

FILED

March 24, 2014

**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
OAL DOCKET NO. BDS 08959-12

Nunc Pro Tunc March 12, 2014

IN THE MATTER OF THE SUSPENSION
OR REVOCATION OF THE LICENSE OF

RICHARD KAUL, M.D.
LICENSE NO.: 25MA063281

TO PRACTICE MEDICINE AND SURGERY
IN THE STATE OF NEW JERSEY

CORRECTED
FINAL DECISION AND ORDER

This matter was returned to the New Jersey State Board of Medical Examiners ("the Board") to consider a recommended Initial Decision by Administrative Law Judge J. Howard Solomon (hereinafter "ALJ") entered on December 13, 2013 following a 23 day hearing at the Office of Administrative Law. The ALJ found, among other things, that Respondent's performance of both open and minimally invasive spinal surgeries without appropriate training and experience constituted gross malpractice; that his performance of such surgical procedures on each of eleven (11) patients involved both gross and repeated malpractice, negligence and incompetence including that Respondent improperly placed screws during spinal fusions, placed allograph bone more likely to result in failed fusions in patients who smoked, performed multi-level fusions in a patient with degenerative disease,

improperly diagnosed various patients and improperly used OptiMesh¹ as an interbody structural support device. The ALJ also found that respondent's misrepresentations to patients and on his website regarding his training constituted professional misconduct; that his performance of the surgery at a one room surgical center he owned without hospital or alternative privileges granted by the Board violated Board regulations; and that his lack of malpractice insurance covering the procedures was likewise a violation of Board regulations.

Based on the findings made, ALJ Solomon recommended that the Board revoke Respondent's license and impose costs. As indicated herein, based upon our review of the record, the Initial Decision, Exceptions and responses filed thereafter and consideration of oral argument of counsel², we have concluded that cause exists to adopt in their entirety all findings of fact and conclusions of law of the ALJ as amplified below. Based upon our independent review of the record and the evidence presented regarding sanctions, we herein modify the penalty recommendation to additionally include a \$300,000.00 monetary penalty. Set forth below is a summary of the procedural history of this matter, the basis for our determination to adopt the ALJ's

¹ OptiMesh is a three dimensional mesh bag to contain bone fragments. ". . . mesh is simply a bag that contains bones and is not capable of maintaining the load of body weight and, therefore, it is not considered to be an appropriate prosthetic device for an interspace." T April 15, 2013 at 45.

² Additional exhibits entered and considered during the hearing were: S-1 Certification of Costs submitted by the State and S-2 Transcript of Recorded Proceedings for May 6, 2013 transcribed by CRT Support Corporation.

findings of fact and conclusions of law and to modify the penalty recommendation.

PROCEDURAL HISTORY

A Verified Complaint was filed by the New Jersey Attorney General on April 2, 2012 against Respondent Richard A. Kaul. Respondent filed his answer with the Board on April 9, 2012 denying the allegations. The Attorney General filed an amended Verified Complaint with the Board on June 13, 2012. A hearing on the Attorney General's Order to Show Cause seeking the temporary suspension of Respondent's license was also heard and granted on June 13, 2012. The matter was then referred to the Office of Administrative Law for a hearing as a contested case and assigned to Administrative Law Judge J. Howard Solomon. Thereafter, the Attorney General filed a second amended complaint. Respondent filed his answer on April 1, 2013, denying the majority of the substantive allegations.

The second amended Complaint alleged that respondent committed multiple acts of gross neglect, gross malpractice, gross incompetence, in violation of N.J.S.A. 45:1-21(c); repeated acts of negligence, malpractice or incompetence, in violation of N.J.S.A. 45:1-21(d); professional misconduct, in violation of N.J.S.A. 45:1-21(e) and (h), including failure to maintain medical malpractice insurance and/or a letter of credit, in violation of N.J.S.A. 45:9-19.7 and/or N.J.A.C. 13:35-6.18(b) and (d); failure to maintain good moral character, in violation of N.J.S.A. 45:9-6; failure to obtain

hospital privileges or alternative privileges, in violation of N.J.A.C. 13:35-4A.6; professional misconduct, in violation of N.J.S.A. 45:1-21(e) and violation of a Board regulation pursuant to N.J.S.A. 45:1-21(h), including the failure to maintain proper patient records, in violation of N.J.A.C. 13:35-6.5; and misrepresentation of his training and experience in the performance of spinal surgeries, and his failure to properly bill for his services, both in violation of N.J.S.A. 45:1-21(b).

Hearings took place on 23 days commencing April 9, 2013 and continuing through June 28, 2013. The record closed on October 31, 2013, after submission of post-hearing briefs. The ALJ issued his initial decision on December 13, 2013.

Upon the request of Respondent for an extension of time for the filing of exceptions, a short extension was granted due to the voluminous record in this case. The Respondent filed exceptions on January 17, 2014. The Attorney General filed a Reply to the Exceptions on January 28, 2014. A hearing on the Exceptions was held before a quorum of the Board of Medical Examiners on February 12, 2014.

ALJ's FINDINGS

In his 105 page Initial Decision, the ALJ found that Respondent had committed gross and repeated acts of negligence and violated numerous other Board of Medical Examiners statutes and regulations.

Specifically, the ALJ found:

1. Respondent is a board-certified anesthesiologist
2. His education, training, internships, residencies and fellowships were insufficient to prepare him for surgeries of the spine, whether minimally invasive or open.
3. The CME courses he took were insufficient to provide such education and training. If hands-on training were offered, it was, in most instances, done on cadavers. In others, he was primarily an observer.
4. In addition to his lack of sufficient education and training in spinal surgeries, he did not receive sufficient monitoring by a trained overseer. For instance, he was on his own the first time he inserted a pedicle screw in a live patient, without the presence of any trained monitor.
5. Respondent's treatment included, but was not limited to, inserting pedicle screws into the spinal canal; failing to immediately remove a stimulator after the onset of infection, thereby risking paralysis; using OptiMesh as an interbody structural device; and performing a staged fusion. . .

6. Some of the patient consents were unsigned.
7. He failed to carry medical malpractice insurance from June 10, 2004 to June 10, 2007 that covered spinal surgeries.

8. He did not have hospital or alternative privileges.

9. He used allograft bone in patients who were smokers.

10. He failed to advise patients who were smokers of the risks associated with smoking and allograft bone.

11. He misrepresented his qualifications, not only on his website, but also in discussions with his patients.

12. None of his certifications were recognized by the American Board of Medical Specialties, with the exception of his board-certification in anesthesiology. Non-recognition included his certification by the American Board of Interventional Pain Management.

I.D. at 81

The ALJ also addressed witness credibility very clearly, "the testimony of each and every witness produced by petitioner, both fact and expert was deemed extremely credible and compelling." I.D. at 78. He further found that the majority of expert and fact witnesses presented by Respondent were lacking in credibility and/or their testimony was given little to no weight. I.D. at 78-79

ARGUMENT ON EXCEPTIONS

In his written exceptions³, Respondent made three substantive arguments regarding liability. (1) The Board should reject the ALJ's finding of fact that Respondent did not possess the required training and education to perform minimally invasive spine surgery because the

³ Although given the opportunity for oral argument, Respondent declined and relied upon his written exceptions.

Respondent received the same or substantially similar training in the performance of minimally invasive spine surgery as other members in the field performing the same procedures, including the State's expert witness. Respondent also argued that proctoring⁴ is not a generally accepted requirement for performing minimally invasive spinal procedures. (2) Respondent's actions in performing minimally invasive spine surgeries without alternative privileges does not amount to professional misconduct because his failure to obtain alternative privileges was based upon the advice of legal counsel. (3) The ALJ improperly concluded that Respondent's use of the Optimesh device for interbody fusions constituted a deviation from the generally accepted standard of care.

The Attorney General responded to each of the exceptions in writing and made oral argument: (1) The Attorney General argued that the Board should adopt the ALJ's finding that Respondent's training and qualifications to perform spinal surgery are grossly deficient. The ALJ found both Dr. Przybylski and Dr. Kaufmann's testimony about respondent's lack of training and competency in performing spinal surgeries to be extremely credible and compelling. Respondent himself admitted that he was never trained or proctored on a live patient in a hospital setting for the performance of minimally invasive spinal fusion and performed his first lumbar fusion on a

⁴ Proctoring is a method of training of physicians which involves close supervision until the trainee physician is judged ready to perform a procedure independently and which the State argued was an essential part of training, which Respondent lacked.

live patient, by himself, with no proctor or supervising spinal surgeon, at a surgical center. (2) The Attorney General argued that the ALJ appropriately gave little to no weight to the Respondent's assertion that his failure to obtain either hospital privileges or alternative privileges was based on his reliance on the advice of his counsel, Jeffrey Randolph, Esq. Specifically, the ALJ found the testimony of Mr. Randolph to be lacking in credibility and Respondent's witness Kevin Earle (who served as the administrator of the surgi-center where Kaul operated) testified that he told the Respondent that he needed alternative privileges and the regulations are "clear in requiring privileges for what Respondent intended to perform at his one-room surgical center." (3) The Attorney General argued that ALJ Solomon's finding that Respondent's use of OptiMesh is a deviation from the generally accepted standard of care is amply supported by the evidence.

The State noted that Respondent did not take exception to ALJ's finding that the insertion of pedicle screws into the spinal canal of patient TZ was gross negligence. The DAG reminded the Board that competent counsel cross-examined all 12 of the State's witnesses, including two experts and that the ALJ is in the best position to make credibility findings. The ALJ found all the State's witnesses to be compelling and credible. I.D. at 78.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the entire record, written and oral arguments of counsel regarding Exceptions, and a review of submissions, the Board deliberated in executive session, and voted on and announced its decision on the record in open session. The Board determined to adopt the findings of fact and conclusions of law as set forth in the Initial Decision of ALJ Solomon in its entirety in as much as the Board read it to find gross negligence and repeated acts of negligence in the treatment rendered by Respondent as to each of the counts regarding specific patients, as well as the specific findings and conclusions on the remaining counts of the Complaint. Respondent's exceptions as well as the Attorney General's reply and oral arguments were scrutinized at the Board meeting on February 12, 2014. The Board found Respondent's exceptions not to be persuasive, and will address each during discussion of the relevant count.

As a preliminary matter, the ALJ's credibility findings are supported by sufficient competent, and credible evidence in the record. Using our own medical expertise, we also find independently that Dr. Przybylski's and Dr. Kaufmann's expert testimony was not only highly credible, but more credible than the testimony of Respondent's experts. Accordingly, the Board adopts the ALJ's credibility findings.

The Second Amended Complaint alleged in Count I that Respondent grossly and repeatedly deviated from the accepted standard of care and good medical practice, and engaged in professional misconduct by performing spinal surgical procedures without the appropriate training and experience. After hearing all the testimony and reviewing the evidence, ALJ Solomon found:

Respondent's negligence far exceeded ordinary negligence. His lack of education and training precluded him from even attempting spinal surgery in any form, whether it is called minimally invasive or open. This was not a case of a trained and certified spinal surgeon who may have been careless in a given instance, giving rise to ordinary negligence. This was about a doctor who operated on patients without sufficient training, skills and competence. I therefore CONCLUDE that respondent engaged in gross negligence, gross malpractice and gross incompetence which damaged or endangered the life, health, safety or property of his patients, in violation of N.J.S.A. 45:1-21(c).

I.D. at 85.

Respondent argues in his exceptions that he received the same or substantially similar training in the performance of minimally invasive spine surgery as other members in the field performing the same procedures, including the State's expert witness. In our medical expertise, there can be no comparison between the rigorous and highly specialized training and education of Dr. Przybylski and that of Respondent. None of Respondent's certifications were recognized by the American Board of Medical Specialties, with the exception of his board-certification in anesthesiology. The CME

courses he took were insufficient to provide adequate education and training in spinal surgery. He did not receive sufficient monitoring by a trained overseer. If hands-on training was offered, it was, in nearly all instances, done on cadavers, which do not mimic the various responses and tendencies of a live body.

Dr. Przybylski opined on multiple occasions that Respondent did not have the training or experience to perform spinal surgery on specific patients. E.g. April 10, 2013 at 215-216. For example, Dr. Przybylski opined that it was gross negligence for Respondent to attempt an open anterior cervical discectomy and fusion with spinal implementation on patient KS. T April 16, 2013 at 97. He also opined that Respondent was grossly negligent in performing an open bone graft harvest and minimally invasive fusion with transfacet pedicle screws on patient SS without appropriate training. T April 16, 2013 at 156-157. We agree in our medical expertise, that performing such complex and demanding surgical procedures would ordinarily involve years of additional training which respondent lacked and which one would expect given the types of residency and internships completed by Respondent.

Accordingly, we find, using our medical expertise, that Respondent grossly and repeatedly deviated from the accepted standard of care and good medical practice, and engaged in professional misconduct by performing spinal surgical procedures including but not limited to minimally invasive spinal fusions with instrumentation,

open spinal surgery, and discectomies on a minimum of eleven patients (as named in the Complaint) without sufficient training, education and experience in violation of N.J.S.A. 45:1-21(c), (d) and (e) and N.J.S.A. 45:9-6.

Count II alleges that Respondent's failure to have the appropriate hospital privileges or Board-approved alternative privileges in spinal surgery and/or interventional pain management is a violation of N.J.A.C. 13:35-4A.6 and is thus deemed to be professional misconduct under N.J.S.A. 45:1-21(e) and a violation of a Board regulation under N.J.S.A. 45:1-21(h). Dr. Przybylski testified repeatedly that Respondent's lack of hospital privileges for the procedures he was performing was grossly negligent (e.g. T April 16, 2013 At 99-101). ALJ Solomon found

... it was clear from the proofs presented that respondent, through another anesthesiologist, utilized anesthesia in the performance of minimally invasive techniques for which he was required to have either hospital privileges or Board approved privileges. He had neither. While he and his witnesses claimed that the application for privileges on the Board's website was somewhat confusing, the regulations were clear in requiring privileges for what respondent intended to perform at his one room surgical center. He failed to present any proofs that he had such privileges. I therefore CONCLUDE that respondent failed to obtain hospital privileges or Board approved privileges in violation of N.J.A.C. 13:35-4A.6... (and) in violation of N.J.S.A. 45:1-21(e) and (h).

I.D. at 90.

Respondent argues in his exceptions that his failure to obtain either hospital privileges or alternative privileges was based on his reliance on the advice of his counsel, Jeffrey Randolph, Esq. However, the ALJ found the testimony of Mr. Randolph to be lacking in credibility as Randolph focused primarily on the language contained in or omitted from the alternative privilege application rather than the relevant regulations. The ALJ further found Respondent's witness Kevin Earle to be credible when he testified that he told the Respondent that he needed alternative privileges and the regulations are "clear in requiring privileges for what Respondent intended to perform at his one-room surgical center." I.D. at 79 and 90.

Hospital privileges or alternative privileges are required by this Board to protect patients who receive treatment in one room surgical facilities, so that they can be transferred to a hospital quickly and efficiently in an emergency. Failure to have such privileges places the patient at unnecessary risk of harm. We concur with the ALJ and find that Respondent failed to obtain hospital privileges or Board approved privileges in violation of N.J.A.C. 13:35-4A and N.J.S.A. 45:1-21(e) and (h).

Count VIII alleges that the website for New Jersey Spine and Rehabilitation (Respondent's surgical center) contains numerous misleading statements regarding Respondent's education, training and credentials to perform spinal surgical procedures which impair a patient's ability to provide informed consent for spinal surgery

procedure performed by Respondent. After finding that the Respondent's "lack of education and training precluded him from even attempting spinal surgery in any form," the ALJ concluded that Respondent engaged in dishonesty, fraud, deception, misrepresentation, false promise or false pretense in violation of N.J.S.A. 45:1-21(b) by representing himself as capable both on his website and in his personal interaction with patients and in his misrepresentation of the scope of proposed procedures to patients. I.D. at 86-87. We concur.

Count IX alleges that Respondent failed to have medical malpractice insurance and/or a Letter of Credit covering his performance of spinal surgical procedures. Respondent was unable to produce evidence of such insurance or letter of credit. The ALJ found that Respondent failed to maintain medical malpractice insurance insuring spinal surgeries and/or a letter of credit in violation of N.J.S.A. 45:9-19.7 and N.J.A.C. 13:35-6.18(b) and (d) and that such failure constituted professional misconduct within the meaning of N.J.S.A. 45:1-21(e) and N.J.A.C. 13:35-6.18(e). I.D. 87-88. We Concur.

Count XIII was dismissed.

Counts III-VII, X-XII and XIV-XVI deal with Respondent's treatment of specific patients. As noted above, we find that Respondent grossly and repeatedly deviated from the accepted standard of care and good medical practice and engaged in professional

misconduct by performing spinal surgical procedures on each of the patients named in the complaint when he did not have the training and experience necessary to do so. We further concur with Dr. Przybylski and the ALJ's recommended findings that Respondent failed to maintain a proper patient record for those patients for which he failed to obtain signed patient consent forms, contrary to N.J.A.C. 13:35-6.5, which therefore constitutes a violation of N.J.S.A. 45:1-21(h).

The ALJ clearly found that the combination of Dr. Przybylski's expert testimony and the documentary evidence is sufficient to identify the standard of care applicable to the treatment rendered by Respondent. I.D. at 85. The ALJ listed deviations in his discussion surrounding his findings that Respondent's treatment of the patients named in the complaint constitutes gross negligence, malpractice or incompetence in violation of N.J.S.A. 45:1-21(c) and repeated acts of negligence, malpractice or incompetence in violation of N.J.S.A. 45:1-21(d) as to each patient named in the complaint. The deviations listed by the ALJ include, but are not limited to: "improperly placing screws during spinal fusions, placing allograft bone in patients who smoked, performing multilevel fusions in a patient with degenerative disease, performing a staged fusion, improperly diagnosing various patients, improperly using and placing OptiMesh, and failing to obtain proper patient consent." I.D. at 85-86. Using our medical expertise, we concur with Dr. Przybylski and the

ALJ and amplify the findings of the ALJ as to each patient as indicated below.

As noted by the ALJ, Dr. Przybylski opined and we find that Respondent's treatment of K.S. (Count III) was grossly negligent. Specifically, it was a gross deviation from the standard of care to proceed with a two level decompression of the nerve root and multilevel cervical fusion without clinical indication. I.D. at 24; T April 16, 2013 at 95-101.

As noted by the ALJ, Dr. Przybylski opined and we find that Respondent's treatment of GH (Count IV) was grossly negligent. Specifically, it was a gross deviation from the standard of care to (1) order an unnecessary discography; (2) attempt and perform a three level fusion on this patient; (3) use OptiMesh in the interbody space. These deviations placed the patient at risk for neurological injury. I.D. at 11-12; T April 15, 2013 at 69 and 72.

Respondent argues in his Exceptions that the ALJ improperly concluded that Respondent's use of the Optimesh device for interbody fusions constituted a deviation from the generally accepted standard of care. In making this argument, Respondent relied, in part, on the testimony of Robert McGann, senior territory manager for Spineology, Inc., the manufacturer of OptiMesh, who testified that he had witnessed approximately 170 physicians use OptiMesh for interbody fusions.

The Attorney General argued, and we agree, that ALJ Solomon's finding that Respondent's use of OPTIMESH is a gross deviation from the generally accepted standard of care is amply supported by the evidence including: Dr. Przybylski's opinion that Respondent's use of the off-label mesh device is a gross deviation; the FDA's black box warning that the "safety and effectiveness of this device used for fusion of the interbody space has not been established; and the contraindications set forth on the packaging label. In our medical expertise, we agree with Dr. Przybylski that the use of mesh was improper because mesh has not been shown to withstand the load from body weight as an interbody structural support.

As noted by the ALJ, Dr. Przybylski opined and we find that Respondent's treatment of SS (Count V) was grossly negligent. Specifically, it was a gross deviation from the standard of care to: (1) perform an open bone graft harvest using a minimally invasive procedure with instrumented screws and use of a mesh case as a support device in the interbody space, (2) to use allograft bone⁵ in a smoker and not explain the risk of increased chance of failure of the fusion to the patient. I.D. at 31; T April 16, 2013 at 156-159. Experts presented by both the State and Dr. Kaul agree that using allograft in smokers increases the risk that the fusion will not take. T April 15, 2013 at 132; T June 18, 2013 at 128-130. These deviations placed the patient at risk of harm.

⁵ Allograft bone is obtained from a cadaver. Autograft bone is harvested from the patient's own body, often from the iliac crest.

As noted by the ALJ, Dr. Przybylski opined and we find that Respondent's treatment of FK (Count VI) was grossly negligent. Specifically, it was a gross deviation from the standard of care to: (1) proceed with spinal fusion surgery without indication that a prior fusion needed to be fixed and without information that the patient was exhibiting new symptoms that would indicate the need for spinal fusion; (2) conduct a two level discography without a control level; (3) use mesh cages in the interbody space; (4) fail to place the screws in the correct place (5) use allograft bone in a smoker. I.D. at 15-16; T April 15, 2013 at 127-135.

As noted by the ALJ, Dr. Przybylski opined, and we find, that Respondent's treatment of PM (Count VII) was grossly negligent. Specifically, it was a gross deviation from the standard of care to: (1) perform a three level fusion without clinical indication and where the MRI shows degenerative disc disease; (2) use mesh cages as a structural support device in interbody space; (3) use allograft bone in a smoker; (4) use transfacet pedicle screws in an improper plane which prevented stability. I.D. at 22; T April 16, 2013 at 69-73.

As noted by the ALJ, Dr. Przybylski opined, and we find, that Respondent's treatment of TZ (Count X) was grossly negligent. Specifically, it was a gross deviation from the standard of care to: (1) perform unnecessary epidural injections when there was no benefit from prior injection; (2) improperly place 4 of 5 screws into the

spinal canal causing injury to the patient and damaging nerves; (3) perform fusion on a patient with multi-level degenerative disease. I.D. at 38-39; T April 17, 2013 at 88-91. Dr. Naseef, a subsequent treating physician, testified that when he removed the screws from TZ,

. . . they were in a place I have never seen before... this one completely missed the pedicle and went directly through the lamina and into the vertebral body, which putting screws in that is a completely different field. When you are not in bone, it's grossly abnormal.

T May 10, 2013 at 29-30.

In our medical expertise, we are aware that placing screws directly in the spinal canal can result in damage to the nerve root and blood vessels.

As noted by the ALJ, Dr. Przybylski opined, and we find, that Respondent's treatment of JZ (Count XI) was grossly negligent. Specifically, it was a gross deviation from the standard of care to: (1) perform an epidural injection when the first injection had no benefit, putting the patient unnecessarily at risk for spinal cord injury; (2) untimely manage a post-operative wound infection. I.D. at 34; T April 17, 2013 at 31-33. All the experts, including Respondent's, agree that when there is an infection after insertion of a spinal stimulator you must remove it immediately. In our medical expertise, a three day delay is simply inexcusable.

As noted by the ALJ, Dr. Przybylski opined, and we find, that Respondent's treatment of JJ (Count XII) was grossly negligent. Specifically, it was a gross deviation from the standard of care to: (1) perform a two level fusion on a patient with degenerative disc disease and an MRI that did not support fusion; (2) use a mesh cage as an interbody support device and; (3) place a mesh cage beyond the disc-space footprint, putting the patient at risk of harm to nerves and blood vessels. I.D. at 14, T April 15, 2013 at 108-110.

As noted by the ALJ, Dr. Przybylski opined, and we find, that Respondent's treatment of RB (Count XIV) was grossly negligent. Specifically, it was a gross deviation to (1) perform a discography without a control level (2) have a material inconsistency between the consent and the operative report; (3) perform multiple surgeries in the same area; (4) use OptiMesh as an interbody support device. I.D. at 9-10; T April 15, 2013 at 25, 29 and 42-47.

As noted by the ALJ, Dr. Przybylski opined, and we find that Respondent's treatment of HS (Count XV) was grossly negligent. Specifically, it was a gross deviation from the standard of care to: (1) give a third epidural injection and perform lumbar fusion which were not clinically indicated and unnecessary; (2) perform a three level or more fusion which was not clinically indicated; (3) use a mesh cage as a structural support device in the interbody space. These deviations placed the patient at risk of harm. I.D. 26-27; T April 16, 2013 at 119-124.

As noted by the ALJ, Dr. Przybylski opined, and we find, that Respondent's treatment of LM (Count XVI) was grossly negligent. Specifically, it was a gross deviation to: (1) use a mesh cage as an interbody support device; (2) perform surgery without clinical indication and with a normal discogram and EMG study; (3) Improperly place the screw and mesh. Consequently, a revision surgery was necessary; (4) fail to recognize a foot drop. I.D. at 19-20; T April 16, 2013 at 29-40.

Thus we adopt all findings of fact and conclusions of law recommended by the ALJ in the Initial Decision.

PENALTY HEARING

Immediately following the Board's announcement of its determination that cause for discipline had been found, the Board proceeded to a hearing for determination of penalties.

Counsel for Respondent argued briefly, on Respondent's behalf, that a significant portion of the sanction recommended by the ALJ was based on failure to obtain privileges. He reminded the Board that Jeffrey Randolph, Esq. appeared and testified before the ALJ that he told Respondent he didn't need privileges. Respondent relied upon the advice of legal counsel in good faith and should not be held liable for not getting privileges. No other presentation was made nor documents submitted in mitigation of penalty. Respondent was not present.

The Attorney General played a video from Respondent's website, in which Respondent states that he is "absolutely shocked" by the ALJ's decision in this matter and that the decision does not reflect the facts that were presented in the case. He makes broad allegations of altered court transcripts, interference with legal evidence and political influence. He states his intention to get back into the operating room in America and develop and innovate in the field of minimally invasive spine surgery.

The Attorney General argued that there is no evidence to support any of Respondent's self-serving allegations regarding these proceedings. Respondent's independent transcript of one day of the twenty-three day hearing at the OAL was entered into evidence as S-2 over the objection of counsel.⁶ It shows that Respondent's transcript and the official transcript had only minor insubstantial inconsistencies.

The Attorney General played a second video from Respondent's website in which Respondent claims that he will use the "knowledge skills and experience" he obtained at NJSR to bring "high quality and cost effective spine care to a global audience." He plans to open Columna Institute, with offices in Columbia, Congo and Mexico, to provide a "deep broad educational platform for physicians around the

⁶ Respondent's counsel objected to the transcript being entered as evidence based upon inability to authenticate the transcripts. The Attorney General represented that the transcript was appended to a letter to President Obama on Respondent's website. The transcript was allowed into evidence as it is in the public domain.

world who will be trained and proctored in the field of minimally invasive spine surgery."

DISCUSSION ON SANCTIONS

Initially, we note that Dr. Kaul's continued refusal to recognize any failing on his part, to accept responsibility or be in any way apologetic for the activity in which he engaged is disturbing. Dr. Kaul has not expressed remorse for any of the misconduct which has been found in this case. Despite the numerous instances of gross malpractice found, the failure to ensure that patients on whom he operated for many hours in a surgi-center would be protected through approval of his training and experience (whether through hospital privileges or alternative privileges), the failure to have malpractice insurance for several years for the surgery he performed to ensure patients could be compensated for any malpractice, and the misrepresentations regarding his training and experience, among other findings, Respondent was heard in a video publicly posted on his website to maintain that he has done nothing wrong and to proclaim his intention to continue to perform the procedures which led to this matter and even to teach others his methods.

This is not the first time Respondent has come before this Board. By way of Final Order entered on May 14, 2003, this Board warned Respondent:

"What the record before this Board calls into question is Respondent's integrity. Respondent continues to lack insight into the role that licensing and credentialing authorities must play -- he does not get to write the rules, or read them selectively to shield his conduct from scrutiny. Neither semantic gymnastics nor contrived contrition serve the process -- or respondent -- well. Counsel argues that respondent may have provided different answers to the questions on these applications if he had sought counsel. Board licensees committed to truthful dealing with regulators and employers do not need attorneys to assist in answering straightforward, unambiguous questions or in constructing post-hoc rationalizations as to their jurisdictional reach. Respondent would do well to reflect on the role that regulatory bodies play and the need that they have to repose trust in those to whom they have given the privilege to practice. . .The Board has eschewed a more stringent penalty with the hope and expectation that respondent will resolve to practice with the vigilance that he has promised. He must also resolve to deal forthrightly and honestly with this Board, his employers and hospitals and insurers. Future transgressions will not be deserving of leniency. Our expectations for the strictest of compliance with the standard of care and the ethical tenets of the profession will be at the highest level.

2003 Final Order entered into evidence as Exhibit P-114 at 39

We hoped that Respondent would take the opportunity given to him in 2003 to learn from his mistakes and turn over a new leaf to practice medicine responsibly. Instead, Respondent's actions as found in the instant matter, show a continued and absolute disregard of the standards of care governing the practice of medicine and a

total failure to understand his actions were wrong, placed his patients at risk of harm and actually harmed patients.

We searched the record and were unable to find any mitigating factors in this matter. Despite years of practice, Respondent was unable, throughout this proceeding, to recognize that his practice falls significantly below acceptable standards of practice and that he does not have the training and experience necessary to perform complex spinal surgery.

In order to protect patients and sanction the improprieties found, the Board adopts the ALJ's recommendation to revoke the license of Respondent and further imposes a \$300,000.00 civil penalty. The civil penalty recognizes each Count of the Complaint as a separate and subsequent violation to the action taken by this Board in 2003 and imposes the maximum fine pursuant to N.J.S.A. 45:1-25 of \$20,000 per count for each of the fifteen counts on which findings of violations have been made.

As to the imposition of costs in this matter, we have reviewed the costs sought by the State and find the application sufficiently detailed and the amount reasonable given the length of time expended and complexity of the prosecution of this matter. Costs are traditionally imposed pursuant to N.J.S.A. 45:1-25 so as not to pass the cost of the proceedings onto licensees who support Board activities through licensing fees. Our analysis follows.

The Attorney General's certification in this matter extensively documented the time the attorneys expended in these proceedings, detailing costs beginning in April 2012 up to December 2013 which reflected a total of attorney fees in the amount of \$129,570.00. The rate charged by the Division of Law of \$175 for a Deputy Attorney General with 10 or more years of experience has been approved in prior litigated matters and appears to be well below the community standard. The Board finds the certification attached to the billings to be sufficient. Although the total amount is large, we find that it is justified and note that it is already discounted because attorney fees are submitted only for the period between the filing of the Complaint and the completion of this matter at the OAL. Attorney time spent on pre-complaint investigation and drafting of the initial complaint as well as time spent to draft exceptions, prepare for and attend the hearing on exceptions are not included. 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 the Attorney General has adequately documented the legal work necessary to advance the prosecution of this case. We are thus satisfied that the Attorney General's claims are reasonable, especially when viewed in the context of the seriousness and scope of the action maintained

against the Respondent, the complexity of the case and voluminous evidence.

However, we also find that the Respondent should not be responsible to carry the burden of attorney costs for costs incurred related to his counsel's motion to withdraw. Accordingly, we are subtracting 7.5 hours or \$1312.00 from the total amount of attorney fees awarded.

We take notice that investigative costs, approved many times in the past, are based on salaries, overhead and costs of state employees. Considering the important state interest to be vindicated, protection of the public by assuring physicians practice within the standard of care, the investigative costs sought are certainly reasonable. However, a close review of the submitted costs reveals approximately 12 hours of time where the investigator indicates she was "waiting" or working on charities related issues regarding Respondent (which were not included in the Complaint). Accordingly, we find that the total investigative costs awarded should be reduced by \$1771.00.

Similarly, the expert testimony and court reporting/transcript fees are documented by invoices and appear necessary and reasonable to this proceeding, especially when one considers that the OAL hearing spanned 23 days. Transcription costs for the February 12, 2014 hearing on exceptions are not sought.

We are thus satisfied that the fees we are awarding are reasonable especially when viewed in the context of the seriousness of the action maintained against Respondent.

Expert Costs	\$30,999.08
Transcript Costs	14,327.50
Investigative Costs	34,237.74
Attorney's Fees	128,258.00

TOTAL **\$175,422.32**

We further find that Respondent has provided absolutely no documentation of any inability to pay such costs as required by notification provided to him well before the hearing date in this matter.

For all the reasons set forth, and in consideration of the egregious nature of the violations in this matter, we modify the recommendations of the ALJ in the Initial Decision as indicated below.

IT IS THEREFORE ON THIS 12 DAY OF MARCH, 2014

AS ORALLY ORDERED ON THE RECORD ON FEBRUARY 12, 2014:

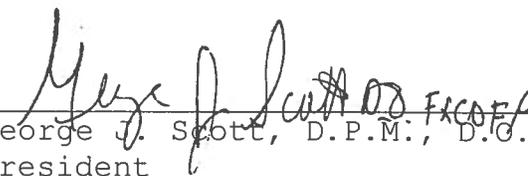
1. Respondent's license to practice medicine and surgery in the State of New Jersey is hereby revoked, effective February 12, 2014. The attached Directives regarding future activities of a Board licensee who has been disciplined is incorporated into this Order.

2. Respondent shall pay civil penalties in the amount of \$300,000.00, representing \$20,000 for each count on which liability was found. Payment shall be made within thirty days of the entry of this Order by certified check or money order, payable to the State of New Jersey and forwarded to the attention of Bill Roeder, Executive Director, Board of Medical Examiners, 140 East Front Street, 2nd Floor, Trenton, New Jersey, 08608, unless installment payments are sought from and approved by the Board prior to the date due.

3. Respondent shall pay costs in the amount of \$175,422.32. Payment shall be made within thirty days of the entry of this Order by certified check or money order, payable to the State of New Jersey and forwarded to the attention of Bill Roeder, Executive Director, Board of Medical Examiners, 140 East Front Street, 2nd Floor, Trenton New Jersey, 08608, unless installment payments are sought from and approved by the Board prior to the date due.

4. Failure to make timely payment of penalties and costs under this Order shall result in the filing of a certificate of debt, and such other proceedings as are permitted by law.

NEW JERSEY STATE BOARD OF
MEDICAL EXAMINERS

By:  George J. Scott, D.P.M., D.C.
President