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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

In the Matter of:

SANTUSHT PERERA, M.D.

25 MA 06664200

FINAL ORDER ADOPTING
IN PART AND MODIFYING
IN PART INITIAL DECISION
OF ALJ SPRINGER

This matter was returned to the Board of Medical Examiners (the "Board") from the Office of Administrative Law, so as to allow the Board to consider the Initial Decision of Administrative Law Judge Ken R. Springer and to determine whether to adopt, modify or reject the proposed findings of fact, conclusions of law, and recommendations as to penalty made therein. This is a matter wherein it was alleged that Dr. Perera engaged in multiple acts of gross negligence when he performed wrong sided surgery - namely, a right-sided middle and lower lobectomy of patient R.F.'s lung -- on September 5, 2000. The Attorney General alleged that the operation that should have been performed was a left lower lobe lobectomy, to remove a carcinoid tumor which had caused multiple episodes of hemoptysis and was considered to be life-threatening by R.F.'s referring pulmonologist. The Attorney General also alleged in her complaint that Dr. Perera attempted to cover-up his error by altering his medical records following his

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performance of the procedure, to make it appear that it had been his intent to operate on the right side all along.

Following five days of hearings, ALJ Springer found that Dr. Perera had engaged in two distinct acts of gross malpractice, but found insufficient evidence on which to sustain the charges that Dr. Perera altered his medical record. Based on those findings, ALJ Springer recommended that the Board actively suspend the license of Dr. Perera for a period of two months, assess a civil penalty of \$10,000, and assess all costs of investigation and prosecution incurred in this matter to Dr. Perera.

*Procedural History and Arguments Presented
In Filed Exceptions*

As recounted within ALJ Springer's Initial Decision, an administrative complaint seeking, among other items, the suspension or revocation of the license of respondent Santusht Perera, M.D., was filed by the Attorney General on May 16, 2005, and an answer thereto filed on respondent's behalf on July 11, 2005. Following the transmittal of the matter to the Office of Administrative Law, five days of hearings were held before ALJ Springer on September 1, 2006 and April 19, 20, 27 and 30, 2007. The record was closed, following the submission of post-hearing briefs, on July 20, 2007, and ALJ Springer's decision then issued on April 14, 2008.

The Board received written exceptions to the Initial Decision from the Attorney General dated April 29, 2008, together

with a Certification of Costs detailing costs that were incurred in the prosecution of this matter. Respondent thereafter submitted two letters to the Board, dated May 14, 2008 and May 20, 2008, wherein he set forth his exceptions to the decision and his reply to the exceptions filed by the Attorney General.¹ The Attorney General also filed a written reply to respondent's exceptions on May 15, 2008.

Within her written exceptions, the Attorney General urged that the Board adopt the bulk of the Initial Decision of ALJ Springer - specifically, the Attorney General urged that the Board adopt ALJ Springer's findings that Dr. Perera engaged in gross negligence when removing the right middle and lower lobes of patient R.F.'s lung, and that his failure to have performed a repeat CAT scan before operating on R.F. constituted a second ~~distinct act of gross malpractice.~~ The Attorney General argued, however, that we should reject ALJ Springer's conclusion that there was insufficient evidence in the record to find that Dr. Perera altered his medical record, and instead find that Dr. Perera purposely altered his medical record (presumably at some time after the wrong-sided surgery was performed) so as to make it appear that his intent was to perform a right-sided procedure all along.

¹ We note that respondent's exceptions were not filed within the thirteen day time frame (from the date of the issuance of the judge's initial decision) required by N.J.A.C. 1:1-18.4. The Board nonetheless did review and consider respondent's written exceptions.

Finally, the Attorney General urged that the Board reject the ALJ's recommendation as to penalty, which recommendation was claimed to be too lenient to redress the misconduct in which Dr. Perera engaged.

Respondent urged the Board to adopt ALJ Springer's finding that Dr. Perera did not alter his patient record, but took exception to Judge Springer's conclusion that Dr. Perera's decision to perform right sided surgery, and his decision to proceed without first obtaining a CAT scan, constituted gross negligence. Respondent argued that, in order to find gross negligence, the Board needed to first find that Dr. Perera engaged in intentional wrongdoing, acted with malice, or acted with reckless disregard for the patient's well-being. Respondent urged that ALJ Springer's conclusions should be rejected because no such findings were made. Respondent instead argued that the Board should conclude that Dr. Perera engaged in simple negligence (that is, negligence which did not rise to a level that would support a finding of "gross" negligence). Dr. Perera further suggested that the Board should view what occurred in this case as being a "systems failure" rather than any mistake that could be attributed to Dr. Perera alone. Finally, respondent urged that, in the event the Board found no gross negligence, then there should be no period of active suspension imposed; in the alternative, respondent suggested that should the Board adopt the ALJ's findings, then the Board should

likewise adopt the recommendations made by ALJ Springer upon penalty.

The parties were advised that the matter would be considered by the full Board on May 21, 2008, and that counsel for both parties would be then afforded a time-limited opportunity to present oral argument to the Board upon their filed exceptions. The parties were further advised that, in the event the Board were to adopt the Decision, in whole or in part (and to conclude that a basis for the imposition of disciplinary sanction existed), the Board would then hold a hearing to determine the penalty to be meted to Dr. Perera, at which hearing the Board would afford respondent an opportunity to present evidence in mitigation of penalty and the Attorney General an opportunity to present evidence in aggravation of penalty.

On May 21, 2008, Michael Keating, Esq., appeared on behalf of respondent, however Dr. Perera did not attend the hearing. Deputy Attorney General Kevin R. Jespersen appeared on behalf of the Attorney General. On review of the written exceptions and consideration of oral arguments of counsel presented on May 21, 2008, the Board has concluded that good cause exists to adopt, in their entirety, the vast majority of the findings of fact and conclusions of law within the Initial Decision - specifically, all findings of fact and conclusions of law pertaining to the conclusions that Dr. Perera engaged in gross negligence when he

mistakenly operated on R.F.'s right lung and when he failed to take a repeat CAT scan in advance of the operation. We reject, however, ALJ Springer's conclusion that Dr. Perera did not deliberately alter the medical record he maintained for R.F., and instead conclude that a preponderance of the evidence supports a finding that Dr. Perera did in fact alter his medical record (specifically, his note dated August 29, 2000) in a manner to make it appear that his decision to perform right-sided surgery was intentional, rather than a product of physician error. Finally, based on our amended finding and our conclusion that Dr. Perera not only engaged in acts of gross negligence, but also sought to "cover-up" his mistake by, among other items, altering his patient record, we conclude that both the length of the suspension of respondent's license, and the amount of the fine to be imposed, are to be increased (specifically, we amend the ALJ's recommendations from a two month suspension to a six month suspension, and the recommendation upon penalty assessment from \$10,000 to \$30,000). We set forth below the basis for our decision to partially modify the proposed findings of fact and conclusions of law within ALJ Springer's Initial Decision, a summary of the evidence presented during the penalty phase hearing, and our determinations upon the penalty to be meted to Dr. Perera in this matter.

*Determination to Modify Findings and Conclusions
Upon the Issue of Record Alteration*

A. *Findings of Gross Negligence*

Initially, we point out that we have concluded that there is little reason or need to expound on the findings made by ALJ Springer on all issues in this case with the sole exception of the record alteration issue, as we fundamentally concur with his thoughtful analysis of all other issues. We unanimously find, as did ALJ Springer, that Dr. Perera committed two distinct acts of gross negligence in this case. Dr. Perera committed a gross error when he mistakenly identified R.F.'s carcinoid tumor as being in his right lung, rather than his left lung, and then proceeded to needlessly remove the middle and lower lobes of patient R.F.'s right lung. It is apparent that Dr. Perera's error was initially made at the time of R.F.'s first visit to Dr. Perera's office on August 29, 2000, and it is likewise apparent that Dr. Perera did not recognize his error until some time after the surgery to remove R.F.'s lung had commenced.

We unanimously concur with ALJ Springer's conclusion that respondent's error constitutes gross negligence. We point out that we reach that conclusion not only on the basis of the error itself, but also because we conclude that Dr. Perera could have and should have recognized and corrected his error long before commencing an operation on September 5, 2000. The error thus could and should have been recognized had Dr. Perera reviewed the findings of the CAT scans taken in April; had Dr. Perera in fact discussed the case

in advance with the referring pulmonologist, Dr. George Ciechanowski; and/or had Dr. Perera reviewed the records of the bronchoscopy and/or PET scan that had been performed prior to the time R.F. saw Dr. Perera. Further, even after Dr. Perera mistakenly identified the carcinoid tumor as being in the right rather than the left lung on August 29, 2000, Dr. Perera could have and should have recognized his error had he retrieved and reviewed the information and medical records available to him at any time prior to commencing surgery (and/or had he ordered a repeat CAT scan, see discussion below). The tragic error which occurred in this case thus could have been prevented had Dr. Perera simply engaged in the most basic and minimal of actions that should be taken by a surgeon in advance of the surgery, and we find his failure to have taken those basic actions unquestionably constituted gross negligence.²

Similarly, we concur with ALJ Springer's findings of fact that Dr. Perera engaged in grossly negligent conduct when he failed to order a repeat CAT scan prior to performing surgery. It is

² We expressly reject respondent's claim that the error which occurred should be considered to be a "systems" failure rather than an error that should be attributable to Dr. Perera. It is clear that the only reason that a right-sided procedure was performed was because Dr. Perera confused the location of the carcinoid, and never recognized his error prior to surgery. There is no other individual who could reasonably be held responsible to have known that the tumor was on the left side, or to have otherwise questioned Dr. Perera's decision to proceed with right-sided surgery in advance of the procedure.

undisputed that a period of over four months had passed from the time that the initial CAT scan was performed (April 27, 2000) to the time that R.F. visited Dr. Perera on August 29, 2000. We fully concur with ALJ Springer's finding that failing to repeat the CAT scan constituted a monumental breach of the standard of care in these circumstances. It is also tragically the case that, by failing to order a second CAT scan prior to commencing the procedure, Dr. Perera missed yet another opportunity to identify and correct his mistake about the location of R.F.'s carcinoid tumor in advance of surgery.

Finally, with regard to respondent's claim that a finding of gross negligence may be made by this Board only upon a predicate finding that a physician has engaged in intentional wrongdoing or wanton or reckless behavior, we note that respondent did not cite ~~in his written exceptions any case law to support his claims.~~ Nonetheless, on review of the record, we point out that we expressly find Dr. Perera's conduct in this case to have been reckless, and thus suggest that even were we to apply respondent's suggested threshold standard, we would find that Dr. Perera engaged in gross negligence when he proceeded to operate on R.F.'s right lung.³

³ The above statement should not be taken to suggest that we concur with respondent's analysis of the threshold standards for a finding of gross negligence. "Gross malpractice" as used in N.J.S.A. 45:1-21(c) means conduct that is wrongful beyond a mere deviation from a normal standard of care. In re Kerlin, 151

B. Findings related to Medical Records

The sole point on which we find cause to differ from ALJ Springer in this case is on the issue of record alteration. Initially, we point out that we concur with the conclusion reached by ALJ Springer that Dr. Perera's medical record was written with more than one pen. That conclusion is clearly supported by the testimony that was offered by forensic document examiner Dennis Ryan, who examined the note using infrared lighting techniques and was able to distinguish between and identify those portions of the note which were written with one ink formulation and those written in a second ink formulation.

While it is thus the case that two distinct portions of the record could be segregated and independently examined, ALJ Springer's Initial Decision is devoid of any analysis of the two ~~distinct portions of the record~~, nor does it include any findings concerning which portions of the note were written at the time of Dr. Perera's examination of R.F. and which portions were added to the note at some time thereafter. Additionally, the Initial

N.J. Super. 179, 185-86 (App. Div. 1977). The distinction between malpractice and gross malpractice is a matter of degree left to the judgment of the Board based on the facts in a case. Kerlin, 151 N.J. Super. at 186.

In this case, we expressly concur with and adopt herein ALJ Springer's analysis and his conclusion that Dr. Perera's egregious omissions and errors in this case satisfy "even the most stringent meaning of gross malpractice." (Initial Decision at pgs. 21-22).

Decision does not include any analysis or discussion of the meaning of the note as first written (that is, without the additions made in a second ink) as compared with the meaning of the note with additions. We set forth below our analysis of those two issues, as that analysis ultimately undergirds our conclusion that Dr. Perera purposefully altered his medical record so as to make it appear that his intention was to perform a right-sided procedure and so as to attempt to "cover-up" the mistake he made.

i. Ordering of the Entry of the Note - Which Portion was Written First?

Within his opinion, ALJ Springer concluded that one portion of Dr. Perera's medical record was written at the time of his examination of R.F., and other portions completed at a later time in a second pen.⁴ Having made that conclusion, however, ALJ Springer then stopped short of making any findings concerning the portions of the note that were written in one pen and those portions of the note written in a second pen, and similarly declined to analyze whether one portion could clearly be identified as having been written first and another portion identified as

⁴ While ALJ Springer did not expressly find that Dr. Perera wrote one portion of his note at one time with one pen, and then a second portion of his note at a later time using a second pen, he states that he found that Dr. Perera had provided the "plausible explanation that he routinely writes some of his notes in the examining room and completes them in the consultation room." (Initial Decision, p. 19-20).

having been written at some later time.

We have carefully reviewed the evidence admitted and testimony offered at the hearing before the Office of Administrative Law, and conclude that it is clear that one portion of the note must have been written first (i.e., at the time Dr. Perera examined R.F. on August 29, 2000) and other portions of the note written at some time thereafter. We append hereto three copies of Dr. Perera's medical record of August 29, 2000 - Exhibit 1 is a copy of the entire medical record, which was identified below as S-1; Exhibit 2 is a copy of portions of the record written in one identified ink formulation and Exhibit 3 is a copy of portions of the record written in a second ink formulation.⁵

We find that it is abundantly clear that the portions of the note that appear on Exhibit 2 must have been written by Dr. Perera first (presumably at the time of his initial examination of R.F.) and the remainder of the entries (that is, those appearing on Exhibit 3) added at some later time. It is thus the case that the notes written on Exhibit 2 logically appear to have been entered at one time, as all five lines start at approximately the same left

⁵ For purposes of the above analysis, S-1 in evidence below was copied in its entirety (i.e., as appearing on Exhibit 1 hereto), and thereafter the portions written in the two ink formulations were respectively "whited out" to form Exhibits 2 and 3. The Exhibits were created for use as attachments to this Order solely to illustrate and explain the basis for the determinations that we have made herein regarding the ordering and meaning of the entries made by Dr. Perera.

side margin and appear to be relatively evenly spaced. In contrast, one would not expect the notes in Exhibit 3 to have been written at the time of R.F.'s examination, as those entries lack consistency in spacing and do not all begin on the left margin of the page (only one of the four lines in fact begins at the left margin). Additionally, in two instances, the entries are preceded with slash marks that only make sense when they are read in conjunction with and as additions to the entries appearing on Exhibit 2.

Even more significantly, the entries made on Exhibit 2 make logical sense when one reads them as a whole (it is further noted that the entries on Exhibit 2 were signed by Dr. Perera, whereas those on Exhibit 3 do not include Dr. Perera's signature). In contrast, the entries made in Exhibit 3 cannot be read to constitute a logical or coherent medical note.⁶ We thus conclude that, on August 29, 2000, Dr. Perera prepared a five-lined note reading:

Patient seen
Needs right lower lobectomy for
carcinoid?
Discussed with patient
for admission next week.

⁶ Standing alone, the entries on Exhibit 3 read:

Patient with biopsy left lower lobe
currently without symptoms
/ carcinoma?
/ Dr. Ciechanowski

We further conclude that entries made in a second ink formulation identified on Exhibit 3 must have been added to the record as some time after the entries made on Exhibit 2 had been made.

ii. The Changed Meaning of the Note with the Additions

The next critical analytical step which we believe ALJ Springer failed to take was to consider the meaning of the note as initially written (i.e., as appearing in Exhibit 2) and as amended (i.e., as appearing in its entirety in Exhibit 1). It is clear that the meaning of the note is drastically altered when one contrasts the initial note with the note as it was later amended. As initially written (i.e., as appearing on Exhibit 2), Dr. Perera's note suggests that Dr. Perera intended to perform a right lower lobectomy to remove a carcinoid. There is no suggestion whatsoever in the initial note that Dr. Perera intended to perform a lobectomy for any purpose other than to remove a carcinoid, nor is there any writing that so much as suggests the possibility of a carcinoma on the right side. Similarly, there is no indication at all in the initial note that Dr. Perera was aware that a carcinoid had been found in R.F.'s left lower lobe. Simply put, the original note is entirely consistent with the predicate and essential finding that was made by ALJ Springer in this case - namely, that Dr. Perera mistook from R.F.'s very first visit the lobe on which R.F.'s carcinoid had been found, believing it to be the right lobe

when in fact it had been found on the left lobe.

In contrast, the amended note (that is, the text appearing in Exhibit 1, which includes both the entries written in one ink formulation appearing on Exhibit 2 and those written in the second ink formulation appearing on Exhibit 3) differs from the initial note in four significant respects. First, the note suggests to the reader that Dr. Perera was aware of the findings that had been made following a biopsy of R.F.'s left lower lobe, which in turn inferentially suggests that Dr. Perera purposefully and intentionally planned to operate on R.F.'s right lobe. Second, the note includes a reference to the fact that R.F. is currently "without symptoms," which again would be a fact which would be significant to explain Dr. Perera's election not to remove the left sided carcinoid and instead focus on an unknown density on the right side. ~~Third, the note suggests to the reader that Dr. Perera's purpose for operating on the right side was to remove either a carcinoma or a carcinoid (thus inferring that Dr. Perera was aware of a right sided mass, but not aware whether or not it was cancerous or benign).~~

Finally, the amended note suggests to the reader that Dr. Perera discussed his plans with the referring pulmonologist, Dr. Ciechanowski. While the note does not so state, the inference a reader of the note would certainly make is that Dr. Ciechanowski must have agreed with Dr. Perera's plans. Again, (if true), the

fact that Dr. Perera vetted his amended plan with Dr. Ciechanowski would be a significant fact that would lend support to Dr. Perera's decision to perform a right-sided rather than a left-sided lobectomy.

It is thus the case that the two notes cast the decision to operate on the right side in dramatically differing lights. As originally written, the note is yet another piece of evidence supporting the core finding in this case that Dr. Perera mistook the side of the lung on which R.F.'s carcinoid had been found. As amended, however, the note suggests a purposeful intent on Dr. Perera's part to perform a right sided operation, with knowledge of the findings made following the left sided biopsy, and with the approval of the referring pulmonologist. It is thus the case that the amended note clearly casts Dr. Perera's decision to operate on the right side in a dramatically differing light from the original note.

iii. Basis for our Determination that Dr. Perera altered his medical record after the surgical procedure.

Having made the two conclusions set forth above (that is, that the entries appearing on Exhibit 3 were added to Dr. Perera's record at some time after Exhibit 2 was created, and that the meaning of the note is drastically altered with the additional text), the next essential question which we need address is whether the text within Exhibit 3 was added before or after Dr. Perera

performed the right-sided lobectomy on patient R.F. The distinction is critical, because if the text was added before the operation, it would be unreasonable to conclude that Dr. Perera's intention when adding notes to his chart was to "cover-up" a mistake he made.⁷ In stark contrast, if Dr. Perera made the alterations after he performed wrong-sided surgery, then those additions must be seen as a transparent effort to alter his medical record after the fact, so as to create the illusion that his decision to operate on the right side was an intentional act rather than a grave mistake.

We are unanimous in our conclusion that there is an ample evidentiary predicate upon which to conclude that Dr. Perera altered his medical record after he mistakenly took out the middle and lower lobes of R.F.'s right lung. We thus decline to adopt ALJ Springer's conclusion that Dr. Perera's explanation as to how he may have prepared R.F.'s record with two pens was "plausible," and instead reject that explanation.⁸

⁷ It is clear, regardless whether the additions to Dr. Perera's record were made before or after surgery, that Dr. Perera made the additions to the record in a manner which violated N.J.A.C. 13:35-6.5 (b)(2) ("Corrections/additions to an existing record can be made, provided that each change is clearly identified as such, dated and initialed by the licensee.").

⁸ As recounted in the Initial Decision, Dr. Perera testified that he had no recollection of preparing the note, but conceded that he could have used more than one pen to prepare the note (Dr. Perera suggested that he could have completed certain portions of the note while examining R.F. in the examining room and then completed the note later in the consultation room).

We point out that there is a stark inconsistency in the manner in which ALJ Springer evaluated the credibility of Dr. Perera's testimony. ALJ Springer necessarily found that Dr. Perera's testimony on his actions preceding the surgery was not credible when he discounted that testimony and instead concluded that Dr. Perera confused the patient's left side with his right side and inadvertently operated on the wrong lung. Although ALJ Springer thus found the bulk of the testimony offered by Dr. Perera to be not credible, he then found Dr. Perera's testimony on the issue of the manner in which he prepared the patient record to be credible. While we are fully aware that credibility determinations are ordinarily best made by the trier of fact, in this instance we can discern no reason why the bulk of Dr. Perera's testimony was discounted as not credible but his related testimony on the issue of the manner in which he generally prepares his patient records was found to be credible (Dr. Perera was only able to testify about his usual practices, as he could not recall preparing R.F.'s record and thus offered no testimony specific to the preparation of that record).

We find it particularly significant that an ample predicate to support the charges that Dr. Perera altered his

Initial Decision, p. 19. ALJ Springer found Dr. Perera's explanation to be "plausible," and concluded that there was an inadequate foundation in the record to support the "far-flung inferences that the Deputy Attorney General seeks to draw." Initial Decision, p. 19-20.

medical record was in fact formed by the testimony that was offered by Dr. Ciechanowski. Dr. Ciechanowski testified that he had no conversations with Dr. Perera regarding Dr. Perera's decision to perform a right-sided procedure in advance of the surgery, and testified that he first learned that the carcinoid in R.F.'s left lung was still intact and that the operation had been performed on the right side when he unexpectedly saw R.F. in the hospital post-operatively. See Transcript of April 27, 2007; pg 174, l. 10 - p. 176, l. 2). Dr. Perera, in contrast, testified that he talked to Dr. Ciechanowski about R.F. in advance of surgery and, while Dr. Perera conceded that he could not recall the exact conversation he had, Dr. Perera stated that he would have told Dr. Ciechanowski during that conversation about what he intended to do. See Transcript of Testimony on April 27, 2007, p. 82, l.25 - 84, l. 9.

~~As noted above, we find it manifest that ALJ Springer necessarily found that much of Dr. Perera's testimony was not credible; accepting Dr. Ciechanowski's testimony as true, it is manifestly the case that Dr. Perera's note falsely purports to memorialize an event which in fact did not occur.~~

In a similar ilk, our conclusion that Dr. Perera altered his medical record after the surgery was performed is inferentially supported and buttressed by ALJ Springer's finding that Dr. Perera engaged in a second contemptible act of deceit after the surgery - namely, lying to R.F. about the findings that were made at surgery

- in order to attempt to cover-up his mistake (testimony offered by R.F. during depositions taken prior to his death during the civil malpractice action were entered into evidence at the hearing). In those depositions, R.F. testified that when he asked Dr. Perera why the operation had been performed on the right lung rather than the left lung, Dr. Perera falsely told R.F. that he had found a tumor in the right lung larger than the left lung and that he had removed that tumor to save R.F.'s life.⁹ Significantly, the conversation occurred at a time that Dr. Perera knew full well that the removed lung tissue contained no tumor at all, and his statement to R.F. thus must be considered to be a deliberate and knowing falsehood.

⁹ ALJ Springer initially noted that there was a "glaring discrepancy between the conflicting versions of what Dr. Perera told his patient after the operation was over," as Dr. Perera had testified that he informed R.F. that he had "gone in looking for cancer, but 'there was no cancer and there was no carcinoid in that lung.'" Initial Decision, p. 14. While ALJ Springer at no point explicitly states that he found that Dr. Perera's "version" of the conversation to be false, we find that ALJ Springer necessarily concluded that Dr. Perera lied when he found that R.F.'s "version" was "believable" and stated:

Corroboration that Dr. Perera took out the wrong lung comes from the deposition of R.F., who woke up in his hospital bed wondering why the right side of his body was hurting. R.F. accepted Dr. Perera's assurance that he had saved his life by removing a larger tumor from his right lung and only later learned that the tissue from his right lung was non-cancerous. R.F.'s version is believable and comports with his and his girlfriend's stated understanding that he was admitted to the hospital to remove a carcinoid from his right lung.

Initial Decision, p. 16.

While it is the case that the finding that Dr. Perera sought to deceive R.F. after the surgery does not directly establish that Dr. Perera altered his medical record, there is an inescapable similarity and parallel between that act and the act of altering the patient record. When coupled with Dr. Ciechanowski's testimony and with ALJ Springer's general determination that much of Dr. Perera's testimony was not credible, we are satisfied that there is good cause to conclude that ALJ Springer erred when he failed to find that Dr. Perera altered his patient record.¹⁰

iv. Testimony of Document Examiner Ryan

In rejecting ALJ Springer's conclusion on the question whether Dr. Perera altered his medical record, we point out that we respectfully disagree with the suggestion within the Initial Decision that it would have been necessary for the State's expert witness to have testified that the entries were made at different times and/or that any added entries changed the meaning of the note. Mr. Ryan's opinion was limited to identifying portions of the record written in different inks. We are satisfied that Mr. Ryan's opinion created an adequate predicate from which the trier

¹⁰ We also note that it is disturbing that Dr. Perera did not dictate his operative note for the surgery (S-2 in evidence below) until September 22, 2000, some seventeen days after the procedure was performed. While there may be reasons that are not part of the record why the dictation of the operative report was delayed, we point out that ordinary practice would have been for the operative note to have been dictated on the day of (or at the latest within a day or two of) the actual procedure.

of fact could then examine the record and make the very determinations we have made herein as to which entries were written first and whether the additional entries altered the meaning of the record.¹¹ In short, we do not find ALJ Springer's reliance on the fact that the expert did not offer an opinion as to whether Dr. Perera altered his record to be convincing - rather, we suggest that the issue was not one for the expert, but rather for the trier of fact.

Determinations upon Penalty

After concluding to adopt in part and modify in part the findings of the ALJ, we proceeded to hold a hearing limited to the issue of penalty to be imposed. Significantly, respondent did not appear at said hearing to present any testimony or statement in mitigation of penalty for the Board to consider, nor did he present either any mitigation witnesses on his behalf or any statements from witnesses.¹²

¹¹ While ALJ Springer pointed out that Mr. Ryan could not identify whether the entries were all made by Dr. Perera, our review of the record suggests that there was no claim made by Dr. Perera that he did not personally write the entire record (that is, other than the portions where the date, blood pressure and weight were recorded).

¹² Counsel for respondent requested that we adjourn our consideration of penalty to be imposed so as to afford respondent an opportunity to present evidence in mitigation of penalty at a later date. There is, however, no question that respondent had adequate notice of the fact that the Board was intending to proceed with a hearing on the issue of penalty to be assessed on May 21 (a practice which the Board routinely follows and a practice which counsel for respondent, who has appeared many

The Attorney General called Edith Bickoff, the surviving partner of R.F., to testify about the effects of the wrong-sided surgery on R.F. prior to his death. Portions of deposition testimony of R.F. and a videotaped statement of R.F. (made prior to his death) and a certification of Marika Frank, a close friend of R.F., were also introduced into evidence. It is apparent that R.F. suffered monumental and devastating consequences as a result of the wrong-sided surgery performed by Dr. Perera. Following the surgery, R.F. was in essence left as a respiratory cripple. He thereafter had insufficient lung capacity to allow the left-sided

times in the past before the Board, presumably well knew would be followed). Respondent in fact forwarded a list of 26 individuals who he identified as possible mitigation witnesses on Dr. Perera's behalf to the Board office on May 19, 2008, two days in advance of the hearing. Not a single one of those 26 individuals, nor Dr. Perera himself, however, appeared at the hearing on May 21, 2008, nor were any written statements offered from any of those 26 individuals or from anyone else on Dr. Perera's behalf. When asked on the record, counsel for respondent could not offer any explanation to the Board as to why the individuals identified on his list of proposed witnesses were not present (with the sole exception of one identified witness who was claimed to be out of the country) and/or why written statements from said individuals could not have been presented to the Board on May 21, 2008.

It should be noted that a majority of members of the Board present (9 out of 13 members) did in fact vote to grant respondent's request to adjourn the hearing so as to afford respondent additional time to present mitigation evidence. Pursuant to N.J.S.A. 45:1-2.2(d), however, an affirmative vote of a quorum of the Board (a quorum being defined to be a majority of the voting members of Board - that is, eleven members of the Board) was required to have taken the requested action. Accordingly, there was insufficient support to adopt a motion to adjourn the Board meeting, and the hearing continued.

operation which should have been performed in the first instance to occur, and thus was left with a potentially life-threatening condition that could not be surgically addressed. It is also apparent that Dr. Perera sought to keep the truth from R.F. regarding the reasons why the operation was performed on the right rather than the left side, and that R.F. likely would never have known the truth (that is, that there was no tumor present in the right lung tissue that Dr. Perera removed) but for the fortuity of his having obtained his patient records from the medical-group office many months after the surgery upon the bankruptcy of the medical group.

While Dr. Perera has not presented any evidence in mitigation of penalty, we have considered the testimony that he offered when testifying at the OAL in our deliberations. Additionally, as ALJ Springer noted, we are cognizant that there is nothing in the record to suggest that, but for this one case, Dr. Perera has a past history of substandard performance. Initial Decision, p. 23.

Upon consideration of all available evidence, we conclude that the recommendation as to penalty made by ALJ Springer should be amended, and that respondent should be assessed a more significant penalty than had been recommended by ALJ Springer. Specifically, we conclude that the balance of the equities supports the imposition of a more substantial penalty than that initially

recommended by ALJ Springer, based on the addition to the scales of the finding we have made that Dr. Perera not only engaged in acts of gross negligence, but thereafter altered his medical records and engaged in conduct designed to obfuscate and cover-up the mistake he made. We point out that we find Dr. Perera's post-surgical conduct to be morally repugnant, and of a character that clearly supports the imposition of a penalty beyond that which we would consider appropriate had the case simply involved a tragic error made without any finding of malintent on Dr. Perera's part.

While we might find ALJ Springer's recommendation of a two month suspension and \$10,000 fine adequate had we not concluded that this case included dishonest and deceptive conduct on Dr. Perera's part, that additional element of misconduct must be redressed with a more significant penalty, as it necessarily bespeaks an effort on Dr. Perera's part to both have avoided responsibility for the mistake that he made and to have sought to actively mislead his patient and his medical colleagues on the events which occurred. On balance, we conclude that an appropriate amendment of the recommendation as to sanction is to impose a two year period of license suspension, the first six months of which are to be served as a period of active license suspension, and to assess a civil penalty of \$30,000 in aggregate (to represent \$10,000 for each of the three counts of the complaint). We are satisfied that eighteen months of the suspension may be stayed and

served as a period of probation, provided that Dr. Perera first takes courses in medical record keeping and in medical ethics during the period that his license is actively suspended and provided that he complies with all other conditions of our Order herein.

Finally, on the issue of costs, Dr. Perera did not object to, or otherwise dispute, any item within the Attorney General's certification of costs. That certification, and the documentation appended thereto, forms an adequate predicate on which to support the application for total costs of \$51,273.10 in this case, to include \$5,400 in expert witness fees, \$2,088.10 in transcript costs, and \$43,785.00 in attorney's fees. We point out for the record that we find the import of this case to clearly support the expenditures that were made, and we find on our independent review the application for attorney's fees to have been sufficiently detailed to support the fees that were sought. Accordingly, we grant the entirety of the cost application made by the Attorney General.

WHEREFORE, it is on this 5th day of June, 2008

ORDERED:

1. The license of respondent Santusht Perera, M.D., is hereby ordered suspended for a period of two years, commencing at 5:00 p.m. on June 6, 2008. At a minimum, the first six months of the suspension (that is, from June 7, 2008 through and including

December 6, 2008) are to be served as a period of active suspension. The remaining eighteen months of the period of suspension (that is, from December 7, 2008 through and including June 6, 2010) may be stayed and served as a period of probation, provided that respondent complies with all conditions of the within Order.

2. Respondent is hereby assessed a civil penalty in the amount of \$30,000.00.

3. Respondent is hereby assessed costs incurred in this matter (specifically, attorney's fees, transcript costs and expert witness fees) in the aggregate amount of \$51,273.10.

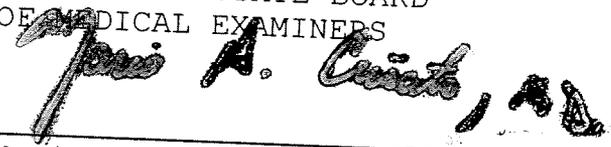
4. Respondent is ordered to fully attend and successfully complete a course in medical record-keeping, acceptable to the Board. Said course must be completed before respondent may resume any practice of medicine and surgery in the State of New Jersey.

5. Respondent shall be required to fully attend and successfully complete a course in medical ethics, acceptable to the Board. Said course must be completed before respondent may resume any practice of medicine and surgery in the State of New Jersey.

6. Prior to resuming any practice of medicine during the period of probation or thereafter, respondent shall first appear before a Committee of the Board, and shall then demonstrate both that he has complied with all conditions of this Order and that he

is then fit to resume the practice of medicine and surgery in the State of New Jersey. The Board expressly reserves the right, following said appearance, to impose any conditions or limitations the Board may then deem appropriate and/or necessary upon any resumed practice of medicine by respondent.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS



By:

Mario A. Criscito, M.D.
Board President

Patient Name

Flagg, Richard

Number

44857

PROGRES:

Date / Problems

(No. and Description)

FINDINGS (Subjective and Objective)

Plans

5/29/00
08/29/00

Bp.
CC:

140
90

Wgt

253

Temp.

Pulse

EXHIBIT
P-2
9-20-01

pt - c Don't see
pt - see many of eyes to
Needs (R) eye for
caroid 2 / caroid 2
few ft. / on. hennish.
for aids - kept well

EXHIBIT 1

Exhibit
S-1

Patient Name Flagg, Richard Number 44857

PROGRESS

Date / Problems (No. and Description)	FINDINGS (Subjective and Objective)				Plans
	Bp.	Wgt	Temp.	Pulse	
5 W/Aggravation 08/29/00	CC: 140 90	253			

EXHIBIT
P-2
9-20-01

Pt. - See.

Needs (R) cc for
caroid?

few ft

for admission - next week

[Large handwritten scribble]

EXHIBIT 2

Exhibit
S-1

Patient Name

Flagg, Richard

Number

44857

PROGRESS I

Date / Problems

(No. and Description)

FINDINGS (Subjective and Objective)

Plans

5 W/29/00

08/29/00

Bp:

140

wgt.

253

Temp.

Pulse

CC:

90

PT -

E

Don't see
country of Egypt

/ Cameron?
/ Dr. Williams

EXHIBIT
P-2
4-20-01

EXHIBIT 3

Exhibit
S-1

SANTUSHT PERERA, M.D.
NJ License # MA066642

ADDENDUM

Any licensee who is the subject of an order of the Board suspending, revoking or otherwise conditioning the license, shall provide the following information at the time that the order is signed, if it is entered by consent, or immediately after service of a fully executed order entered after a hearing. The information required here is necessary for the Board to fulfill its reporting obligations:

Social Security Number¹: _____

List the Name and Address of any and all Health Care Facilities with which you are affiliated:

List the Names and Address of any and all Health Maintenance Organizations with which you are affiliated:

Provide the names and addresses of every person with whom you are associated in your professional practice: (You may attach a blank sheet of stationery bearing this information).

¹ Pursuant to 45 CFR Subtitle A Section 61.7 and 45 CFR Subtitle A Section 60.8, the Board is required to obtain your Social Security Number and/or federal taxpayer identification number in order to discharge its responsibility to report adverse actions to the National Practitioner Data Bank and the HIP Data Bank.

**DIRECTIVES APPLICABLE TO ANY MEDICAL BOARD LICENSEE
WHO IS DISCIPLINED OR WHOSE SURRENDER OF LICENSURE
HAS BEEN ACCEPTED**

APPROVED BY THE BOARD ON MAY 10, 2000

All licensees who are the subject of a disciplinary order of the Board are required to provide the information required on the addendum to these directives. The information provided will be maintained separately and will not be part of the public document filed with the Board. Failure to provide the information required may result in further disciplinary action for failing to cooperate with the Board, as required by N.J.A.C. 13:45C-1 et seq. Paragraphs 1 through 4 below shall apply when a license is suspended or revoked or permanently surrendered, with or without prejudice. Paragraph 5 applies to licensees who are the subject of an order which, while permitting continued practice, contains a probation or monitoring requirement.

1. Document Return and Agency Notification

The licensee shall promptly forward to the Board office at Post Office Box 183, 140 East Front Street, 2nd floor, Trenton, New Jersey 08625-0183, the original license, current biennial registration and, if applicable, the original CDS registration. In addition, if the licensee holds a Drug Enforcement Agency (DEA) registration, he or she shall promptly advise the DEA of the licensure action. (With respect to suspensions of a finite term, at the conclusion of the term, the licensee may contact the Board office for the return of the documents previously surrendered to the Board. In addition, at the conclusion of the term, the licensee should contact the DEA to advise of the resumption of practice and to ascertain the impact of that change upon his/her DEA registration.)

2. Practice Cessation

The licensee shall cease and desist from engaging in the practice of medicine in this State. This prohibition not only bars a licensee from rendering professional services, but also from providing an opinion as to professional practice or its application, or representing him/herself as being eligible to practice. (Although the licensee need not affirmatively advise patients or others of the revocation, suspension or surrender, the licensee must truthfully disclose his/her licensure status in response to inquiry.) The disciplined licensee is also prohibited from occupying, sharing or using office space in which another licensee provides health care services. The disciplined licensee may contract for, accept payment from another licensee for or rent at fair market value office premises and/or equipment. In no case may the disciplined licensee authorize, allow or condone the use of his/her provider number by any health care practice or any other licensee or health care provider. (In situations where the licensee has been suspended for less than one year, the licensee may accept payment from another professional who is using his/her office during the period that the licensee is suspended, for the payment of salaries for office staff employed at the time of the Board action.)

A licensee whose license has been revoked, suspended for one (1) year or more or permanently surrendered must remove signs and take affirmative action to stop advertisements by which his/her eligibility to practice is represented. The licensee must also take steps to remove his/her name from professional listings, telephone directories, professional stationery, or billings. If the licensee's name is utilized in a group practice title, it shall be deleted. Prescription pads bearing the licensee's name shall be destroyed. A destruction report form obtained from the Office of Drug Control (973-504-6558) must be filed. If no other licensee is providing services at the location, all medications must be removed and returned to the manufacturer, if possible, destroyed or safeguarded. (In situations where a license has been suspended for less than one year, prescription pads and medications need not be destroyed but must be secured in a locked place for safekeeping.)

3. Practice Income Prohibitions/Divestiture of Equity Interest in Professional Service Corporations and Limited Liability Companies

A licensee shall not charge, receive or share in any fee for professional services rendered by him/herself or others while barred from engaging in the professional practice. The licensee may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of the Board action.

A licensee who is a shareholder in a professional service corporation organized to engage in the professional practice, whose license is revoked, surrendered or suspended for a term of one (1) year or more shall be deemed to be disqualified from the practice within the meaning of the Professional Service Corporation Act. (N.J.S.A. 14A:17-11). A disqualified licensee shall divest him/herself of all financial interest in the professional service corporation pursuant to N.J.S.A. 14A:17-13(c). A licensee who is a member of a limited liability company organized pursuant to N.J.S.A. 42:1-44, shall divest him/herself of all financial interest. Such divestiture shall occur within 90 days following the the entry of the Order rendering the licensee disqualified to participate in the applicable form of ownership. Upon divestiture, a licensee shall forward to the Board a copy of documentation forwarded to the Secretary of State, Commercial Reporting Division, demonstrating that the interest has been terminated. If the licensee is the sole shareholder in a professional service corporation, the corporation must be dissolved within 90 days of the licensee's disqualification.

4. Medical Records

If, as a result of the Board's action, a practice is closed or transferred to another location, the licensee shall ensure that during the three (3) month period following the effective date of the disciplinary order, a message will be delivered to patients calling the former office of the premises, advising where records may be obtained. The message should inform patients of the names and telephone numbers of the licensee (or his/her attorney) assuming custody of the records. The same information shall also be disseminated by means of a notice to be published at least once per month for three (3) months in a newspaper of

general circulation in the geographic vicinity in which the practice was conducted. At the end of the three month period, the licensee shall file with the Board the name and telephone number of the contact person who will have access to medical records of former patients. Any change in that individual or his/her telephone number shall be promptly reported to the Board. When a patient or his/her representative requests a copy of his/her medical record or asks that record be forwarded to another health care provider, the licensee shall promptly provide the record without charge to the patient.

5. Probation/Monitoring Conditions

With respect to any licensee who is the subject of any Order imposing a probation or monitoring requirement or a stay of an active suspension, in whole or in part, which is conditioned upon compliance with a probation or monitoring requirement, the licensee shall fully cooperate with the Board and its designated representatives, including the Enforcement Bureau of the Division of Consumer Affairs, in ongoing monitoring of the licensee's status and practice. Such monitoring shall be at the expense of the disciplined practitioner.

(a) Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and inspection and copying of patient records (confidentiality of patient identity shall be protected by the Board) to verify compliance with the Board Order and accepted standards of practice.

(b) Monitoring of status conditions for an impaired practitioner may include, but is not limited to, practitioner cooperation in providing releases permitting unrestricted access to records and other information to the extent permitted by law from any treatment facility, other treating practitioner, support group or other individual/facility involved in the education, treatment, monitoring or oversight of the practitioner, or maintained by a rehabilitation program for impaired practitioners. If bodily substance monitoring has been ordered, the practitioner shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

**NOTICE OF REPORTING PRACTICES OF BOARD
REGARDING DISCIPLINARY ACTIONS**

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the status of a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested. All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request.

Pursuant to 45 CFR Subtitle A 60.8, the Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

- (1) Which revokes or suspends (or otherwise restricts) a license,
- (2) Which censures, reprimands or places on probation,
- (3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, the Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency that is publicly available information.

Pursuant to N.J.S.A. 45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which a licensee is affiliated and every other board licensee in this state with whom he or she is directly associated in private medical practice.

In accordance with an agreement with the Federation of State Medical Boards of the United States, a list of all disciplinary orders are provided to that organization on a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda for the next monthly Board meeting and is forwarded to those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available to those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary Action Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description of all of the orders entered by the Board.

From time to time, the Press Office of the Division of Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.