

**FILED**

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**NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS**

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF MEDICAL EXAMINERS  
DOCKET NO.**

**IN THE MATTER OF**

**KENNETH ZAHL, M.D.  
LICENSE NO. MA 56413**

**CONSENT ORDER  
IN SETTLEMENT OF  
MOTIONS TO MODIFY  
MAY 5, 2003 ORDER**

**Preamble as to Procedural and Factual History**

On April 3, 2003, the New Jersey State Board of Medical Examiners (hereinafter "Board") revoked Respondent Kenneth Zahl, M.D.'s (hereinafter "Respondent") license to practice medicine and surgery in the State of New Jersey. Respondent's license revocation was ordered to be effective on April 11, 2003.

On April 11, 2003, the Appellate Division granted Respondent's motion for an emergent application to stay the revocation of his license pending final disposition of Respondent's appeal of the April 3, 2003 Board Order. However, the Appellate Division made the stay conditioned on:

appellant's satisfaction of any and all reporting requirements imposed by the State Board of Medical Examiners (Board) and the payment of all costs associated with the Board's continuing supervision and oversight of the financial and billing activities of the appellant's medical practice.

Pursuant to the Order of the Appellate Division, the Board on May 5, 2003 entered an Order which established a monitoring team to oversee Respondent's medical practice during the pendency of the appeal. This monitoring team consisted of a Practice Monitor and a Billing Monitor.

**CERTIFIED TRUE COPY**

Patricia Ann Bocglin, R.N. was the Board-approved Practice Monitor. Her duties included accompanying and observing Respondent as he engaged in medical practice, and preparing a contemporaneous daily log recording any and all medical procedures and/or services that Respondent provided to patients. In accordance with the May 5, 2003 Order, she was to provide the Board with quarterly reports, to include copies of her daily logs, detailing the monitoring activity performed and noting any perceived improprieties, practice deviations or regulation violations observed. Ms. Bocglin filed a report on September 15, 2003, February 6, 2004, February 18, 2004, and a letter dated February 20, 2004.

Patricia Ross, R.N. was the Board-approved Billing Monitor. Her duties included reviewing all bills that Respondent submitted for payment to ensure that Respondent was accurately and appropriately billing and coding for medical services. In accordance with the May 5, 2003 Order, she provided the Board with a first quarterly report detailing the monitoring activity performed, and noting any perceived improprieties, practice deviations, or regulation violations dated September 30, 2003 and three additional reports dated October 13, 2003, October 27, 2003, January 30, 2004, and a letter dated February 20, 2004.

The present matter was opened before the Board based upon both the Attorney General and Respondent filing on February 26, 2004, separate Motions for Modification of the May 5, 2003 Order. The Respondent's motion also sought to compel production of monitoring reports that had not been provided to Respondent's counsel. The Attorney General's motion was supported by reports from the billing and practice monitors and a certification of Gerard Malanga, M.D. Respondent disputed the Attorney General's motion by submitting certifications from Dr. Zahl and

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his staff as well as an expert report from Elaine Caruso-Long on billing issues in opposition to the Attorney General's motion. Oral argument and witness testimony on both motions was scheduled before the full Board on March 10, 2004.

On March 10, 2004, both motions were adjourned by the Board and set down for a hearing before a Committee of the Board (hereinafter "Committee"), on March 17, 2004. On March 17, 2004, the parties presented opening arguments, and the direct testimony and partial cross-examination of Ms. Boeglin. Further testimony was scheduled to take place on March 30, 2004.

Upon the suggestion of the Committee that the parties engage in meaningful settlement discussions, the hearing on March 30, 2004 was scheduled to commence at 1:00 p.m. but the parties met at 9:00 a.m. with the counseling deputy to commence a settlement discussion. Meaningful settlement discussions ensued and were furthered by the advice and counsel of both the counseling deputy and the Board Appointed Hearing Committee. Discussions extended over eight hours and resulted in the within document. Given that this was a strongly contested matter entailing both a motion and cross-motion, the agreements expressed herein represent a thoroughly negotiated resolution in which each side voiced its concerns and attempted, in good faith, to meld those concerns with the concerns and needs of the opposing party, and, where appropriate, with the concerns of the Committee.

**Terms of Consent Order in Resolution of the Motion and Cross-Motion**

For good and sufficient cause shown and with the recommendation of the Board Appointed Hearing Committee and it appearing that the parties have consented to the entry of this Order,

IT IS ORDERED THIS 14<sup>th</sup> DAY OF APRIL 2004 AS FOLLOWS:

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1. The service of Patricia A. Boeglin, R.N. as practice monitor is hereby terminated. The service of Patricia Ross, R.N. as billing monitor is modified as set forth in Paragraph 2 of this Consent Order. The ongoing practice monitor and billing monitor functions shall be performed by three Registered Nurses employed by United Review Services (URS) on a rotating schedule. Said nurses are subject to the consent of the parties and approval of Medical Director Gluck, which approval was issued on March 31, 2004. Dr. Gluck shall apprise the monitors of their duties and the parties agree that he may contact them via a conference call for this purpose. Respondent's counsel shall provide them with a copy of this Order. The monitors shall have unfettered access to original patient medical records for those patients treated during the time frame of monitoring by URS.

2. Patricia Ross, RN shall also perform as a billing monitor as follows. Ms. Ross shall review approximately 20 randomly chosen patient records per month for which bills were prepared by URS chosen by her in a process provided by the Attorney General and agreed to by Respondent.

3. In the course of their assignment to monitor the Respondent in his practice, the monitors will have occasion to observe other licensed healthcare professionals. However, it is agreed by the parties that the role of the monitor is not to separately monitor and report on the other licensed professionals employed in Dr. Zahl's practice.

4. URS and Ms. Ross shall prepare and serve monthly reports for the first quarter of their review, and thereafter on a schedule approved by Dr. Gluck. The reports shall be delivered to Dr. Gluck, Board counsel, Respondent's counsel and the Attorney General. At the conclusion of the

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first quarter of this review, the involvement of Ms. Ross may be terminated in the discretion of the Medical Director on application by Respondent.

5. Within three (3) business days of Respondent's counsel being provided with an estimate of the quarterly charges of URS and Ms. Ross, Respondent shall establish an escrow account in accord with the May 5, 2003 Order (paragraph 5 therein) and deposit in such account an amount equal to the anticipated quarterly charges.

6. Respondent may bill for Independent Medical Examinations (IMEs) and Office Visits that are nonprocedural encounters on a going forward basis, without the necessity for a monitor's presence. Consistent with the May 5, 2003 Order, Respondent may not bill for any other services rendered outside the presence of a URS monitor.

7. Respondent shall be permitted to bill for services rendered on July 15, 2003 and October 27, 2003 in the absence of the practice monitor due to circumstances beyond Respondent's control arising out of Ms. Boeglin's late notice of an inability to be present and the need to attend to a family medical emergency. Respondent shall provide the records concerning such services to a URS monitor for coding and bill preparation.

8. Without admission or finding as to whether any contrary conduct occurred to date, Respondent shall observe accepted standards of care in his medical practice. In particular, Respondent:

(A) Shall use appropriate sterile technique including but not limited to: observing single use restrictions on medical devices; not physically handling a telephone from the commencement of a patient's procedure (defined as when Dr. Zahl puts on gloves after his first

15. The parties agree to the resolution of certain issues raised in Ms. Ross' reports as set out in this paragraph.

(A) One of the issues raised in Ms. Ross' reports was whether conscious sedation anesthesia services rendered by a Certified Registered Nurse Anesthetist (hereinafter "CRNA") can be billed separately by a physician or professional service corporation.

Respondent conducts his medical practice through two separate professional corporations: Ambulatory Anesthesia of New Jersey, P.C. (hereinafter "AANJ") and Kenneth Zahl, M.D., P.C. (hereinafter "KZMD"). Respondent is the sole owner of both of these professional corporations.

AANJ employs CRNAs to provide anesthesia services under the supervision of Respondent. These anesthesia services include light conscious sedation, and local anesthesia with monitored anesthesia care. A bill is rendered by AANJ for the CRNAs' anesthesia services during a procedure. KZMD provides physician services of interventional pain management treatment and procedures. A bill is rendered by KZMD for Respondent's services during each office visit and procedure.

On further review and discussion, the parties agreed that, in general terms, billing rendered by a licensed professional, employed by a professional service corporation, was proper. However, in the present case, whether the CRNA could bill separately depended on a factual analysis to determine whether the procedure performed by the CRNA was separate and apart from Respondent's services. If the services performed by the CRNA were "entirely distinguishable" from those undertaken by Respondent, then the billing would be proper. On the other hand, if the services performed were part of the procedure being performed by the Respondent, then the CRNAs services could not be billed separately. An analysis of AMA comments to the CPT codes reveals that this

determination turns, in part, on whether the CRNAs participation is "medically necessary", which varies based on the patient's circumstances and the procedure.

(B) Another issue raised in Ms. Ross' reports was whether Respondent was charging excessive fees for the administration of medications during pain management procedures performed in his office. On further review and discussion, it was agreed by the parties that Respondent's billing for the drugs dispensed during the in-office administration of injections is not a per se violation of the Board's regulation set forth in N.J.A.C. 13:35-7.5(h).

16. The parties were unable to resolve other issues raised by Ms. Ross' reports and agreed that URS shall be consulted by the Board's Medical Director with regard to these billing questions. The parties further agreed that URS' determination on each of these questions be binding on the parties and that, if URS determines that Respondent has been inappropriately billing, he must reform and reissue his bills retroactively beginning with the date of the first report in which Ms. Ross identified each allegedly inappropriate billing practice. The parties agree that this determination need not be made retrospectively in any instance in which billing was made to Medicare or which was subject to arbitration in a Workers Compensation or PIP matter because they have already been subjected to scrutiny under the applicable rules for those entities or forums. The parties further agree that where such a reissuance cannot be done on a blanket basis but requires a case by case review of patient care, i.e. to determine whether it is "medically necessary" for CRNAs to provide monitored anesthesia care to patients, such re-evaluation and reissuance of bills will not be deemed necessary. The following are the issues to be addressed by URS:

a) Whether it is "medically necessary" for CRNAs to provide monitored anesthesia care

to patients who receive only local anesthesia during the performance of an interventional pain management procedure?

- b) Whether fluoroscopy used in conjunction with injections given at multiple levels can be billed based on spinal level imaged (as argued by Respondent) or spinal region imaged (as maintained by the Attorney General)?
- c) Whether it is appropriate to bill for monitored anesthesia services rendered by the CRNA during the interventional pain management procedures performed by Respondent using CPT-4 codes 00600 and 00630, which allow for 10 and 8 anesthesia base units, or using CPT-4 codes 01991, 01992, and 99141, which allow a lesser amount of anesthesia base units per procedure?
- d) Whether the CRNAs are charging an excessive amount of time for anesthesia services, specifically when no intravenous conscious sedation is given to the patient and the CRNA is providing monitoring anesthesia care to a patient who had received a local anesthetic?

17. The within provisions should be considered supplementary to the Board's Order of May 5, 2003. To the extent that any terms of this Order are in conflict with the terms of the May 5, 2003 Order this Order shall supersede.

18. The Executive Director of the Board shall correct the information forwarded to the Healthcare Integrity and Protection Data Bank on August 5, 2003 to delete references to the basis for action of the Board as "insurance fraud (Medicare, Medicaid or Other)" in connection with the April 3, 2003 Final Order.

David A. Wallace, M.D.  
Board President

We hereby consent to the form and entry of this Order

Darren A. Hafner  
Darren A. Hafner  
Deputy Attorney General

John Zen Jackson  
John Zen Jackson, Esquire  
Counsel for Respondent

We recommend the entry of this Order.

Bernard Roberts, M.D., F.A.C.P.  
Hearing Committee Chair

Edwin M. Trayner  
Edwin M. Trayner, M.D.  
Hearing Committee Member

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ATTY GEN/DIV OF LAW FAX: 973-

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