

**FILED**

June 20, 2012

**NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS**

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

IN THE MATTER OF THE SUSPENSION : Administrative Action  
OR REVOCATION OF THE LICENSE OF :  
:   
**RICHARD A. KAUL, M.D.** : **ORDER OF TEMPORARY**  
**LICENSE NO. 25 MA 063281** : **SUSPENSION OF LICENSE**  
:   
TO PRACTICE MEDICINE AND SURGERY :  
IN THE STATE OF NEW JERSEY :  
:

This matter was opened to the New Jersey State Board of Medical Examiners ("Board") upon the filing of a Notice of Motion In Aid of Litigant's Rights seeking to renew an application for the temporary suspension of the medical license of Respondent, Richard A. Kaul, M.D. and to amend a Verified Complaint filed on April 2, 2012. An answer had been filed by respondent denying the substance of the allegations of the Verified Complaint.

The motion alleged Inter Alia, that respondent failed to materially comply with an Interim Consent Order filed on May 9, 2012 and failed to cooperate with an investigative subpoena issued on May 23, 2012, and thus asserted the State was entitled under rights reserved in paragraph 9 of the Interim Consent Order to proceed on its application for temporary suspension of license. In addition, the Attorney General sought to amend the Verified Complaint to set forth additional bases for the temporary

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suspension of respondent's license, which the State asserted would demonstrate that respondent's lack of judgment was so pervasive, that nothing short of a temporary suspension of license would protect the public.<sup>1</sup>

The Verified Complaint in this matter alleged in eight counts that respondent grossly and repeatedly deviated from accepted standards of care as he lacked the surgical training, education and experience necessary to perform spinal surgical procedures including open spinal surgery, minimally invasive spinal fusions with instrumentation, and discectomies, all of which are performed by respondent; that he misrepresented his credentials to patients; that his failure to have hospital privileges or alternative privileges required by regulation (N.J.A.C.13:35-4A.6) to perform the spinal procedures and interventional pain management procedures he performs in a one-room surgical office places the public in imminent danger; and that his medical treatment of five (5) patients who had spinal surgical procedures exhibited a pattern of gross and repeated negligence, and multiple deviations from the

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<sup>1</sup> The May 9, 2012 Consent Order provided inter alia that respondent had agreed to cease and desist performing or assisting in any and all spinal surgical procedures, and from performing any surgery and special procedures including interventional pain management. Under the Order, Dr. Kaul was permitted to perform minor surgical procedures, could apply to a hospital or the Board for privileges to perform certain surgery and special procedures and could employ an ABMS Board certified surgeon with certain hospital privileges to perform surgery or special procedures at NJ Spine and Rehabilitation Center (NJSR), his facility. Respondent was required by the Order to revise the website for NJSR to accurately reflect the procedures he can perform and to identify those performed by other practitioners. The Attorney General reserved the right to proceed on the temporary suspension application and/or to file an application in aid of litigant's rights upon receipt of proof of failure to materially comply with any condition of the Order.

Board rules pertaining to surgical practice in physician offices - which pattern was alleged to have demonstrated that his continued practice would constitute a clear and imminent danger to the public health, safety and welfare.

Regarding specific patient care the allegations included that as to F.K. (Count VI) and P.M. (Count VIII), performance of a three level lumbar fusion was unjustified; as to F.K., that placement of pedicle screws asymmetrically (L2 on right and L5 on left) caused each end vertebrae to have only a single screw fixation inadequate to resist rotational or translational movement, increasing the risk of pseudoarthrosis or fixation failure; as to P.M. that there is no evidence of transfacet screw fixation across the joints, and failure to interconnect the screws renders them unable to resist rotational or translational movement; that respondent used allograft bone (rather than autograft) when treating both patients who smoke cigarettes, and failed to inform the patients of the significant risk of smoking and the occurrence of pseudoarthrosis after a lumbar fusion particularly with the use of only allograft bone; that respondent never addressed a disparity of findings of concordant pain in discographies in one of the patients (F.K.); and that the performance of this spinal surgery on both patients deviated from the standard of care, as respondent lacks adequate training and experience to perform the procedure. Respondent's overall conduct regarding F.K. and P.M. including but not limited

to the above allegations, was alleged to constitute gross or repeated negligence, malpractice or incompetence, and to demonstrate that his continued practice presents a clear and imminent danger to the public health, safety, and welfare pursuant to N.J.S.A. 45:1-22.

As to three (3) other patients (K.S. [Count III], G.H. [Count IV] and S.S. [Count V]) the neurological exams performed prior to surgery were alleged to be deficient as respondent failed to include the relevant features of an examination pertinent to the procedure to be performed and his performance of the complex spinal surgical procedures in each of these three patients was alleged to deviate from the standard of care, as respondent lacks the education, surgical training and experience as well as privileges to perform the procedures.

Count VIII of the Complaint alleged that respondent's website for NJSR contains numerous misleading statements regarding his credentials including that he is a "board-certified minimally-invasive spine specialist"; that he is a "pioneer in minimally-invasive and percutaneous spinal surgery"; that he is a member of a minimally invasive spine medicine and surgery academy, although the organization does not list him as a member or as one of its board-certified specialists; and that he has "passed the oral and written qualifying examinations to be a fellow..." of an interventional pain management Board, which similarly does not list him as either a

diplomate or a fellow. The Verified Complaint was supported by exhibits including patient records, transcripts of respondent's prior appearance before a committee of the Board and two (2) expert reports.

At the time of the regular monthly meeting on May 9, 2012, with the consent of respondent, the Board determined to enter a Consent Order imposing temporary limitations on respondent's license. On June 5, 2012 the State filed the Motion In Aid of Litigant's Rights as indicated previously.

On June 13, 2012, the Board heard argument on the Attorney General's motion.<sup>2</sup> Deputy Attorney General Doreen Hafner appeared on behalf of the State. Robert Conroy, Esq. and R. Bruce Crelin, Esq. (Kern & Augustin) appeared on behalf of respondent. Prior to DAG Hafner's argument, counsel for respondent indicated he had no objection to the proposed amendments to the Verified Complaint.

The additional allegations of the Amended Verified Complaint later accepted and before the Board included three (3) additional spinal surgery patients all of whom were alleged to have been

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<sup>2</sup> Earlier in the day the Board heard, and determined to grant, an emergent motion to quash a notice in lieu of subpoena served by respondent on June 8, 2012 for the appearance and testimony of Board President Dr. Paul Jordan, Acting Director of DCA Kanefsky, and Attorney General Jeffrey Chiesa. The Board (without participation of Dr. Jordan), found after argument by AAG Kevin Jespersen and respondent's counsel, that the notice was procedurally defective as a subpoena for an agency head can only be issued by the tribunal-the Board; as there was insufficient showing that the witnesses have firsthand knowledge of the factual issues before the Board or that their testimony would be relevant to the proceedings; and due to the impropriety of calling agency heads in order to go behind and probe their determinations. Given the expedited nature of the order herein, the Board reserves the right to greater clarify the rationale for its action in a supplemental order.

subjected to gross or repeated malpractice and to have suffered serious injury. As to T.Z. (Count X) the complaint alleged that two (2) months after Dr. Kaul performed a seven (7) hour lumbar decompression and interbody fusion with a mesh cage and allograft bone with bilateral pedicle screws, diagnostic studies revealed that one of the screws was within the spinal canal and impinging on the nerve root accounting for the patient's loss of reflex and weakness "in her evertors and plantar flexor and antalgic gait" (Amended Verified Complaint paragraphs 150 and 152). Later surgery revealed several screws directly in the canal (paragraph 155). The Amended Complaint further alleged as follows:

**Count IX**

Respondent failed to have malpractice insurance or a letter of credit covering spinal surgery he performed from June 10, 2004 through at least June 10, 2006 despite a Board regulation requiring such coverage, and including an 18 month period during which he was on probation from a prior Board matter.

**Count XI**

Patient J.Z., a 37 year old with severe coronary artery disease, was evaluated by Respondent with severe cardiac pain. Following the May 23, 2011 insertion of two eight electrode permanent dorsal column stimulator leads into an epidural space and insertion of a spinal cord stimulator into the right buttocks, respondent learned the spinal cord stimulator lead had dislodged

and surgery was performed to reposition or reinsert a new lead on June 8, 2011. During a later hospital admission for acute chest pain, an infection was confirmed at the sites of insertion of the spinal cord stimulator. On July 21, 2011, respondent advised J.Z. the stimulator would be removed the next day.

**Count XII**

As to patient J.J., following discectomies, a CT scan showed high density material in the disc space, and impingement on the nerve root could not be excluded. Additionally a pedicle screw may have breached the lateral cortex.

**Count XIII**

On May 24, 2012 respondent affirmatively refused to respond to an investigative subpoena served May 23, 2012 for the complete patient records of S.L., Tr.Z., H.S., T.Z., J.J., L.M., R.B. and J.Z., constituting a violation of N.J.S.A. 45:1-18 and a failure of the duty to cooperate with the Board pursuant to N.J.A.C. 13:45C-1.2 and 1.3(a) (5).

The Deputy opened oral argument by asserting that the State had believed at the time the Interim Consent Order was ratified by the Board last month that the public safety was addressed by the restrictions included as long as respondent abided by the consent order and regulations of the Board. However, as respondent has failed to materially comply with the consent order by making no revisions to his website to accurately reflect procedures he can

perform and by continuing to hold himself out as a spine surgeon in New Jersey in a variety of ways on the site, then by refusing to comply, with a May 23, 2012 investigative subpoena of the Board (which lists new and additional patients) to determine what procedures he's performing since entry of the consent order, the Attorney General asserted as there was a material failure to comply, the State should be permitted to proceed on its application for temporary suspension of license.

During the course of argument, the State was permitted to play videos "captured" from the website, and represented its submission (P-22A and P-22B) included 52 minutes of videos and testimonials describing patient experiences, respondent's activities and performance of spinal surgery, including narration of such surgery by respondent himself, Dr. Kaul on video describing corrective lumbar fusion surgery with a minimal approach, and describing a "particularly difficult case" including a 2 to 3 hour surgery decompressing the spine from behind and inserting an autograft and pedicle screws, followed by a rapid recovery because of very little muscle destruction and minimal blood loss.

The Deputy Attorney General argued that contrary to respondent's claims that his website contained vague representations and historical data, it specifically depicts Dr. Kaul performing and describing his outpatient spinal surgery and promoting himself as the person doing the surgery - and including

links to a You-Tube webpage showing the very spinal procedures which are barred- the precise type of misrepresentative information the Board sought to prevent via the requirement in the Consent Order that the website be revised. Most significantly nowhere on respondent's website is there any indication that he is unable to perform the procedures represented. DAG Hafner asserted this was a material violation of the Consent Order entitling the State to proceed on its application for temporary suspension. Additionally the deputy argued that respondent's refusal to comply with an investigative subpoena of May 23, 2012 designed to determine what procedures he has been performing since the entry of the April 9<sup>th</sup> Consent Order, to determine whether he has complied, and obtain records of additional patients not included in the Verified Complaint, provides another reason to permit the State to proceed with its Temporary Suspension Application.

Respondent argued that the State sought a "second bite at the apple" as a patient said something positive about respondent years ago and it was on his website. Counsel cautioned against re-opening settlements. Counsel asserted his belief that an investigator for the State tried and failed to get respondent to offer surgery; and pointed to Ex. U (P-21), a series of e-mails with a State expert on May 29, 2012 to show the State knew it was bringing a motion to re-open before it confirmed the contents of the website via a June 5, 2012 investigator's certification. As

the case had been transmitted to the OAL, respondent asserted the subpoena could not be investigative in nature and was an improper attempt to obtain discovery. Respondent asserted that the proceedings on June 13<sup>th</sup> were due to the Attorney General not liking the deal the Board struck with respondent, and a media report claiming the State's rate of discipline of physicians is lower than some other states. Counsel argued that the website is not an advertisement, "it's a video", and there was no proof Kaul scheduled surgery in contravention of the April order. He took the position respondent should not have to purge the electronic content of the website; that the materials are historic in nature and do not indicate Kaul is presently booking cases. He asserted nothing has changed since the April Consent Order.

Following deliberations in executive session, having considered the documentary evidence and arguments and based on the facts before it as to compliance with the Consent Order and without regard to any outside matter or proceeding, the Board returned to open session and voted unanimously regarding the State's motion to enforce litigant's rights as follows:

We accept the amendments to the Verified Complaint proposed by the State without objection of respondent.

Second, in the face of a multiplicity of information on his website representing respondent as a Board-certified spine surgeon, including testimonials, videos, a narration of spinal surgery performed by respondent and including statements such as, "He is performing spine procedures on an outpatient basis," we find that respondent has failed to accurately

reflect the procedures he can perform and nowhere on his website indicates that he's no longer performing spinal surgery procedures.

We find this to be a material failure to comply with paragraph 8 of the Consent Order; and therefore, find that there is sufficient cause to allow the Attorney General to proceed on the temporary suspension application today.

Following a request from respondent for further ruling on the additional grounds posited for the State's motion, the Board entered further deliberations and then unanimously voted in response to the objection of respondent requesting a further ruling, that while the Board found the material violation of the Consent Order alone a sufficient basis to permit the Attorney General to proceed on the temporary suspension application, on that aspect of the Attorney General's motion to enforce litigant's rights regarding the subpoena, the Board directed compliance with the investigative subpoena (Exhibit D to the Motion) as to new patients who were not part of the Verified Complaint at the time the subpoena was issued. To rule otherwise would bar the State from investigating new allegations of violations of law or compliance with orders once any Complaint is filed, in contravention of the Board's duty to protect the public.

As to the remaining allegations regarding whether respondent's past refusal to comply with the subpoena was a failure to cooperate and regarding failure to maintain certain malpractice insurance, they are now part of the amended complaint and subsumed therein.

They will be tried as part of the Amended Verified Complaint and need not be reached as part of the present proceeding.

The Deputy Attorney General opened her presentation of the State's application for temporary suspension of Dr. Kaul's license by stating that the evidence would show that Respondent's lack of judgment so permeates his entire practice of medicine, that nothing short of a temporary suspension will protect the public. She asserted that Dr. Kaul's lack of self-awareness in flagrantly disregarding his own lack of training and expertise in the field of spinal surgery, and performing these risky procedures on patients, signals a practitioner who should not be allowed to continue to practice. In support of the application, the Attorney General offered the testimony of two expert witnesses, Dr. Gregory Przybylski, who was qualified as an expert in neurosurgery, and in both open as well as minimally invasive spinal surgery; and Dr. Andrew G. Kaufman, presented as an expert in anesthesiology and in interventional pain management. In addition, the Attorney General submitted twenty-two (22) items into evidence. A full list of exhibits entered into evidence appears at the conclusion of this Order.

Respondent offered no expert or other testimony, relying on oral argument, and submitting one exhibit, P-2, the Interim Consent Order. While respondent has sought to portray this matter as an attempt motivated by inappropriate influences to have a second bite

at the apple after agreeing to an interim order including broad practice limitations, the State described the events since the signing of the Order as including learning of new allegations regarding several patients, including at least one who suffered serious harm at the hands of respondent, and discovery of flagrant violations of the recent consent order by respondent, together with flouting of the Board's authority to investigate whether he has complied and as to new allegations.

With respect to the care and treatment of several of the patients in the Amended Verified Complaint, the Attorney General presented the testimony of Dr. Przybylski who among other credentials, is Board certified in neurological surgery. His training included 2 one year fellowships in spinal surgery. In addition to performing cranial procedures, spinal procedures and peripheral nerve procedures, typically operating more than one full day a week, his many positions in the field include having trained residents in neurosurgery at several institutions. He currently serves as a professor of neuroscience at Seton Hall University and as the Director of Neurosurgery at the New Jersey Neuroscience Institute at JFK Medical center (since 2002), and at Jersey Shore Medical Center (beginning in 2007); as well as serving on a multidisciplinary credentials work group at JFK Medical Center looking at various spine providers to determine the spectrum of appropriate procedures for each specialty; and service as the

current past president of the North American Spine Society, an association representing over 7,000 spine specialists of many disciplines.

Dr. Przybylski opined that respondent is not competent to perform either open or minimally invasive spinal surgeries. He based that conclusion on his familiarity with the standard of care in New Jersey for a spinal surgeon-to have a minimum of either an accredited orthopedic or neurological residency training program, with the trend for more, if not most spinal surgeons to include fellowship training. Later testimony indicated this training typically requires 5-7 years.

In Dr. Przybylski's view Respondent's residency and certification in anesthesiology would not include the requisite training of an orthopedic surgeon or a neurological surgeon; and his fellowship in pain management provides appropriate training only to perform percutaneous procedures. Although his CV indicates having taken many CME courses in performance of spine surgery, such courses merely ratify that an attendee was at a meeting and completed questions, but does not mean they are competent to do anything taught at the course.

By performing spinal surgery with these credentials, it was the opinion of Dr. Przybylski that respondent grossly deviated from the standard of care. Further, the expert opined that performing such surgery at an outpatient center without having hospital

privileges was also a gross deviation from the standard of care as there are significant risks of harm -in cervical surgery of carotid injury, esophageal or trachea injury; in lumbar surgery bowel perforation is one of several complications. As these injuries can be an imminent threat to life or organ system, the surgeon must have adequate capacity to manage complications in the appropriate setting, and the absence of hospital privileges [or we note, alternative privileges with immediate access via a transfer agreement] is problematic as to how a patient would be appropriately managed in an outpatient center without the safety net that a hospital affords.

With respect to six (6) patients included in the Amended Verified complaint, T.Z., F.K., P.M., S.S., K.S., and G.H. Dr. Przybylski opined that respondent grossly deviated from the standard of care. Specifically, patient T.Z. underwent a 7 hour lumbar fusion using spinal instrumentation, including pedicle screw fixation and bone grafting, and woke up with pain in an upper lumbar. Imaging records revealed that pedicle screw fixation on one side were not in the pedicles but one was through the foramen (a natural opening or passage through a bone) and likely injuring a nerve root; and another was in the spinal canal-medial to or inward of the pedicle, and likely injuring a nerve root. An interbody prosthetic device was placed outside of the confines of the perimeter of the vertebral body, therefore encroaching the foramen

and likely harming the same nerve root. Many months after Respondent's surgery, T.Z. underwent a revision spinal surgery to appropriately place the pedicle screws. Dr. Przybylski opined that patient T.Z. underwent a procedure by a physician not qualified to perform it, which resulted in harm including the placement of pedicle fixation in anatomically inappropriate locations that resulted in nerve injury, and subsequent harm as to dysfunction of those nerves as demonstrated by clinical exam and electrophysiologic studies, and T.Z. required revision surgery. The care and treatment of patient T.Z. was termed a gross deviation from the standard of care.

Dr. Przybylski also testified regarding the care and treatment of patient F.K. who underwent a minimally invasive 3 level lumbar fusion surgery with interbody fusions and pedicle screw fixation with Dr. Kaul. The patient had a prior laminectomy and instrumented fusion by another surgeon. In the procedure performed by respondent, unilateral screw fixation was placed asymmetrically (at the L2 level on one side and at L5 on the other) which is biomechanically inferior, substantially increasing the likelihood the patient will develop a pseudoarthrosis or a failed fusion. This patient developed a pseudoarthrosis where the unilateral pedicle screw fixation was placed, developed a neuropathic pain problem diagnosed with reflex sympathetic dystrophy. Among the questions raised regarding the treatment of this patient by Dr. Kaul's own

records, imaging demonstrated that the spine had already been fused at the levels he treated. As once a spine is fused, it does not need to be fused again, Dr. Przybylski termed this yet again as a gross deviation. In addition, he termed respondent's use of pieces of allograft bone a gross deviation as it is known to result in notoriously poor healing in patients with a smoking history, such as F.K., who was not given the option of using other materials to mitigate the effects of smoking, nor counseled according to the record to quit smoking, nor warned of the risks of pseudoarthrosis and possible need for reoperation if smoking continued.

As to the care of P.M., who also underwent a 3 level fusion with interbody grafting and a form of screw fixation, the expert opined that the history taken was inadequate to determine the sources of pain; multiple diagnostic and therapeutic procedures were done prior to repeated discography, on which the levels found positive were L2-3 and L4-5, yet a 3 level fusion was performed also including L4-5.

Among his comments regarding the care of this patient, the witness testified there is no medical evidence that a 3 level lumbar fusion is appropriate in patients with axial back pain, such as this one. Also, the intraoperative fluoroscopic images indicated the screw fixation looked unusual. As described by the witness, there was no evidence of transfacet screw fixation across the joints. He explained that if the surgeon puts the screw into the L3

pedicle, it needs to cross the L2-3 joint in order to be able to achieve fixation across that level-which was not done here, increasing the patient's risk of pseudoarthrosis. If the goal was a three-level spinal fusion, the expert opined the best likelihood of success would not be through the type of instrumentation that was placed.

Although eliciting a history of smoking with this patient, there was nothing in the record to indicate she was counseled regarding the increased risks of failure associated with smoking, nor that the patient was given alternative options for bone grafting to improve success. Finally Dr. Przybylski noted that the postoperative follow-up with this patient was limited to several months, whereas a lumbar fusion patient should be followed for a minimum of one year, and typically two years as it can take that long for the process of arthrosis to occur, and to adequately determine the patient's outcome. Once again the expert found the deviation of the standard of care in respondent's treatment of this patient to be a gross deviation.

Dr. Przybylski briefly discussed the care of patient S.S., who had a presumed pseudoarthrosis from a prior L5-S1 fusion and respondent reoperated on the patient. The expert opined that it was a gross deviation to perform an open lumbar fusion on this patient without the generally accepted qualifications to perform such a procedure. Similarly as to patient K.S., who underwent a multilevel

open anterior cervical discectomy and fusion with instrumentation, Dr. Przybylski testified that it was a gross deviation for respondent, an anesthesiologist without the generally accepted training to perform an open operation with the inherent risks of carotid, esophageal, or recurrent laryngeal nerve injury as well as spinal cord injury that can occur. Finally, as to patient G.H. who had a lumbar fusion with instrumentation, as Dr. Kaul does not possess the generally accepted qualifications to perform an instrumented lumbar fusion with interbody fusion, his performance of the procedure at multiple levels is not consistent with published guidelines for treatment of patients with axial low back pain. The care of this patient as well was termed a gross deviation from the standard of care by Dr. Przybylski.

Cross examination by respondent was limited to one additional patient- Mr. Z, regarding whose treatment the expert indicated that respondent engaged in a minor deviation; that the witness had been asked to testify at a previous hearing which did not occur, and asked whether he was available for testimony at the June 13, 2012 hearing sometime near the end of May, prior to the date an investigator certified she checked NJSR's website. In response to inquiry whether he found anything clinically objectionable in the cases in which the expert testified only that respondent lacked credentials to perform a procedure, Dr. Przybylski testified that he did not have sufficient information on postoperative follow-up

to know if those patients had any untoward effects from the procedures-that without reviewing the imaging studies he cannot tell whether the final product involved a deviation. The witness responded to inquiry by indicating he did not review respondent's use of controlled drugs in the cases he reviewed, and had not issued an opinion in that regard. Finally, objections to questions the witness was asked regarding the measures which might suffice to address any concerns the expert might have about the public health safety and welfare, were upheld as that is the ultimate issue in the matter, and the province of the Board.

The State also presented the testimony of Andrew Kaufman, M.D. as an expert in anesthesiology and pain management. His credentials include Board certification in the former field, with a sub-certificate in the latter. He holds privileges at Overlook Medical Center and University Hospital in Newark and is privileged in anesthesia there, though currently serving as director of pain medicine for the Department of Anesthesia. He performs percutaneous procedures. In addition to duties as an associate professor of anesthesiology at New Jersey Medical School, and as director of resident education program for pain management and medical student electives, he is currently on the credentials committee at University Hospital, evaluating credentials of physicians who apply to perform spinal surgery. He testified that the credentials committee looks for education, including the type of residency that

is done for spinal surgery-whether orthopedic or neurosurgery, with or without appropriate fellowship training.

Dr. Kaufman rendered an opinion, after examining an extensive CV and records respondent supplied of training courses, that respondent is not competent to perform open and minimally invasive spine surgery as his residency program in anesthesia would not have provided any training whatsoever in those procedures; respondent's fellowship in England, the precise curriculum for which was unknown, was not accredited by the ACGME (Accreditation Council for Graduate Medical Education); and the CME (continuing education) he has undertaken, including multiple weekend and one two-week course in Korea where he participated in training for spinal procedures, according to the witness offered very limited education. Following review of respondent's training and credentials, Dr. Kaufman concluded that it was a gross deviation from the standard of care for Dr. Kaul to perform open spinal surgery and minimally invasive spinal surgery.

Cross-examination of Dr. Kaufman included his acknowledgement that he had not reviewed anything leading him to believe that respondent could not perform services as an anesthesiologist, and had not been asked to opine on Kaul's use of medications.

Dr. Kaufman's expert report (P-28A) was entered into evidence over the respondent's objection that it was a "net opinion." Based on the witness's experience, training, familiarity with training of

anesthesia residents and pain fellowships, and the concomitant awareness of the types of procedures which are part of training programs, as he is a professor of anesthesiology, serves on committees which credential spinal surgeons as well as his examination of the curricula of the various residencies and examination of the facts of the credentials asserted by respondent, we find it appropriate to accept his report.

At the conclusion of the State's case, Respondent presented an opening statement. Essentially he argued that nothing had changed since an order was signed in which it was stated that the disposition was adequately protective of the public. Respondent asserted that the website depicting videos of "the doctor performing surgeries in Africa several years ago" does not present an imminent harm to the public, but rather the board members are being asked to change their minds. Counsel asserted respondent had not performed any procedure he agreed not to perform and no patient's clinical care was compromised. Respondent claimed as an investigator was not sent to look at the website until June 5<sup>th</sup>, something else was responsible for this matter, and repeated his belief that statements in the media about the consent order and the rate of disciplinary actions in New Jersey, coupled with a DCA order stripping respondent of CDS privileges, were the reasons for the proceeding before the Board, and that the "rush" to come before the Board is not for appropriate purposes, as the doctor has not

been shown to be any more of a risk than he was when the consent order was entered. Respondent asserted that the expert opinion was rendered regarding three (3) cases which involve only with whether the doctor has appropriate credentials, and the other six (6) involve procedures covered by the Consent Order. As the second expert dealt solely with credentialing issues, respondent claimed the issue of which specialty can perform each procedure is not relevant here today as the doctor agreed not to perform them in the consent order.

In closing statements the Deputy emphasized that what was new today was a demonstration of the utter lack of medical judgment of respondent as demonstrated by the new allegations as to patient T.Z. who suffered grave harm during 7 hours of surgery in a one room surgi-center involving severe deviations from the standard of care. She also reiterated that the Board did not know when entering the interim Consent Order, that respondent was going to show his untrustworthiness by not complying with the simple directive to change his website to show the procedures he is permitted to perform. However, she also asserted that at the time the original application was brought in April, there was ample evidence to support temporary suspension of license, as it was based on repeated performance of surgery without training and experience, and gross deviations posing imminent harm to patients to undergo those surgeries in a one room setting without access to a hospital

for complications. After reviewing each of the patient cases, the failure to have privileges, a period without malpractice insurance for surgery he performed, failure to comply with the Order and the subpoena-the aggregate strikingly shows a physician who lacks basic judgment to be trusted to practice medicine.

Respondent's attorney argued that there was nothing new, and that T.Z.'s surgery occurred before May of 2012, and included the same allegations as in every other case. He asserted that to upend a consent order that the Attorney General supported last month would mean there would be no settled cases, and there would be utter "chaos." He asked the Board to enter an order with the same terms as the previous Consent Order, which had been found adequately protective only a month ago.

#### **DISCUSSION**

Based on the record before us today, containing extensive documentation of multiple instances of respondent's placing the public at grave risk, including unrebutted testimony of two experts that respondent engaged in repeated instances of gross malpractice and gross deviations from the standard of care on numerous patients on whom he performed spinal surgery, and including proof of a lack of judgment and flouting of Board authority, we are satisfied the Attorney General has made a palpable demonstration that respondent's continued practice would present an imminent danger to

the public. The demonstration that has been made at this juncture of the proceeding includes the following:

(1) As testified to by the experts, with whom we agree in our expertise, given the lack of any formal surgical training or education, which should ordinarily include 5 to 7 years of training, respondent repeatedly subjected multiple patients to significant complex spinal surgery in a one-room surgical center with no hospital privileges or access to manage life-threatening complications which might occur. These include as testified to by the State's experts, major vascular lacerations or complications, possible puncturing of a bowel, esophageal trauma or crushing of a larynx, together with other complications, such that this leads the Board to conclude that respondent does not have the judgment to recognize the grave risk to which he puts patients on a repeated basis.

(2) Despite the risks of such outpatient surgery, respondent subjected patient T.Z. to a 7 hour lumbar fusion using spinal instrumentation including pedicle screw fixation. After awakening with pain in an upper lumbar, imaging records and later surgery revealed one of the screws was within the spinal canal and impinging on a nerve root, another was not in the pedicles but through the foramen, also likely injuring a nerve root, and an interbody prosthetic device was placed outside the vertebral body encroaching the nerve root. This procedure resulted in harm to the patient including nerve injury, dysfunction of the nerves, and required revision surgery. We agree with the expert opinion of Dr. Przybylski that the care of this patient represented a gross deviation from the standard of care.

(3) Despite the increased risk that smokers face in terms of healing, pseudoarthrosis or a failed fusion, particularly with the use of pieces of allograft bone, respondent subjected 2 patients (F.K. and P.M.) to minimally invasive 3 level lumbar fusion surgery, with no indication in the record that they were given the option of using other materials, nor counseled to quit smoking, nor warned of the risks of pseudoarthrosis and possible need for re-operation. F.K. developed pseudoarthrosis where the unilateral pedicle screw fixation was placed (asymmetrically), developed a neuropathic pain problem and diagnosed with reflex sympathetic dystrophy. P.M. was subjected to repeated discography on which 2 levels were found positive, yet a 3 level fusion was performed. Fluoroscopic images indicated no evidence of transfacet screw fixation

across the joints, and failure to interconnect the screws renders them unable to resist rotational or translational movement. As the joints were not crossed to achieve fixation, the patient's risk of pseudoarthrosis was increased. We again agree with the expert that the care of patients F.K. and P.M. involved gross deviations of the standard of care.

(4) As to patients S.S., K.S. and G.H. we agree with Dr. Przybylski at this stage of the proceeding, that it was a gross deviation given the lack of education, training and experience thus far demonstrated, for respondent to perform the open lumbar fusion (S.S.), multilevel open anterior cervical discectomy and fusion with instrumentation (K.S.) and lumbar fusion with instrumentation (G.H.) on these patients.

These multiple findings of acts of gross deviations at this juncture, serve to underscore our conclusion that respondent lacks the judgment to be permitted to continue to practice pending the outcome of a plenary hearing in this matter.

Our findings herein are buttressed by respondent's repeated demonstration, both recently and in the past, that he disregards the Board's authority by flagrantly disregarding an affirmative obligation placed upon him by a voluntary Consent Order to revise his website so as not to misrepresent to patients his qualifications and continuing to represent himself as a spinal surgeon able to perform surgery on an outpatient basis. The Consent Order sought very little in this regard, yet having been thrown a lifeline permitting him to practice, respondent did not even add a disclaimer indicating he no longer performs the procedures depicted. Incredibly, he did not even appear willing to revise the website at the time of hearing, continuing to claim that

it contains only historical data and that no one would be enticed to become a patient by its contents, and that to "take it down" would violate his First Amendment rights, (though that was never required by the Board). Such an attitude bespeaks the difficulty we have in trusting in respondent's compliance with any restrictive measures we might fashion, as it appears respondent will interpret directives as he sees fit. Additional examples include knowingly disregarding Board rules by failing to have hospital or alternative privileges he sought as early as 2005, yet continuing to perform surgeries at a one room surgi-center (he had testified that he tried and couldn't obtain privileges at Meadowlands Hospital (P-26 at p.12) and he sought alternative privileges with the Board in 2005, but failed to follow-up). This is significant as it indicates respondent was aware of the Board regulation requiring privileges (N.J.A.C. 13:35-4A.6) which are designed to protect patients who undergo such surgery (N.J.A.C. 13:35-4A.1), yet failed to comply. Additionally, as previously indicated, he failed to respond to an investigative subpoena as to compliance with the Board Order.

We are mindful that this is not the first time that we have had this practitioner before us on allegations of serious quality of care issues, and that in the past the Board eschewed in an order a stringent penalty in the expectation that respondent would resolve to deal forthrightly and honestly with the Board, employers, hospitals, and insurers, and we included in the 2003

order (Exhibit T to the Motion to Enforce) our expectation of the strictest compliance with the standard of care and ethical tenets that respondent should act and that expectation was to be at the highest level.

The demonstration of a lack of judgment permeating respondent's practice made at the hearing, convinces us that a palpable demonstration of an imminent danger to the public has been made, such that no measure short of a temporary suspension of license will suffice. Therefore, respondent's license to practice medicine and surgery in New Jersey shall be temporarily suspended. Effective immediately, he shall not take any new patients or perform any surgical procedures. And within seven (7) days after the announcement of this order orally on the record, respondent shall have transitioned all patients and ceased practice by 5:00 p.m. on June 20, 2012.

The temporary suspension shall remain in effect until consideration by the Board of the outcome of plenary proceedings in this matter. We encourage the parties to agree to an accelerated proceeding of this matter at the Office of Administrative law.

**IT IS THEREFORE ON THIS 20th DAY OF June 2012,**

**AS ANNOUNCED ORALLY ON THE RECORD ON JUNE 13, 2012**

**ORDERED:**

1. The license of Richard A. Kaul, M.D. is temporarily suspended effective seven (7) days after the date of the hearing,

that is at 5:00 P.M. on June 20, 2012, in order to permit an orderly transition of practice for the benefit of patients. The suspension shall continue until such time as the Board reviews the results of the plenary proceedings in this matter.

2. Effective upon oral announcement on the record on June 13, 2012, respondent shall take no new patients, nor perform any surgical procedures, and shall arrange for transition, referral, or transfer of his current patients.

3. Respondent's original medical license shall be surrendered to the office of the Board of Medical Examiners, 140 East Front Street, 2nd Floor, P.O. Box 183, Trenton, New Jersey 08608, within seven (7) days following the June 20, 2012 effective date of the temporary suspension.

4. As indicated on page 11 above, Respondent shall comply with the subpoena issued May 23, 2012 as to patients who were not listed within the original Verified Complaint. Compliance shall be within seven days of the issuance of this Order, consistent with the time frame granted in the original subpoena (Exhibit D to the Attorney General's Motion).

5. The parties are encouraged to agree to an accelerated proceeding at the Office of Administrative Law.

6. Respondent's request for a stay of this Order is denied.

7. Respondent shall comply with the Directives Regarding Licensees who have been disciplined, which is attached hereto and made a part hereof.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINES

By:   
\_\_\_\_\_  
Paul T. Jordan, M.D.  
President

**EXHIBITS ENTERED INTO EVIDENCE**

P-2 Interim Consent Order Filed 5/9/12  
P-12 Partial Patient Record T.Z.  
P-13 T.Z. Statement  
P-16 Malpractice Insurance Policy,  
June 10, 2004 - June 10, 2005  
P-17 Malpractice Insurance Policy,  
June 10, 2005 - June 10, 2006  
P-18 Deposition of Richard Kaul 8/25/10  
P-19 William Roeder Certification  
P-22A DVD  
P-22B DVD  
  
P-24 License Verification Letter  
P-25 Enforcement Bureau Report 1/17/12  
P-26 PEC Transcript 2/3/10  
P-29 CV and Certification Richard Kaul 2/3/10  
P-27A Report of Dr. Przybyski  
P-27B CV of Dr. Gregory Przybyski  
P-28B CV of Dr. Kaufman  
P-30 Copy of American Board of Interventional  
Pain Management Website  
P-31 Copy of Academy Minimally Invasive Spinal  
Medicine and Surgery Website  
P-32 Copy of Website NJ Spine & Rehabilitation Center  
P-33 Patient PM records  
P-34 Patient F.K. records  
P-35 Certification of William Roeder  
Executive Director, Board of Medical Examiners  
P-36 Updated CV Richard Kaul

**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.

**NAME:** RICHARD A. KAUL, M.D.  
**NJ License #** 25MA06328100

**CONFIDENTIAL 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 Number<sup>1</sup>: \_\_\_\_\_

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

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

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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).

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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.

**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.