pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

21. On October 25, 2017, the ALJ issued a Notice of Default and Order finding that Respondent was in default and requiring the Division to file and serve a recommended proposed decision and order no later than November 24, 2017.

22. The Division filed its submission on November 20, 2017. Respondent failed to file a response to either the ALJ’s Notice of Default and Order or to the Division’s submission.

DISCUSSION AND CONCLUSIONS OF LAW

Default

As stated in the October 25, 2017 Notice of Default and Order, Respondent is in default for failing to file an Answer to the Complaint and failing to appear at the prehearing conference held on October 25, 2017. *See* Wis. Admin. Code §§ SPS § 2.09(4) and 2.14; Wis. Admin. Code § HA 1.07(3). Accordingly, an order may be entered against Respondent on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § SPS 2.14; Wis. Admin. Code § HA 1.07(3).

Violations of Wisconsin Statute and Administrative Code

Following an investigation and disciplinary hearing, if the Board determines that a physician is guilty of unprofessional conduct, it may “warn or reprimand that person, or limit, suspend or revoke any license or certificate granted by the board to that person . . .” Wis. Stat. § 448.02(3)(c).

The phrase “unprofessional conduct” as used in Wis. Stat. § 448.02(3)(c) includes “[t]hose acts or attempted acts of commission or omission defined as unprofessional conduct by

the board under the authority delegated to the board by s. 15.08(5)(b).” Wis. Stat. § 448.015(4)(am)1. The Board has defined unprofessional conduct in Wis. Admin. Code § Med 10.03.

The Division alleges that Respondent is subject to discipline for engaging in unprofessional conduct as defined by Wis. Admin. Code § Med 10.03(3)(a), (c), (g), and (i), which state:

Unprofessional conduct. “Unprofessional conduct” includes the following, or aiding or abetting the same:

...

(3) LAW VIOLATIONS, ADVERSE ACTION, AND REQUIRED REPORTS TO THE BOARD.

(a) Failing, within 30 days, to report to the board any final adverse action taken against the licensee’s authority to practice medicine and surgery by another licensing jurisdiction concerned with the practice of medicine and surgery.

...

(c) Having any credential pertaining to the practice of medicine and surgery or any act constituting the practice of medicine and surgery become subject to adverse determination by any agency of this or another state, or by any federal agency or authority.

...

(g) After a request by the board, failing to cooperate in a timely manner with the board’s investigation of a complaint filed against a license holder. There is a rebuttable presumption that a credential holder who takes longer than 30 days to respond to a request of the board has not acted in a timely manner.

...

(i) Except as provided in par. (j), a violation or conviction of any laws or rules of this state, or of any other state, or any federal law or regulation that is substantially related to the practice of medicine and surgery.

Whether Respondent engaged in unprofessional conduct under subsections (3)(a) and (c) of this provision is dependent upon whether the Michigan Consent Order constitutes a “final adverse action,” Wis. Admin. Code § Med 10.03(3)(a), and/or an “adverse determination,” Wis. Admin. Code § Med 10.03(3)(c), against Respondent’s license. I conclude that the Michigan Consent Order constitutes a final adverse action and an adverse determination against Respondent’s license. Respondent stipulated to the permanent surrender of his credential to practice medicine in the State of Michigan. Respondent’s surrender of his Michigan medical license was effected in the course of, and as final resolution of, a disciplinary proceeding conducted by the Michigan Board, which found that Respondent violated the sections of that state’s Public Health Code pertaining to the practice of medicine, set forth in Finding of Fact 6, above. Because the Consent Order is an adverse determination, Respondent engaged in unprofessional conduct under Wis. Admin. Code § Med 10.03(3)(c). Moreover, because Respondent failed to report the Michigan Board’s final adverse action to the Wisconsin Board

within 30 days, he also engaged in unprofessional conduct pursuant to Wis. Admin. Code § Med 10.03(3)(a).

This determination is also consistent with federal law. As the Division notes, the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 *et seq.*) authorized the creation of a National Practitioner Data Bank (NPDB) to collect and release information about state, federal and other entities' credentialing, certification and licensing actions relating to the professional conduct of physicians and other healthcare providers. The law was amended to expand the requirements under the NPDB, ultimately requiring each state to report certain final adverse licensure or certification actions taken against health care practitioners to the NPDB. *See* 42 U.S.C. 1396r-2. Under this law, an adverse action includes a final action taken by a state licensing authority which results in a physician surrendering his or her medical credential and any negative action or finding by such authority regarding the physician. *See* 42 U.S.C. 1396r-2(a)(1)(A)(ii) and (iv); 45 C.F.R. 60.8(a)(3).

In addition, by violating Michigan laws and rules substantially related to the practice of medicine, Respondent also engaged in unprofessional conduct under Wis. Admin. Code § Med 10.03(3)(i).

Finally, the facts also show that Respondent engaged in unprofessional conduct under Wis. Admin. Code § Med 10.03(3)(g). On May 11, 2016, the Division mailed a letter to Respondent's address of record requesting a reply. Respondent did not reply. On June 10, 2016, the Division sent an email to Respondent's email address of record requesting a reply. Respondent did not reply. On August 5, 9, and 15, 2016, the Division called Respondent's telephone number of record and left voicemail messages requesting a return call. Respondent did not respond. On April 28, 2017, Division staff again emailed Respondent requesting a response. Respondent did not reply. By failing to cooperate with the Board's investigation of the complaint against him, Respondent engaged in unprofessional conduct as alleged.

Based on the foregoing, and with Respondent making no argument to the contrary, it is undisputed that Respondent engaged in unprofessional conduct as defined in Wis. Admin. Code § Med 10.03(3)(a),(c),(g) and (i).

Expiration of License Since Complaint Filed

The Complaint in this matter was filed on September 21, 2017. The Complaint properly stated that Respondent's license registration was current through October 31, 2017. As of the date of filing of the Division's recommended proposed decision and order, Respondent's registration had not been renewed, and is therefore expired. Although expired, because Respondent retains the right to renew his license upon payment of a fee according to Wis. Stat. § 440.08(3), the Board retains jurisdiction in this matter and can impose discipline.

Appropriate Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the credential holder; (2) to protect the public from other instances of misconduct; and (3) to deter other

credential holders from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division requests that Respondent's right to renew his Wisconsin license to practice medicine and surgery be revoked. The requested discipline is consistent with the purposes articulated in *Aldrich* for the reasons set forth below.

"Protection of the public is the purpose of requiring a license." *State ex rel. Green v. Clark*, 235 Wis. 628, 631, 294 N.W. 25 (1940). When a license is granted to an individual, the State of Wisconsin is assuring the public that the licensed individual is competent in the profession. *Stringez v. Department of Regulation and Licensing Dentistry Examining Board*, 103 Wis. 2d 281, 287, 307 N.W.2d 664 (1981).

Public safety and protection are paramount in licensing actions. In this case, there is undisputed evidence that while practicing as a physician in Michigan, Respondent engaged in significant and egregious conduct. His conduct demonstrated a departure from, or failure to conform to, the minimal standards of acceptable and prevailing practice for a health profession; showed a failure to exercise due care; and endangered the public by prescribing controlled substances for other than lawful diagnostic or therapeutic purposes. This type of conduct creates an untenable risk of harm to public safety and welfare that cannot be ignored.

In addition to public safety and protection, promoting rehabilitation of the Respondent is an important and established purpose of discipline under *Aldrich*. Although desired, rehabilitation is not always possible. Due to Respondent's complete refusal to be held accountable for his serious conduct, this is such a case. Respondent was duly notified of the Board's pre-complaint investigation, and was also made aware of these proceedings. He had every opportunity to appear and avail himself of whatever options for rehabilitation were available. He elected not to do so. When a physician who acts with incompetence, negligence and recklessness then refuses to cooperate with the Board's investigation and in these proceedings, rehabilitation is highly unlikely. For that reason, revocation of the right to renew his credential is necessary.

Revoking Respondent's right to renew also furthers the third purpose of discipline – deterrence. Revocation will forewarn other licensees that the laws and rules governing their profession are serious, and will be seriously enforced. This will act as a deterrent to engaging in unprofessional conduct and refusing to submit to the Board's legitimate authority.

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondent. See Wis. Stat. § 440.22(2). In exercising such discretion, the Board must look at aggravating and mitigating facts of the case; it may not assess costs against a licensee based solely on a "rigid rule or invocation of an omnipresent policy," such as preventing those costs from being passed on to others. *Noesen v. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, ¶¶ 30-32, 311 Wis. 2d 237, 751 N.W.2d 385. Boards and the Department have also, in previous orders, considered

many factors when determining if all or part of the costs should be assessed against a Respondent. Factors have included: (1) the number of counts charged, contested and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, LS 0802183 CHI (Aug. 14, 2008). It is within the Board's discretion as to which, if any, of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

The Division is correct that Respondent should be assessed all of the costs of this proceeding. The Division has proven all counts alleged. The factual allegations were deemed admitted and there is no argument to indicate any factual findings or litigation were unnecessary. Respondent's conduct is of a serious nature, and the discipline requested and imposed -- revocation -- is the most serious form of discipline available. Respondent has failed to cooperate with the investigative and disciplinary process. By nature of being in default, Respondent has made no argument concerning whether costs should be assessed against him. Furthermore, it would be unfair to impose the costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct. Therefore, it is appropriate for Respondent to pay the full costs of the investigation and of these proceedings.


ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that Respondent Larry F. Carlyon, M.D.'s license to practice medicine and surgery (no. 24364-20), and any right to renew his license, are hereby REVOKED, effective the date the final decision is signed by the Board.

IT IS FURTHER ORDERED that should Respondent ever apply for a credential with the Department in the future, Respondent shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18, prior to the Department's consideration of any such application.

Dated at Madison, Wisconsin on November 29, 2017.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: 
Jennifer E. Nashold
Administrative Law Judge