

FILED

APRIL 24, 2009

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT LAW OF PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

IN THE MATTER OF THE SUSPENSION :
OR REVOCATION OF THE LICENSE :
ISSUED TO: :
: **FINAL DECISION AND ORDER**
: **KENNETH ZAHL, M.D.** :
: **LICENSE NO. MA56413** :
: :
TO PRACTICE MEDICINE AND SURGERY: :
IN THE STATE OF NEW JERSEY :
: :
: :

This matter was opened before the New Jersey State Board of Medical Examiners upon the Board's receipt of an Initial Decision dated December 17, 2008 by Administrative Law Judge ("ALJ") Jeffrey A. Gerson. ALJ Gerson's decision examined evidence presented during five (5) days of hearing and considered one day of argument on motions, and concluded that cause existed for the imposition of disciplinary sanctions against respondent Kenneth Zahl, M.D. on the first count of a four count Verified Complaint filed by the Attorney General against respondent on January 25, 2006. The first count of the complaint alleged that respondent failed to comply with a prior Board monitoring Order¹ which required that any

¹Respondent's license had previously been revoked in a prior matter (Zahl I) initially by an order filed on April 3, 2003. The Appellate Division entered a stay conditioned on the monitoring of respondent's practice. Following entry of an initial Board monitoring order, the parties entered a Consent Order on May 7, 2004 which is the order at issue in this matter.

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procedures Dr. Zahl performed, or services he provided, were to be observed by a practice monitor with bills for such services reviewed by a billing monitor; that he created false patient records for the services and that respondent falsely responded to an investigative demand issued by the Attorney General regarding compliance with the monitoring order. Count II, which alleged a failure to comply with a Board order to pay attorneys fees, was withdrawn by the Attorney General. Count III, which alleged failure to timely provide records and billing information to the monitor was dismissed following argument on a motion for Summary Decision. Count IV alleged repeated violations of the monitoring order in respondent's continuing to bill a particular CPT code -

that is in respondent's billing for fluoroscopies by each spinal level imaged rather than by spinal region, contrary to the decision of the monitor. Following argument on February 1, 2007 on a Motion for Summary Decision, the ALJ reserved decision² and left the

²At the conclusion of argument on the Motion For Summary Decision, ALJ Gerson indicated as follows:

The Court: What I am going to do with this is reserve on it. I'm not going to require you to put any witnesses on to affirm either side because I'm going to revisit this at the conclusion of the case with respect to it as a motion, and I will take any information you have that you think fortifies your position.

* * *

But I can resolve that after the case is over, and I don't think I need any testimony from anyone to make that determination. So I'll reserve on that issue. [February 1, 2007 transcript at pp. 42-3].

motion unresolved. However, the ALJ did not determine the motion or resolve Count IV at the conclusion of the proceedings.

Although respondent's license had already been revoked as a result of the Zahl I proceeding, the ALJ determined that he had jurisdiction to hear this matter involving allegations regarding a revoked licensee, particularly considering that a practitioner's revoked status is subject to reinstatement (See, Limongelli v. New Jersey State Board Dentistry, 260 N.J. Super. 346 (App. Div. 1992) and N.J.S.A. 45:1-22(h)), and concluded it followed that the Board maintains jurisdiction.

Based solely on his findings and conclusions on Count I of the Complaint, inter alia that respondent violated the Consent Order for monitoring as to all 55 procedures, the ALJ determined that the conduct warranted a six month suspension of license followed by a year of stringent billing monitoring. He further recommended that as imposing a suspension on a license already revoked is redundant, the finding of culpability should be taken into account upon any application for reinstatement. Costs of prosecution and attorney's fees, as well as a civil penalty of \$10,000 were also recommended by the ALJ.

On January 13, 2009, the Attorney General filed her exceptions within a 26 page brief (with extensive attachments) in which she argued that the Board should consider and decide the Motion For Summary Decision as to Count IV, apparently overlooked and

undecided by the ALJ, and that the sanctions imposed should be modified. Following a request by respondent for an extension of time to file exceptions in this matter, which was granted, respondent filed a 62 page brief (with extensive attachments) in which he raised multiple exceptions to the ALJ's findings regarding the credibility of many of his witnesses and to the ALJ's findings regarding Dr. Yulo's credibility; that the ALJ did not oversee the hearing properly and should not be afforded the usual deference as his decision was late and incomplete; and that Count IV should have been dismissed via Summary Judgment [Sic]. Dr. Zahl also included within his exceptions an acknowledgment that his response to the Demand For Statement Under Oath (regarding his statement that Dr. Yulo signed 108 operative reports) was inaccurate and presented what he termed "mitigation."

On February 4, 2009, the Attorney General forwarded her reply to respondent's exceptions, including argument that the credibility determinations of the ALJ should not be disturbed; and that the ALJ correctly rejected respondent's assertion that his false certification to the Board was due to inadvertence.³ Finally, Dr.

³The Attorney General also urged the Board to disregard attachments to respondent's exceptions including Exhibit Z-11, as it was excluded from evidence by the ALJ and Exhibits I, II and III as each was either irrelevant, never offered at the hearing at the OAL, and/or was created or issued after the hearing concluded. Items not entered into evidence below are not properly part of the record before us, and have thus not been considered.

Zahl's response to exceptions issued on February 4, 2009 includes argument that at most there is one violation of the monitoring order-in respondent not seeking clarification of whether Dr. Yulo could be doing procedures without a monitor; that respondent did not profit by circumventing monitors; and that he would have gladly paid the \$10,000 penalty recommended by the ALJ. Respondent also reiterated as to the Summary Decision Motion on Count IV that he has not seen any notice by the Board of Medical Examiners Medical Director that he was to cease and desist billing fluoroscopy per level.

The matter was set down for oral argument upon the exceptions, and, in the event the Board sustained findings made by ALJ Gerson, a mitigation hearing, on March 11, 2009. On said date respondent appeared and presented oral argument on the filed exceptions;⁴ Deputy Attorney General Jeri Warhaftig appeared for complainant and presented oral argument in support of her position that the Board should reject respondent's exceptions, adopt the findings of fact and conclusions of law of the ALJ, determine the undecided motion for summary decision on Count IV in favor of the State, and modify the recommended sanctions.

We have reviewed the extensive record below, to include six

⁴On the same date the Board heard argument on a renewed motion for sanctions filed by respondent after the ALJ rendered his initial decision in this matter. The Board denied respondent's motion. A separate order will address that motion.

(6) days of hearing transcripts (including one day of motion proceedings) setting forth the testimony of twelve (12) witnesses and voluminous exhibits (see appendix to the Initial Decision, hereinafter "ID", p. 18-19, listing witnesses who testified and documents that were marked during the proceedings)⁵ and considered the written exceptions of the parties and oral argument thereon, and are satisfied that cause exists to adopt the proposed findings of fact and conclusions of law set forth in the Initial Decision with modifications as indicated below. Further, based on the multiplicity of violations found, respondent's status as a second offender, and that the offenses occurred while he practiced solely due to a court ordered stay of revocation of his license

conditioned on his "satisfaction of any and all reporting requirements imposed by the Board" (B-2), we have determined that cause also exists to modify the recommendations made by the ALJ regarding sanctions to be imposed. We set forth below our analysis of and basis for rejecting the exceptions filed by respondent, granting the State's motion for summary decision as to Count IV, and for modifying the recommendations on penalty made by the ALJ.

⁵Additionally the Board accepted as an exhibit at the time of the argument on exceptions and over the objection of the Attorney General, respondent's submission of 1KZ-13KZ, a packet of documents.

EXCEPTIONS

Within his filed exceptions, respondent argues, inter alia, that the ALJ's credibility determinations as to Dr. Yulo, Shontelle Graham and the patients should be reversed. Respondent thereafter engages in lengthy discussion of testimony offered by both prosecution and defense witnesses, with little specification of particular findings of fact or conclusions of law to which exception was taken.⁶

Respondent's extensive testimonial references are made to suggest that the ALJ should have accepted the testimony of respondent's witnesses and, to the extent it conflicted with the testimony of the State's witnesses, discounted or declined to adopt the testimony offered by the State's witness.

⁶See N.J.A.C. 1:1-18.4(b), which provides that exceptions shall:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken.
2. Set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge;
3. Set forth supporting reasons. Exceptions to, factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law shall set forth the authorities relied upon.

Respondent's exceptions generally failed to conform to the requirements of N.J.A.C. 1:1-18.4(b), but did contain lengthy discussions of testimony offered at the administrative hearing, however on occasion citing from a transcript of a hearing regarding a temporary suspension of his license held in February 2006, despite the fact that the transcript was not entered into evidence.

With regard to respondent's claim that the ALJ's decision should be reversed because he should have found respondent's witnesses credible and should have discounted or rejected testimony offered by the State's witnesses, we note at the outset that it has been repeatedly recognized that credibility determinations are best made by the trier of fact. See Clowes v. Terminix, Inc., 109 N.J. 575, 587 (1988) (ALJ who hears live testimony is in the best position to judge a witness' credibility). It has thus been recognized that an agency reviewing an ALJ's credibility findings relating to a lay witness may not modify or reject the findings unless the agency determines from a review of the record that the ALJ's findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence in the record. S.D. v. Div. Med. Assist, and Health Serv., 349 N.J. Super. 480 (App. Div. 2002); N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.6(c). ALJ Gerson clearly discussed and considered the testimony of all witnesses, and convincingly explains why he found cause to accept the testimony offered by complainant's witness and to discount (or find less credible) testimony offered by respondent's witnesses.

Thus for example, the ALJ pointed to Dr. Yulo's specific denial of having performed any of the fifty-five (55) procedures in question, although he may have been present, however that "he felt he was simply not qualified or competent at that stage of his

career to do so" (I.D. at 15), that is to perform such sophisticated procedures as those at issue. After reviewing evidence which supported Dr. Yulo's credibility including operative reports naming Dr. Zahl or which name both Dr. Zahl and Dr. Yulo (I.D. at 7), and procedure notes which were initialed by Dr. Zahl (I.D. at 7) and that Dr. Zahl scanned Dr. Yulo's signature on many of the 55 operative reports though Yulo had signed all of the EMG reports corresponding to his work (I.D. at 7), the ALJ found Dr. Yulo's testimony credible. By contrast, in assessing the testimony of Shontell Graham, an employee Dr. Zahl presented in an effort to bolster his claim that Dr. Yulo performed the 55 procedures, the ALJ noted she had no recollection of the 55 procedures specifically, that it was "quite obvious" her review of operative reports "dictated the contentions asserted in her testimony" (I.D. at 8), and "appeared to gear her testimony to that which would be helpful to Dr. Zahl as opposed to that which she could specifically recall." (I.D. at 8). Thus the ALJ discounted Ms. Graham's testimony, commenting that she was a "loyal employee" of respondent, and was a current employee, "with a financial interest in the outcome whose testimony was unconvincing and somewhat equivocal." (I.D. at 15). As to the testimony of several patients presented by Dr. Zahl in an effort to demonstrate Dr. Yulo performed procedures, the ALJ noted from their testimony that patients were positioned in a way making direct observation [of the

identity of the provider of the procedures] "either impossible or unlikely," and that patients were sedated, both rendering their testimony "of little value." (I.D. at 15).

The credibility determinations the ALJ made are precisely the type of determinations that should be left to a trier of fact and should not be overturned absent compelling showings of manifest error. In this case, no such showings have been made, and there is no basis to reject the ALJ's credibility determinations; indeed, we are constrained to point out that we are fully in accord with the credibility determinations made by the ALJ based upon our own independent review of the record.

Aside from the fact that nothing was presented anywhere in the record to suggest that Dr. Yulo had any reason to present anything other than truthful information, his testimony that he was inexperienced and unqualified and did not perform any of the advanced and complex procedures at issue is bolstered by many items in the record. Thus, Dr. Zahl (3T155: 23 to 3T156:1), Dr. Yulo (1T50:2 to 1T51:9), and Shontelle Graham (4T86:17-22) all testified that Dr. Zahl prepared the operative reports for all 55 procedures. Dr. Zahl conceded that a physician who performs a procedure should prepare the operative report (3T151:18-21). Similarly, Dr. Yulo testified (1T29:19 to 1T30:1; 1T50:2 to 1T51:9) and Dr. Zahl acknowledged, (6T19:1-11), that Dr. Yulo did not sign any of the operative reports; and Dr. Zahl admitted adding an electronic

facsimile of Dr. Yulo's name to the operative reports, (3T156:2-14). Unsuccessful attempts by Dr. Zahl and his staff to obtain Dr. Yulo's signature long after the events are present in the record (see for example, Ex. B-12) supporting the contention Dr. Zahl was aware he did not have Dr. Yulo's permission to use his electronic signature on the reports admittedly prepared by Dr. Zahl. Moreover, Dr. Yulo's recordkeeping for EMG procedures he did perform, are to the contrary. Reports for the EMGs were prepared by Dr. Yulo on the date of each procedure performed by Yulo and he physically signed all of the reports himself (1T49:13 to 1T50:16; Ex. Z-8 EMG Procedure Reports). Finally, in 15 of the 55 operative reports admittedly prepared by Dr. Zahl, only Dr. Zahl is listed as the physician or "surgeon."⁷ In 34 of the remaining operative reports prepared by Dr. Zahl his name is included as the "surgeon" or physician with Dr. Yulo, demonstrating Zahl was an attending physician and supporting Dr. Yulo's testimony that Dr. Zahl was providing medical care.⁸ Similarly, all of the consent forms for the procedures at issue list Dr. Zahl as the physician who performed the procedures (B-8; 3T159:11-25) and Dr. Yulo's name does not appear as acknowledged by Dr. Zahl (3T159:11-25).

⁷See B-6 Bates Stamp Nos. 29, 34, 52, 76, 90, 115, 120, 149, 159, 169, 180, 186; and B-7 Bates Stamp Nos. 362, 386, and 450.

⁸See B-6 Bates Stamp Nos. 195, 208, 214, 219, 225, 263, 272, 278, 289, 313, 319, 330, 336; and B-7 Bates Stamp Nos. 250, 349, 360, 401, 456, 501, 405, 416, 420, 436, 474, 478, 492, 495, 508, 520, 538, 543, 554, 562, 599, 604

As to Dr. Zahl's exceptions to the ALJ's findings that the testimony of the seven (7) patients presented was of little value due to sedation or their positions rendering it unlikely or impossible to view the procedures, our review of the transcripts overwhelming supports the ALJ's conclusion. Even Dr. Zahl acknowledged as to the patients (3T 34:3-7) "some of them are going to be either mildly sedated, some of them are going to be lying on their tummy, they couldn't see who was doing what." The transcripts confirm most patients could not identify which doctor performed the procedures.

Additionally, review of the transcripts reveals the patients confirm Dr. Zahl's presence and participation in the procedures, (see W.N. 2T94:10-15, K.M. 2T 77:13 to 2T78:8, M.D. 2T129:1-13 and 2T140:20-24; M.K. 2T60:12-22) and in some instances the transcripts reveal they affirmatively indicate that Dr. Zahl performed some of the procedures at issue (see for example patient J.H. [5T16 to 5T19, and 5T21], who testified Dr. Zahl did the diskogram), contrary to Dr. Zahl's contentions. In short, we agree with and placed great weight on Judge Gerson's factual findings, not only because the credibility judgments are best made by the trier of fact, who observes the demeanor and believability and hears the testimony of the witnesses but also as there is substantial support, both in the transcripts and in the documentary evidence, for the determinations of the ALJ regarding credibility.

**EXCEPTION REGARDING MOTION FOR SUMMARY DECISION
ON COUNT IV OF THE VERIFIED COMPLAINT**

A motion for partial summary decision regarding Count IV of the complaint was filed by the State and considered by the ALJ on February 1, 2007 (1T). At the conclusion of argument, ALJ Gerson indicated that he would reserve decision, would not require any witnesses on the issues, would "revisit this at the conclusion of the case" and resolve the motion at that time (1T42 to 1T43:5). However, although the ALJ recites the allegations of Count IV in the Initial Decision (I.D. at 5), he did not resolve them. The Attorney General filed an exception to the failure of the ALJ to rule on her motion for partial summary decision, and re-presented the motion for Board consideration.

Count IV of the complaint alleged that respondent violated a May 7, 2004 Board order (B-4) entered by consent by continuing to bill for fluoroscopies by each spinal level rather than by spinal region. The relevant language of the Consent Order provides as follows:

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 following are the issues to be addressed by URS:

* * *

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)?

* * * [B4 at pp.8 and 9]

The Attorney General argued that the facts regarding Count IV are undisputed, that the billing monitor, URS, issued its determination on the question multiple times in multiple reports that it was only appropriate to bill for one spinal region - not to bill for multiple levels in each spinal region - which produced multiple fluoroscopy charges for each region treated.

Dr. Zahl admitted the allegations of Count IV paragraph 6 in his answer to the Complaint, but asserted "that URS made no binding determination as contemplated by the Board's order of May 7, 2004." Dr. Zahl asserted in his response to the State's exceptions and at oral argument that he was waiting for a final decision on the issue to be sent to him by the Medical Director of the Board, who was to consult with URS. As he received nothing from the Medical Director, he asserts he was under no obligation to change his billing.

The URS monitoring reports for April 26, 2004 through May 28, 2004 indicated in relevant part as to fluoroscopy:

FLOUROSCOPY

CPT code 76005 is used to report flourosopic guidance and localization of needle or catheter tip for spine or paraspinous diagnostic or therapeutic injection

procedures (epidural, transforaminal epidural, subarachnoid, paravertebral facet joint, paravertebral facet joint nerve or sacroiliac joint) including neurolytic agent destruction.

* * *

On multiple occasions in the past, URS has contacted the CPT information Services at the AMA in Chicago regarding the reporting of CPT code 76005. The AMA has responded in writing previously that it is only appropriate to report CPT code 76005 one time per session. The CPT Information Services was again contacted by URS to request an updated written response over three (3) months ago. The written response from the AMA was finally received and informed us that code 76005 is now intended to be reported per spinal region (e.g. Cervical, lumbar) and not per level. It is Dr. Zahl's contention that CPT code 76005 can be reported per spinal level, depending on the payer. Our research has determined that only Medicare permits the reporting of 76005 once per level. Although different payers may reimburse for CPT code 76005 based on internal guidelines, it is appropriate to report code 76005 per spinal region.

Commencing with the June Bill Monitoring Report, CPT code 76005 has been allowed per spinal region and not once per session.

* * * [B-10 at pp. 21-22]

Similar directions are given in several other monitoring reports (see B-10 at pp. 11,43 and73)and in particular, the report for July through September 2004 states:

...As indicated in our previous report, CPT 76005 is allowed to be billed once per spinal region. Evidence in support of the decision is available in the CPT Assistant for September 2002, Volume 12, Issue 9, which is enclosed for your review. [B-10 at p.73]

The URS report goes on to detail nearly 60 instances from July through September of 2004 in which respondent continued to bill for multiple levels, rather than one region, in each instance directing that only a lesser number of "regions" should have been billed (B-10

at pp.73 to 78).

Respondent does not dispute receiving the reports and he acknowledged receiving all of the monitor's reports within about two weeks of their issuance (3T147:13 to 3T149:9). Thus as the first monitoring report indicating the determination of URS was dated May 28, 2004, he had notice of the decision to bill fluoroscopies by spinal region by mid-June 2004. Additionally, respondent's answer admits the allegations of Count IV paragraph 6, including that despite URS' adverse determination and continued notice to respondent, he continued to bill on the basis of each level imaged.

This Board may enter summary decision pursuant to N.J.A.C. 1:1-12.5 when the documents filed demonstrate that "there is no genuine issue as to any material fact challenged and [that] the moving party is entitled to prevail as a matter of law. The adverse party in order to prevail must set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

We find that the State has demonstrated sufficient undisputed facts for the Board to determine liability as to Count IV of the Complaint as more fully explored below. We also find that respondent has failed to show by responding affidavit specific facts demonstrating genuine issues which can only be determined in an evidentiary proceeding as to Count IV. In so finding we have relied

on the Consent Order of May 2004, respondent's answer and acknowledgments in testimony and during argument of the unresolved motion at the OAL, and on the URS monitoring reports. Based on those documents and statements of respondent we find that respondent repeatedly violated the Consent Order and continued to bill CPT code 76005 on the basis of multiple levels imaged rather than the regions of the spine despite notice of URS' adverse determination to him.

Respondent's position that he was awaiting further order or direction of the Board's Medical Director is unavailing not only because of the clear language of the Consent Order, his position is belied by the very reason the Consent Order was entered - as the parties could not agree on the issues, the determination was to be placed in the hands of the monitor. The language in the order is that:

"... URS' determination" on the question at issue is "binding on the parties and that if URS determines that Respondent has been inappropriately billing, he must reform and reissue his bills retroactively..." [B4 at p.8, Emphasis Supplied]

We agree with the Attorney General's position that this language was self-executing. Dr. Zahl's contention that there is an additional requirement after notice of the URS determination that the Medical Director of the Board should have given him direction is without support or basis in the Consent Order and appears spurious. There is no genuine issue of material fact to be determined. Rather the issue involves argument on interpretation of the Consent Order. We

conclude Dr. Zahl was not free to ignore the URS determination under the Consent Order and consequently grant summary decision to the State on this Count.

We therefore affirm the ALJ's findings on Counts I, II and III of the Complaint, with the modifications to specify the conclusions of law indicated below; and we resolve Count IV of the Complaint by granting the State's Motion for Summary Decision.

DISCUSSION ON PENALTY

Although given an opportunity at the hearing to present any mitigating circumstances before the Board determined a penalty in this matter, respondent declined to do so. The Attorney General ~~urged that revocation of license is the appropriate discipline in~~ this case. She argued that revocation is appropriate not only for the extraordinarily deceitful and dishonest conduct of respondent, but additionally as respondent has once again demonstrated disregard for the law, and that after the Supreme Court decision in Zahl I, it has been established that a panoply of dishonest acts can form the basis for revocation of a license, even absent patient harm. The Attorney General posited that in suggesting a penalty, the ALJ failed to consider the significance of the deceit evidenced by the doctor's proffer to the Board of false medical records both for the patients whose treatment is addressed in the records and for his colleague, Dr. Yulo, who he exposed to unwarranted liability by inserting Yulo's name into the record. The Attorney General further

argued for a monetary penalty of a minimum of \$500,000 based on findings of at least 99 statutory violations and respondent's status as a second offender subject to maximum penalties of \$20,000 per violation.

In response to the arguments of the Attorney General, Dr. Zahl asserted in part that the punishment sought is well beyond that which is necessary; that he believes the Zahl I case should be declared a "nullity"; that imposing the monetary penalty requested by the Attorney General would drain his ability to pursue appeals or other action; and that no penalty more than the ALJ's recommendation of \$10,000 should be imposed as appropriate "for the error that was made."⁹

Once again we are called upon to determine an appropriate penalty for respondent's conduct based on findings of a multiplicity of deceitful actions. We consider not only the 55 violations of the Consent Order in respondent's failure to have his participation in medical care or billings monitored on 55 occasions, and false

⁹Respondent asserted throughout the proceedings that edits had been made to the Initial Decision of the ALJ after it was signed, particularly as to the ALJ's recommendation to impose costs as "determined" by the Attorney General, and as to anesthesia regarding one patient on one visit which he alleged should cause the Board to question the decision. Prior to the hearing on exceptions the Board received confirmation from the Office of Administrative Law that the precise decision under review is indeed the Initial Decision of ALJ Gerson, and the OAL's explanation as to how an order with editing "notes" was posted on a website in error (See 2KZ and 12KZ). We accept the explanation and find the "edits" are minor and do not in any way alter our findings herein.

certifications regarding Dr. Yulo's alleged signing of 108 operative reports considered by the ALJ, we also consider respondent's multiple failures to reform his billing despite many notices by the URS monitors that he was billing improperly. Most strikingly, at the time of all of these violations, respondent was practicing solely due to a court ordered stay of the revocation of his license based on prior dishonest acts - yet he chose to engage in virtually identical conduct -repetitively misusing the name of another physician he employed, creating false patient records, and in addition continuing to bill inappropriately, despite repeated direction of the entity he agreed to as the final arbiter of the issue.

We agree with the ALJ that it is Dr. Zahl's character and honesty that are once again at issue in this case - that his unreliability, lack of responsibility and lack of trustworthiness are his shortcomings. Respondent has fallen short once again regarding character.

We believe it appropriate to reiterate the penalty of revocation imposed in Zahl I, not only to punish for the numerous additional acts of dishonesty, but to supply guidance to the regulated community and to the public as to the standards of conduct to be expected of a medical professional. Recognizing that Dr. Zahl's license is already in revoked status we find the acts engaged in require reaffirmation of our earlier order of revocation and

warrant imposition of the most severe sanction and therefore modify the Initial Decision as to sanction to include revocation of respondent's license.

As to the monetary penalty recommended by the ALJ, we modify and impose a penalty of \$50,000. The ALJ does not appear to have considered that enhanced penalties may be assessed for second and subsequent violations, and we found additional violations regarding Count IV. While we could have imposed greater monetary penalties, as sought by the Attorney General, we are satisfied that the penalty we have arrived at, is on balance, a fair and proportionate penalty for the actions of respondent. The maximum penalty of \$20,000 per violation for each of the myriad violations of the statute would be justifiable in this instance, given the lack of remorse or even of recognition of wrongdoing by this licensee. However, considering the revocation of license imposed, and in the overall context of the circumstances of the offenses committed, we find on balance the penalty of \$50,000 to be sufficient.

DISCUSSION ON COSTS

Finally, we have determined that cause exists to support the ALJ's recommendation to impose attorneys' fees and costs on Dr. Zahl.¹⁰

¹⁰The ALJ recommended that Dr. Zahl "pay costs and attorneys fees in an amount to be determined by the Office of the Attorney General." Consistent with the case law and our prior practice, we of course scrutinize cost applications submitted by the State and any response, and we determine the amount of fees and costs

The Attorney General submitted a certification detailing all costs sought on February 4, 2009 with attachments including the following exhibits:

- Certification dated January 28, 2009 by William Roeder, Executive Director with attached bills for court reporting fees and transcripts.
- Time sheet report of DASG Warhaftig, Jespersen, Kenny and Burstein.

The Attorney General documented a total of \$15,291.44 in shorthand reporting costs, and \$132,407.50 in counsel fees (which did not include any fees for time expended prior to the filing of the Verified Complaint, nor any time occasioned by the transition of this matter to be handled by a new DAG, - nor any time expended after January 28, 2009) that had been incurred in the course of the proceedings regarding respondent. The Attorney General's certification was supported by the time sheets of the DASG involved and included information derived from a memorandum by Nancy Kaplan, then Acting Director of the Department of Law and Public Safety detailing the uniform rate of compensation for the purpose of recovery of attorney fees (see State v. Waldron, Docket No. L702-99 (Law Div. December 4, 2001) established in 1999 and amended in 2005, setting the hourly rate of a DAG with ten plus years of legal experience at \$175.00 per hour.

Dr. Zahl during oral argument took issue with alleged

to be imposed.

duplication of costs for more than one Deputy Attorney General, with the bills for a DAG who died, and to the comparison of the rates for DASG when contrasted with private practitioners. We are satisfied that the record adequately details the tasks performed and the amount of time spent on each by the Deputy Attorneys General (to include prosecution of an Order to Show Cause for temporary suspension, defense of respondent's stay application, opposition to respondent's motion for sanctions, handling of motions for summary decision, conducting discovery and depositions, 5 days of hearing and (one) 1 day of motions, post hearing submissions of proposed findings of fact, exceptions and reply to exceptions). We are ~~satisfied the tasks performed, while time-consuming, needed to be~~ performed and that in each instance the time spent was reasonable.

We note that no fees have been sought for any time spent due to transitioning this case to new counsel, or delays, that the fees sought do not include any of the period prior to the filing of the complaint or for any work after January 28, 2009, following which the cost application, oral arguments on exceptions and additional transcript costs were incurred. Respondent's objection to the hourly rates at which attorney's fees are calculated is unavailing. We note that the rates charged by the Division of Law of \$175.00 for a DAG with 10 or more years of experience has been approved in prior litigated matters and appears to be well below the community standard. Moreover, we find the certification attached to the

billings to be sufficient. If respondent's argument were accepted, costs could never be assessed regarding an attorney unavailable at the time of a cost application.

We find the application to be sufficiently detailed to permit our conclusion that the amount of time spent on each activity, and the overall fees sought are objectively reasonable as well. (See, Poritz v. Stang, 288 N.J. Super 217 (App. Div. 1996). We find that in regard to all charges the Attorney General has adequately documented the legal work which was performed and find that the work documented was work necessary to advance the prosecution of this case. We are thus satisfied that the Attorney General has ~~adequately documented the tasks performed to support her application~~ for attorney's fees and that her claims are reasonable especially when viewed in the context of the seriousness and scope of the action maintained against respondent. However, in view of the sanction and penalty imposed herein, and given the overall circumstances of this matter, we have determined to reduce the amount of costs awarded for attorney's fees and other costs, from the documented fees sought by the State of \$147,000, down to \$100,000.

In sum, we find that the Attorney General may be awarded attorney's fees, transcript and court reporter fees herein pursuant to N.J.S.A. 45:1-25, in the amount of \$100,000.

IT IS THEREFORE ON THIS 23rd DAY OF APRIL 2009

As announced on the record orally on March 11, 2009, and made effective thereafter five (5) days following service of this order upon respondent:

1. The findings of fact and conclusions of law set forth in the Initial Decision are adopted with the following modifications:

a. The Attorney General's Motion For Summary Decision is granted on Count IV of the Complaint as the State has demonstrated sufficient undisputed facts and no genuine issue of material fact has been raised to require an evidentiary hearing on the issues.

b. Respondent's failure to comply with the order of the Board entered by consent as to Count IV constitutes professional misconduct in violation of N.J.S.A. 45:1-21(e) and failure to comply with N.J.A.C. 13:45C-1.4 which requires Board licensees to cooperate by complying with duly entered Board orders.

c. The Conclusions of Law of the ALJ on page 15 of the Initial Decision-that as to Count I respondent violated the Consent Order as to all 55 procedures are modified to include the specific statutory and regulatory violations; that is Dr. Zahl's failure to comply with the Consent Order constitutes professional misconduct in violation of N.J.S.A. 45:1-21(e), a failure of the duty to cooperate in violation of N.J.A.C. 13:45C-1.4, constitutes the use of deception or misrepresentation in violation of N.J.S.A. 45:1-21(b) and violates N.J.S.A. 45:1-21(h).

2. The license of respondent Kenneth Zahl, M.D. to practice

medicine and surgery in the State of New Jersey is revoked.

3. Respondent is assessed and ordered to pay costs of \$100,000. Respondent shall remit payment in full of all costs assessed within thirty (30) days of the date of entry of this Order, or may apply to pay the costs assessed over time to include interest to be assessed at the rate set by the rules of Court. In the event respondent fails to make payment within (30) thirty days as ordered above or fails to make payments in accordance with any schedule of payments that may be found to be acceptable by the Board, respondent shall be considered to be in default of his monetary obligation to the Board. Any remaining balance then owed to the Board shall be considered to be immediately due in full and the Board shall then

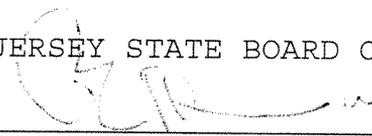
forthwith file a Certificate of Debt for the full amount of costs then owing.

4. Respondent is ordered to pay penalties in the amount of \$50,000. Respondent shall remit payment in full of all penalties assessed within thirty (30) days of the date of entry of this Order, or may apply to pay the penalties assessed over time, to include interest to be assessed at the rate set by the rules of Court. In the event respondent fails to make payment within thirty (30) days as ordered above or fails to make payments in accordance with any schedule of payments that may be found to be acceptable by the Board, respondent shall be considered to be in default of his monetary obligation to the Board. Any remaining balance then owed

to the Board shall be considered to be immediately due in full, and the Board shall then forthwith file a Certificate of Debt for the full amount of penalties then owing.

5. Respondent shall comply with the Directives For Disciplined Licensees which are made a part hereof, whether or not attached hereto.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

By: 

Paul Mendelowitz, M.D.
Board President

Kenneth Zahl, M.D.
NJ License # MA056413

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 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.