BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

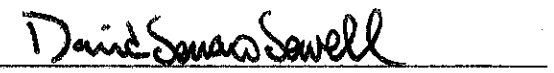
In the Matter of the Accusation Against:	OAH No. 2010080483
GARY PAGE, M.D.,	MBC Case No. 02-2009-197437
Physician's and Surgeon's Certificate No. A67353	PRECEDENTIAL DECISION No. MBC-2015-01 Q

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Medical Board of California hereby designates as precedential that portion of the decision listed below in the Matter of the Accusation against Gary Page, M.D.:

Factual Findings 2 – 32, and
Legal Conclusions 1-21.

This precedential designation shall be effective January 30, 2015.



DAVID SERRANO SEWELL, President
Medical Board of California

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: GARY PAGE, M.D., Physician's and Surgeon's Certificate No. A67353 Respondent.	Case No. 02-2009-197437 OAH No. 2010080483

PROPOSED DECISION AFTER REMAND

This matter was first heard on May 11, 2011, at Los Angeles, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Evidence was presented, the record was closed and a Proposed Decision issued, dated June 29, 2011. (Exhibit 14.) The Medical Board of California (MBC) issued an Order of Remand to Administrative Law Judge dated November 10, 2011. (Order of Remand; Exhibit 15.)

The Order of Remand includes a factual finding and/or legal conclusion, a remand for taking additional evidence, and a request. The finding and/or legal conclusion is that the MBC "has determined that Respondent's license is subject to discipline in that the acts described in the Arizona Consent Agreement are substantially related to the practice of medicine and would have been grounds for discipline in California of a physician's and surgeon's certificate." (*Ibid.*)

The Order of Remand includes a remand in accordance with Government Code section 11517, subdivision (c), "for taking additional evidence and, as necessary, argument directed to the following:

"(1) The previous disciplinary action in California referenced in the Proposed Decision;
"(2) Respondent's credentials;
"(3) Further evidence regarding the underlying Arizona disciplinary action; and
"(4) Any other evidence that would assist the board in assessing Respondent's conduct and activities since his license was reinstated in California." (*Ibid.*)

The Order of Remand also requests that the ALJ "incorporate the additional evidence and recommendations into the Proposed Decision dated June 29, 2011." (*Ibid.*)

Subsequently, new hearing dates were set, continuances were granted, a proposed settlement was submitted, the proposed settlement was rejected by the MBC, amended pleadings were filed, both parties substituted new attorneys, and the matter was reset for hearing.

The matter on remand was heard on May 21, 2014, at Los Angeles, California, before David B. Rosenman, ALJ. Respondent Gary Page, M.D., was present and was represented by Rutan & Tucker, by Joseph D. Larsen, Attorney at Law. Complainant (initially Linda K. Whitney, subsequently Kimberly Kirchmeyer) Executive Officer of the MBC was represented by Deputy Attorney General Jannsen Tan.

At the hearing, the Second Amended Accusation was amended such that the reference to a second paragraph numbered 18 was changed to paragraph 19 (page 10, line 2). Oral and documentary evidence was presented. The record remained open for receipt of written closing arguments, received and marked for identification as follows: Complainant's Closing Brief, July 10, 2014, Exhibit 35; Respondent's Closing Brief, August 11, 2014, Exhibit U; and Complainant's letter that no reply brief would be filed, August 22, 2014, Exhibit 36.

The record was closed and the matter was submitted for decision on August 22, 2014.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

*****

2. On January 8, 1999, the Board issued Physician's and Surgeon's Certificate No. A67353 to Respondent. After an accusation was filed, Respondent surrendered his certificate, which was accepted by a Decision of the MBC effective on March 31, 2003. After a petition for reinstatement was filed, Respondent's certificate was reinstated by a Decision on the MBC effective on July 26, 2006. (2006 Decision; Exhibit 20, pp. 1-13.) The license surrender and reinstatement was described in more detail below. The certificate as renewed will expire on October 31, 2014.

The Surrender of Respondent's Arizona License, and its Effect at the First Hearing in this Pending Matter

3. Respondent was also licensed by the Arizona Board of Homeopathic Medical Examiners (Arizona Board).[1] The Arizona Board received complaints regarding Respondent's practice. Respondent denied the allegations. Respondent and the Arizona Board entered into a Consent Agreement in 2008 as the final disposition of the matter whereby Respondent voluntarily surrendered his Arizona license. Although the 2008 Consent Agreement was preceded by a Voluntary Interim Order of Summary Suspension filed September 6, 2007 (Exhibit 4, pp. 10-15), that Order included a stipulation that both parties agreed that it "may not be used as evidence or as an admission by either party in any other judicial or administrative

[1] Homeopathic and allopathic physicians are regulated by different licensing boards in Arizona.

proceeding." (*Id.*, p. 13.) Therefore, no reference can be made here to any substantive material in that Order.

4. On March 18, 2008, the Arizona Board adopted the Consent Agreement. (Exhibit 4, pp. 5-9, and Exhibit 5, pp. 2-6. Further references will be to Exhibit 4.) The Consent Agreement includes the following recital: "The Board received complaints alleging Dr. Page performed cosmetic surgeries, including tumescent liposuction and tumescent breast augmentation which were not specifically within the scope of homeopathic practice and which were allegedly performed without compliance with the applicable standards of homeopathic medical care." (Exhibit 4, p. 5.) There are no other acts of Respondent included in the Consent Agreement, which also states that Respondent did not admit any of the allegations and contended that he complied with applicable standards of care.

5. The Consent Agreement states: "Respondent does not admit, but does not contest that the allegations set forth in the Recitals would constitute a violation of A.R.S. § 32-2933 (1)(19) and (34)."[2] (*Id.*, p. 6.) The Consent Agreement also states that Respondent is entering into the agreement to avoid the expense and uncertainty of a hearing, and that the agreement is reached "in the interest of a prompt and judicious settlement of the case, consistent with the public interest, statutory requirements and responsibilities" of the Arizona Board. (*Ibid.*)

6. In the initial Accusation in this matter, Complainant contended that Respondent's license to practice medicine in California should be disciplined based on the disciplinary order from the Arizona Board, under Business and Professions Code section 141 and/or 2305, and that discipline could be imposed under the MBC's general discipline authority in section 2227.[3] In the Proposed Decision issued after the May 2011 hearing (2011 Proposed Decision; Exhibit 14), the ALJ concluded that no cause for discipline was proven and the Accusation was dismissed. As noted above, the MBC later issued its Order of Remand, including that it "has determined that Respondent's license is subject to discipline in that the acts described in the Arizona Consent Agreement are substantially related to the practice of medicine and would have been grounds for discipline in California of a physician's and surgeon's certificate." (Exhibit 15.)

The Second Amended Accusation in this Matter and Respondent's Criminal Conviction in Arizona

7. The First and Second Amended Accusations (Exhibit 17) were subsequently filed, July 24, 2012 and April 22, 2014, respectively. The Second Amended Accusation alleges three bases for discipline: (1) the disciplinary action by the Arizona Board; (2) conviction of a crime; and (3) a disciplinary action in Utah by the Division of Occupational and Professional Licensing of the Department of Commerce of the State of Utah (Utah Division). Additional evidence was

---

[2] At the May 2011 hearing, official notice was taken of Arizona Revised Statutes (A.R.S.) (see Exhibit B), in which section 32-2933 defines "unprofessional conduct" of a homeopathic physician to include, as relevant here, performing an invasive procedure not specifically permitted by law (subdivision (1)), conduct contrary to recognized standards of ethics or conduct that might constitute a danger to the health, welfare or safety of a patient (subdivision (19)), and failure to properly supervise another licensed health care provider or assistant to assist in patient care (subdivision (34)).

[3] All statutory references are to the Business and Professions Code unless otherwise indicated.

submitted at the May 2014 hearing on these new allegations as well as the subjects included in the MBC's Order of Remand.

8. There was no new evidence submitted relating to the disciplinary action by the Arizona Board.

9. On July 15, 2011, based on a plea agreement, Respondent entered a plea of guilty of violating A.R.S. section 13-1201, endangerment, a class 6 felony.[4] On September 12, 2011, Respondent was sentenced to serve three years of supervised probation and pay $14,000 in restitution. (Superior Court of Arizona, Maricopa County, Case No. CR2009-006062-01 DT.)

10. The Superior Court of Arizona issued an order granting Respondent's motion for early termination of probation on April 19, 2012, and an order granting Respondent's application to restore his civil rights on June 18, 2012. (Exhibits F and H.) Respondent intends to petition for an order setting aside the conviction when it is recommended by his attorney.

11. According to the indictment (Exhibit 22), it was alleged that Respondent caused the death of a patient on or between July 3 and 4, 2007. Respondent testified credibly, without contradiction, and consistent with his testimony when he pleaded guilty in Arizona (Exhibit 23). Another source of evidence is the findings of fact in the disciplinary decision by the Utah Division (Exhibit 32), discussed in more detail below. Respondent performed a tumescent liposuction procedure on patient L.R. on July 3, 2007, under local anesthesia, in a clinic operated by Dr. Peter Normann in Arizona. After the procedure the patient met the requirements for discharge, including a repeat physical examination and a conversation with the patient. Using a standard scoring methodology, Respondent concluded the patient scored nine out of ten, with nine being the minimum score for discharge. There was no answer at the phone number for the person designated by the patient to pick her up. Therefore, Dr. Normann offered to oversee the patient's care and Respondent discharged the patient to the care of Dr. Normann. Respondent was aware that two of Dr. Normann's patients had died within the prior six months and that Dr. Normann was under practice restrictions of the Arizona Board and could not perform certain office based procedures, cosmetic surgery, or conscious sedation. The patient became unconscious later that evening. Dr. Normann attempted to resuscitate the patient. The patient died the next day. Dr. Normann was found guilty of criminal charges relating to the event. The Arizona Board investigated and, as noted above, accepted Respondent's surrender of his license.

The Surrender of Respondent's License in Utah, and the MBC's Action Based on that Surrender

12. Respondent was initially licensed in Utah on March 9, 1999. For approximately six weeks in April and May 2002, Respondent was associated with MediScripts, L.L.C., which operated an internet website. During this association, Respondent issued prescriptions to website customers for medications, including a controlled substance for weight loss. The Utah Division alleged that Respondent failed to maintain adequate records. On June 11, 2002, Respondent

[4] The statute provides that a person commits endangerment "by recklessly endangering another person with a substantial risk of imminent death or physical injury," and that it is a class 1 misdemeanor except when the endangerment involves a substantial risk of imminent death, which is a class 6 felony. (A.R.S. § 13-1201; Exhibit 26.)

signed a Stipulation and Order before the Utah Division acknowledging that he had voluntarily surrendered his DEA Registration and represented that he wished to surrender his Utah license to administer and prescribe controlled substances. The Order became effective June 19, 2002.

13. On January 14, 2003, Respondent signed a Stipulation and Order before the Utah Division, whereby his license to administer and prescribe controlled substances in Utah was reinstated, but his license to practice medicine was put on probation for one year, commencing on January 17, 2003, on various terms and conditions, and he was assessed an administrative fine of $2,000. Among other things, under the probation terms Respondent was prohibited from employment with an internet company without Utah Division approval, he was required to complete an approved prescribing course, he was required to submit a proposed practice plan to the Utah Division for approval, he was required to write prescriptions in a manner directed by the Utah Division and to have his practice randomly sampled by a licensed physician to assure accuracy, he was required to practice under the supervision of a licensed physician in good standing who was to provide regular performance evaluations to the Utah Division, and he was required to submit a proposed practice plan to the Utah Division for approval, he was required to write prescriptions in a manner directed by the Utah Division and to have his practice randomly sampled by a licensed physician to assure accuracy, he was required to practice under the supervision of a licensed physician in good standing who was to provide regular performance evaluations to the Utah Division, and he was required to advise employers of the discipline imposed and to notify other jurisdictions of the discipline imposed. Respondent paid his fine on February 21, 2003. He completed the approved prescribing course and complied with all other terms and conditions of probation.

On January 21, 2004, the Utah Division reinstated Respondent's medical license with full privileges.[5]

14. Based on the discipline by the Utah Division, the MBC filed an Accusation in 2002 and a First Amended Accusation in 2003. The matter was resolved by a stipulation in 2003 which recited, among other things, that Respondent resided and practiced medicine in Utah, did not intend to practice medicine in California at that time, agreed that cause existed to discipline his California license, and agreed to surrender his California license. The stipulated surrender was accepted by the MBC and became effective on March 31, 2003.

New Findings Regarding Arizona, Utah and Nevada

15. Respondent moved to Arizona sometime in 2005. On August 18, 2005, Respondent sent a letter to the Arizona Board, inquiring as to the meaning of "minor surgery" as permitted relative to the practice of homeopathic medicine. (Exhibit M.) The letter sought to confirm information from a prior telephone conversation discussing, among other things, the types of anesthesia and ambulatory surgeries permissible under Respondent's license. The Arizona Board discussed the issue at a meeting and responded, generally agreeing with Respondent's letter but requesting further clarification that Respondent did not intend to use general anesthesia and requesting that Respondent provide a written informed consent form for

[5] Factual Findings 12 and 13 are based on the MBC's 2006 Decision (Exhibit 20) and the records of the Utah Division (Exhibit 32).

Board review. (Exhibits M and N.) Respondent confirmed he would not use general anesthesia and provided the form, which the Arizona Board approved. (Exhibits O and P.)

16. Respondent maintained his license to practice medicine in Utah by submitting a renewal application every two years. He submitted a renewal application in January 2010 which was denied by the Utah Division on September 29, 2011, resulting in a hearing in February 2012, a proposed decision also in February 2012, and an Order dated March 1, 2012, denying the application.[6] (Exhibit 32.) The Order is based on some of the events noted above, and other events noted below.

17. More specifically, the Utah Division's Order refers to Respondent's earlier discipline in Utah, the surrender of his license in California in 2003 and the reinstatement of the California license in 2006, the 2007 surgery and patient death in Arizona, and the criminal convictions of Dr. Normann on five counts and Respondent on one count. The Order also refers to the denial of Respondent's application for a medical license in Nevada in 2005, based on his "false, misleading and/or inaccurate statements on his license application and his prior problems with prescribing controlled substances." (Exhibit 32, Findings of Fact, etc., p. 5, para. 4.) Further information about the Nevada proceedings is in Factual Finding 19 below. The Order also finds that Respondent was then providing care in Arizona through Indian Healthcare Services of the federal government, hoped to practice in Utah, and was willing to do so under license restrictions. (*Id.*, p. 8, para. 17.)

18. The following allegations in paragraph 18 of the Second Amended Accusation in the pending MBC matter (Exhibit 17) are established by similar or identical conclusions of law in the Utah Division's Order.

"J. Following the [Utah Division hearing on February 8, 2012], the Utah Board found that Respondent had engaged in unprofessional conduct based on his September 12, 2011 conviction of endangerment. Specifically, the Utah Board asserts that the Arizona criminal proceeding was prompted by LR's death and Respondent's conviction directly bears a reasonable relationship to his ability to safely and competently practice as a physician and surgeon in this state.

"K. The Utah Board also held that Respondent has been subject to disciplinary licensure action in various states since 2002. The Utah Board asserted that such convictions [sic] are defined as unprofessional conduct under Utah law and provide a further basis for the denial of Respondent's request to renew his license in Utah. The Utah Board held that it has concerns with Respondent's conduct and his serving the public.

"L. The Utah Board also found that Respondent engaged in unprofessional conduct as defined under Utah statutes because Respondent's conduct as to LR clearly bears a reasonable relationship to both Respondent's ability to competently practice as a surgeon/physician and also his ability to safely engage in that practice. Specifically, the liposuction procedures which Respondent performed on LR did not constitute minor surgery. Moreover, the Utah Board held that it seriously doubted whether Respondent adequately understood the basic use of anesthesia

[6] Respondent had conditional approval of his Utah license during the pendency of the proceedings.

in that context and the manner in which LR's sleep apnea would have likely impacted her recovery from that procedure. The Utah Board added that serious concerns exist that Respondent performed the liposuction procedures in an office setting where there was a lack of staff to adequately monitor LR, both during and after the procedures in question.

"M. The Utah Board held that Respondent repeatedly exercised exceedingly poor clinical judgment. The Utah Board held that it is further disturbing that Respondent minimized his own deficiencies, while suggesting measurable responsibility be placed on Dr. Normann for his conduct in this case.

"N. The Utah Board also found that Respondent had engaged in unprofessional conduct under Utah statutes when he was denied a license by Nevada on December 3, 2005. The Utah Board found a factual and legal basis in the denial and found it an aggravating circumstance in that it revealed Respondent's entirely misguided submission of false information in an effort to obtain a license in that state."

19. In his application for a license to practice medicine in Nevada in 2005, Respondent denied being investigated for a crime.[7] He revealed information about his license restrictions and the surrender of his California License. The Nevada State Board of Medical Examiners (Nevada Board) had information to the effect that Respondent had been investigated for using the credit card of another person in June 1993, his last year at Brigham Young University, and it asked Respondent to provide further information. As noted in the MBC's 2006 Decision:

"With regard to the previously undisclosed criminal investigation, Dr. Page provided a carefully drafted written statement in which he admitted that when he was a college student he found a wallet belonging to another which had credit cards in it, that charges for gas, food, school supplies, and two new tires were billed to that credit card and that the credit card holder claimed those charges were unauthorized. Dr. Page indicated the police scheduled an appointment to meet with him at the police station and when Dr. Page met with the police, he was fingerprinted, after which he 'immediately paid off the balance that had been allegedly charged on the card and nothing else was ever done.' Dr. Page represented he was unaware at the time that the police contact amounted to a formal investigation. He was never charged with any crime. The issue of his investigation or arrest for any criminal matter had not been raised in the 12 years preceding his Nevada application.

"On Saturday, December 3, 2005, Dr. Page (and others) appeared before the Nevada State Board of Medical Examiners concerning his application for licensure. It was not a judicial-like proceeding. According to the Nevada Board's minutes, he was questioned by Board members about his application, his practice history, the incident at BYU involving a credit card, and an incident occurring during residency. Dr. Page was not represented by counsel. He was not under oath. According to the Nevada Board's minutes, the application was denied in executive sessions 'based upon his false, misleading and/or inaccurate statements on his application for licensure, and his past problems with prescribing of controlled substances . . .' No written reasoned decision by an independent adjudicator was adopted by the Board. Dr. Page

[7] This Factual Finding is based on information in the MBC's 2006 Decision, Exhibit 20.

was instructed by the Nevada Board to wait an additional three years before reapplying. The Nevada Board's minutes were not formal findings and conclusions, and the decision was not the result of the Nevada Board acting in a judicial capacity in which Dr. Page had the opportunity to litigate the issues." (Footnote omitted." (Exhibit 20, Proposed Decision, pp. 6 and 7 (handwritten page numbers added at hearing), para. 5.)

20. At the hearing in 2006 on his reinstatement petition in California, Respondent testified further about the Nevada incident. In summary, he did not recall many of the details of the BYU credit card incident when he filed his application in Nevada. The events had occurred 12 years prior to the application. Respondent was found credible in explaining that the incident was not on his mind and he was not certain that there had been an investigation, as called for by the question in the application. He described his involvement as a lapse in judgment and was remorseful. The ALJ concluded that this incident was remote in time, and of a minor nature. Although it raised initial questions about Respondent's character, "his candid testimony overcame any concerns about his honesty." (*Id.*, p. 10.)

Other Relevant Information From the MBC's 2006 Decision Reinstating Respondent's License

21. The 2006 Decision (Exhibit 20) includes the following information about Respondent's credentials, conduct and activities. Respondent was born on October 12, 1965. He [was] graduated from Brigham Young University in Provo, Utah, in 1993. He was admitted to the Creighton University School of Medicine in Omaha, Nebraska, where he received a medical degree on May 17, 1997. Respondent completed a three-year Family Medicine residency at St. Joseph Hospital in Omaha, which was affiliated with the Creighton University School of Medicine. He became board-certified in Family Medicine in September 1999.

After completing his residency, Respondent worked in a clinic in Ogden, Utah, from July 1999 through October 2000, and he then worked as a solo practitioner specializing in emergency room care in the Ogden area from November 2000 through July 2005. It was during this period when, for approximately six weeks in April and May 2002, he was associated with MediScripts, L.L.C., which operated an internet website, and the actions occurred that were the basis for his license discipline, first in Utah and then in California. As of the 2006 Decision, Respondent was also licensed to practice medicine in Nebraska and Iowa, those licenses were inactive and they had not been subject to any license discipline.

Respondent is a Diplomate of the American Board of Family Medicine, a Diplomate of the American Board of Laser Surgery, an Associate Member of the American Society for Dermatologic Surgery, an Associate Member of the American Academy of Cosmetic Surgery, a Member of the American Society for Laser Medicine and Surgery, and a Member of the American College of Phlebology.

22. At the time of the 2006 hearing, Respondent submitted, among other things, supporting declarations of two physicians licensed in California and evidence of 320 hours of continuing education. No malpractice claims had been filed against him. His candid testimony established: he moved from Utah to Arizona to be closer to his wife's family; his two shifts at the emergency room of the Indian Hospital in Parker, Arizona, allowed him to spend more time

with his family; his prescribing over the internet occurred after he checked with the Utah authorities and believes that there were no applicable guidelines; his total work for MediScripts encompassed 35 hours, at which time a DEA agent informed him that the prescribing was illegal; he cooperated with the DEA and voluntarily surrendered his DEA registration; he had taken a two-day prescribing practices course in Oregon; he demonstrated an acceptable working knowledge of general prescribing requirements in California; he cooperated with the agencies that had contacted him; and he wanted his California license to be reinstated to clear his record, to be able to report the reinstatement to other states' licensing boards, and to resolve questions from insurance companies.

23. In evaluating the evidence and the law in 2006, the ALJ determined that it was consistent with the public interest to reinstate Respondent's license. It was not necessary to require Respondent to take a prescribing practices course or an ethics course, as such conditions would not serve to protect the public. In other words, they were not necessary. The denial of his application in Nevada did not involve a judicial proceeding and had virtually no bearing on his good moral character or on the petition for reinstatement. The ALJ found that Respondent was fully rehabilitated and that the reoccurrence of prescribing problems was highly unlikely. Respondent met his burden of proof and his license was reinstated, without conditions. The Proposed Decision was adopted by the MBC. (Exhibit 20.)

New Findings Regarding Respondent's Credentials and Conduct, and Other Relevant Evidence

24. Respondent resides in Arizona.[8] He confirmed his history and credentials as set forth in the written evidence (summarized above). With respect to his practice in Arizona, Respondent had inquired of the Arizona Board about the scope of practice almost two years before he treated patient L.R. He understood that under his license as a homeopathic physician, he could perform minor surgery if it did not penetrate muscle or invade a body cavity and used local or regional anesthesia but not general anesthesia. This is supported by the statute, A.R.S. section 32-2901 (Exhibit B, pp. 60 and 61). After his contacts with the Arizona Board he held a reasonable belief that he could perform tumescent liposuction under his license. Respondent had received training in this procedure from the American Society of Dermatologic Surgery, had worked with many physicians who performed the procedure, and had performed about 100 of these procedures, in California, Arizona and Utah.

25. Before the procedure on patient L.R. on July 3, 2007, Respondent had performed a physical examination and obtained a history. Respondent believed the surgery was appropriate for the office setting. He administered local anesthesia and the patient was awake for the procedure. The patient was monitored by a blood pressure cuff, pulse oxymeter and for heart rate and pulse. Emergency medical equipment in the form of a standard "crash cart" was present, and Respondent was both trained and experienced in emergency medicine.

26. Dr. Normann was licensed as an allopathic/general physician in Arizona. Although Respondent was aware that Dr. Normann was under practice restrictions of the Arizona

[8] Throughout their closing briefs, both parties referred to the transcript of the proceedings on May 21, 2014. No transcript was lodged with the ALJ who, by necessity and experience, relies upon his notes and recall of the proceedings. In no instance does the ALJ doubt the accuracy of the transcript references made by the parties.

Board governing allopathic physicians, related to two patients that had died in the prior six months, Respondent was not aware of the details of those deaths. He was aware of prohibitions on Dr. Normann's ability to perform certain surgeries or use conscious sedation. Respondent did not believe that any such practices or procedures would be necessary for the post-surgery care of this patient. As noted, the patient met the criteria for discharge and, if her contact person was available, the patient would have been discharged and not placed in the care of Dr. Normann. Respondent acknowledged, both at the hearing and at the time of his criminal sentencing in Arizona that he could have been more discerning in researching the restrictions placed on Dr. Normann and in releasing the patient to Dr. Normann's care under all of the circumstances.

27. Respondent accepted the criminal plea bargain in Arizona based on the advice of his attorney and considering, among other things, that he wanted to move on in his life and with his wife, it was the lowest class of felony, and he was concerned about the risks, expense and uncertainties of going to trial. Of significance, the plea agreement states that Respondent's violation "is a non-dangerous, non-repetitive offense under the criminal code." (Exhibit 22, p. 1.) The language of the plea agreement appears to be specifically crafted, so as to resolve the criminal matter. Nevertheless, the statute of which Respondent was convicted (see footnote 1) includes felony endangerment involving a substantial risk of imminent death.

28. Respondent has completed many hours of continuing medical education, much of it in online courses. The certificates from 2011 and 2012 confirm 40 and 36 hours, respectively, in a number of courses spanning a wide range of subjects. (Exhibits C and D.) For 2013, Respondent submitted a certificate for 40 hours related to the UC San Diego Physician Assessment and Clinical Education (PACE) program, discussed in more detail below, certificates for another eight hours of online courses, and one certificate that is partly illegible. There are certificates for one hour of online courses in 20143. (Exhibit I.)

29. In part to assist in resolving the pending matter, and to also establish his competency to practice, Respondent participated in the PACE program: Phase I, October 16-17, 2012, and Phase II, January 14-18, 2014. He received credit for 40 hours of continuing medical education for Phase II. (Exhibit I.) A comprehensive report was issued by William Norcross, M.D., the Director, and Kate Seippel, MPH, Administrative Director of Assessment, for PACE. (Exhibit J.) The PACE report includes that Respondent has practiced most recently (without dates) in the emergency room in Parker, Arizona, at an ambulatory clinic in St. George, Utah, and at a clinic in Coronado, California. While practicing in Ogden, Utah, Respondent obtained an M.B.A. in leadership studies from Baker College and became certified as a life coach.

30. Each element of Phases I and II is described generally in the report. In PACE Phase I, Respondent's performance in the various areas was usually scored as adequate or satisfactory, occasionally as superior and very good to excellent, and occasionally as below average. Respondent's overall performance was assessed as varied. He performed a limited yet satisfactory history and physical examination on a mock patient; his oral clinical exam results were satisfactory, with a lack of current knowledge in some disease subjects. His performance on the PRIMUM examination and interview was acceptable. He scored in the 11th percentile on the ethics and communication exam, in the 3rd percentile on the family medicine exam, and in the 5th percentile in the mechanisms of disease exam.

31. In PACE Phase II, Respondent was an active participant, showed good medical knowledge, good communication skills, and up to date knowledge in the usage of electronic media and medical records. Overall, Respondent's performance was satisfactory. He received positive evaluations from most of the faculty (one report was not yet received), and obtained a passing score on the standardized patient evaluation. Phase I and Phase II overall performance was "Pass-Category 1," signifying "good to excellent performance in more or all areas measured and is consistent with safe practice and competency. No significant deficiencies are noted." (Exhibit J, p. 12.)

32. Respondent testified that he would like to keep his California license and is willing to accept limitations, restrictions and monitoring if ordered by the MBC.

LEGAL CONCLUSIONS

Based upon the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. The standard of proof to be used for the proceedings on an Accusation is "clear and convincing proof to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) This means the burden rests on Complainant to establish the charging allegations in the accusation by proof that is clear, explicit and unequivocal; "so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind." (Citations omitted.) (*In re Marriage of Weaver* (1990) 24 Cal.App.3d 478, 484.)

2. Section 141 states, in pertinent part, that "a disciplinary action taken by another state . . . for any act substantially related to the practice regulated by the California license, may be a ground for disciplinary action" by the MBC. "A certified copy of the record of the disciplinary action taken against the licensee by another state . . . shall be conclusive evidence of the events related therein.

3. Section 2305 states, in pertinent part: "The revocation, suspension, or other discipline, restriction, or limitation imposed by another state upon a license or certificate to practice medicine issued by that state . . . that would have been grounds for discipline in California of a licensee under this chapter, shall constitute grounds for disciplinary action for unprofessional conduct against the licensee in this state."

4. Under section 2227, a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended or placed on probation. Under section 2234, the MBC shall take action against a licensee charged with unprofessional conduct.

5. The first cause for discipline alleges, in summary, that Respondent's license should be disciplined because the discipline against his Arizona license is a violation of sections 141 and 2305. Certain overlaps and distinctions between these two statutes are the basis of the Court of Appeal decision in *Medical Board of California v. Superior Court; Lam, Real Party In*

Interest (2001) 88 Cal.App.4th 1001 (*Lam*), and are relevant here. Section 141 applies generally to licensees of a number of agencies governed by the Business and Professions Code, while section 2305 applies specifically to licensees of the MBC. Section 141 is permissive – discipline may be imposed, while section 2305 is mandatory – the MBC shall take action. Section 141 requires an act substantially related to the regulated practice, while section 2305 states that it is unprofessional conduct if the other state's discipline would have been grounds for the MBC to impose discipline in California. Of significance, the California action against Dr. Lam was based on section 141 but not section 2305. Based on Dr. Lam's arguments, the appellate court needed to consider whether section 2305, supposedly a more specific statute because it applies to doctors, was the exclusive basis for discipline based on another state's discipline and impliedly repealed the more general application of section 141. The Court answered no, and suggested that section 2305 could prevail over section 141 only when both would apply to a scenario, for the reasons more specifically noted in the decision. Again, the discipline in *Lam* was based on section 141 only, and the appellate court rejected the contention that only section 2305 could apply to out-of-state discipline against a doctor.

6. The basic facts in *Lam* are that the Wisconsin Medical Examining Board "initiated an investigation, following an allegation that 'Dr. Lam was premature in his attempt to repair a rectovaginal fistula which developed following repair of a fourth degree tear which occurred at the time of a vaginal delivery.' (*Id.*, p. 1006.) The investigation was concluded by a stipulation under which Dr. Lam denied any wrongdoing and the board ordered that he would not treat patients with this condition but, rather, would refer them to a gynecologist for evaluation and treatment. Later, the decision notes that the record did not contain the charging documents against Dr. Lam in Wisconsin. (*Id.*, p. 1019.) Under all of the circumstances, the Court determined that section 2305 did not apply, as there was no evidence that Dr. Lam's discipline in Wisconsin would have been grounds for discipline by the MBC in California. However, section 141 did provide a basis for discipline in California as the evidence established that the Wisconsin discipline was for an act substantially related to the practice of medicine in California.

7. Similarly to the stipulation in *Lam*, under the Consent Agreement with the Arizona Board, Respondent did not admit that he had taken any actions that violated Arizona law. Nor does the Consent Agreement include any findings or conclusions that any such violations took place. It is clear from the language of the Consent Agreement that the Arizona Board received complaints against Respondent and investigated them. Respondent denied the allegations against him. Without any admissions that the alleged acts took place or any findings that there was cause for discipline, Respondent and the Arizona Board agreed to resolve the matters with a voluntary surrender of Respondent's Arizona license.

8. There is a distinction between the two statutes that is not addressed in *Lam*. Section 141 is based on another state's discipline for "any act" substantially related to the regulated practice of medicine in California. If so, that act "may be ground for disciplinary action . . ." However, section 2305 makes no reference to acts of a licensee in another state. Rather, it focuses on the nature of the out-of-state discipline and provides that any out-of-state discipline "that would have been grounds for discipline in California . . . shall constitute grounds for discipline for unprofessional conduct" in California.

9. Further analysis of the facts and law is therefore necessary. Admittedly, the Order of Remand includes that the MBC "has determined that Respondent's license is subject to discipline in that the acts described in the Arizona Consent Agreement are substantially related to the practice of medicine and would have been grounds for discipline in California of a physician's and surgeon's certificate." (Exhibit 15.) The MBC clearly has authority to issue an order of remand under Government Code section 11517, subdivision (c)(2)(D), "to take additional evidence." A portion of the Order of Remand properly requests the ALJ to take additional evidence under this authority. However, that authority is separate and distinct from the MBC's authority to reject the [ALJ's] proposed decision, and decide the case upon the record" found in subdivision (c)(2)(E). These two options are mutually exclusive. The MBC can make its own factual findings and legal conclusions only if the MBC rejects the ALJ's proposed decision, which has not occurred here. The inclusion in the Order of Remand of the MBC's factual and/or legal determination noted above is beyond the authority of the MBC for purposes of this remand to take additional evidence. Therefore, it must be determined whether there is a basis for discipline for any substantially related act under section 141, and/or whether there is out-of-state discipline that would be grounds for California discipline under section 2305.

10. It is concluded that there is a basis for discipline under section 2305 as well as a basis for discipline under section 141. Section 141 requires out-of-state discipline for an act that would be substantially related to California's bases for discipline. Admittedly, there was no evidence of any acts by respondent found as a basis for the Arizona Consent Decree, which has a single factual recital to the effect that complaints were made about his practice. There was no conclusion that the complaints were supported by any evidence, proof, or admission, and there was no hearing. However, the "act" in Arizona that forms the basis for discipline under section 141 is the existence of a Consent Decree as the basis for Arizona discipline. A licensing agency has the implied power to settle a case, and the settlement may include any terms voluntarily agreed on by the parties that do not violate public policy. (*Rich Vision Ctrs. V. Board of Med. Examiner* (1983) 144 Cal.App.3d 110, 115-116.) Numerous license disciplinary cases settle in California, including before the MBC, with no admission of culpability but with an agreed outcome. This statement is based upon the ALJ's experience and specialized knowledge, which may be used to evaluate evidence under Government Code section 11425.50, subdivision (c). Therefore, the Arizona Consent Decree accepting the surrender of Respondent's license in Arizona is the type of act which "may be a ground for disciplinary action" in California, as that phrase is used in section 141. As in *Lam*, the out-of-state discipline including no admissions can form a basis for discipline under section 141.

11. Cause exists to suspend or revoke Respondent's California license for violation of section 141, as there was an "act substantially related to the practice regulated by the California license," as required by section 141, as set forth in Factual Findings 1 through 8 and Legal Conclusions 2 through 10.

12. Discipline under section 2305 was the subject of *Marek v. Board of Podiatric Medicine* (1993) 16 Cal.App.4th 1089, which involved two podiatrists who entered into a consent decree in Nevada whereby the Nevada State Board of Podiatry (Nevada Board) issued an order which revoked their licenses to practice and placed them on three years' probation upon certain

terms and conditions. In the consent decree, the podiatrists made no admission of wrongdoing, and the Nevada Board imposed discipline solely pursuant to their consent, without formally presenting evidence. The Court of Appeal determined that section 2305 "requires only that the California Board determine that disciplinary action by another state as to a license to practice medicine issued by that other state had occurred and that the California Board need not take evidence on or establish the factual predicate for that other state's disciplinary action, a full and fair hearing as required by due process occurred as to the limited factual question of whether discipline was imposed by another state." (*Id.*, p. 1093.) The California Board of Podiatry revoked the licenses, stayed the revocations and placed the podiatrists on probation for three years. The appellate court supported that outcome, stating that "the focus of section 2305 is the mere fact that a measure of discipline was imposed on the licensee and not how it was imposed by the foreign jurisdiction," and that the podiatrists' unprofessional conduct was not based on a finding of any misfeasance in Nevada but, rather, the fact that discipline was imposed on their right to practice there. (*Id.*, pp. 1096-1097.) In other words section 2305 liability was triggered by the fact that discipline was imposed by the Nevada Board that could have been imposed in California had the allegations of misfeasance occurred in California, rather than whether the misfeasance itself had occurred. Further, the appellate court rejected the podiatrists' contention that no discipline should be imposed based on their evidence of rehabilitation, as California is entitled to protect its citizens and to ensure the high quality of medical practice to the same extent as Nevada, the California Board's probationary constraints and restrictions are not inappropriate, and the California Board did not abuse its broad discretion in imposing its disciplinary order." (*Id.*, pp. 1099-1100.)

13. Respondent here contends that his alleged acts in Arizona are not grounds for discipline in California because MBC licensees can perform the type of surgery he performed on patient L.R. This contention is not convincing, as the gravamen of the Arizona Board's action was the Respondent was acting outside the scope of his practice, which allegations could also form the basis of license discipline in California.

14. Cause exists to suspend or revoke Respondent's California license for violation of section 2305, as the Arizona Board imposed discipline on Respondent for acts "that would have been grounds for discipline in California of a licensee under this chapter," as required by that section, as set forth in Factual Findings 1 through 8 and Legal Conclusions 2 through 13.

15. A licensee of the MBC may have the license disciplined for conviction of a crime under the authority of sections 490, 493, 2227, 2234 (defining unprofessional conduct), and 2236 (determining that conviction of a crime that is substantially related to the qualifications, functions and duties of a physician and surgeon constitutes unprofessional conduct). "Substantial relationship" is established under California Code of Regulations, title 16, section 1360 if the crime "to a substantial degree . . . evidences present or potential unfitness of the [licensee] to perform the functions authorized by the [license] in a manner consistent with the public health, safety or welfare."

16. Endangering a patient, the basis of Respondent's felony conviction, meets the requirements to establish substantial relationship. The conviction is *prima facie* proof of the elements of the statute of which Respondent was convicted: he recklessly endangered another

person with the substantial risk of imminent death or physical injury. Respondent's rehabilitation, including early termination of his criminal probation and completion of the PACE program establishes that he has taken appropriate action to address concerns about his actions and poor judgment underlying the conviction. However, the MBC met its burden to establish that Respondent's conviction meets the substantial relationship criteria.

17. Cause exists to suspend or revoke Respondent's California license for violation of sections 490, 493, 2227, 2234, and 2236, for conviction of a crime that is substantially related to the qualifications, functions and duties of a physician and surgeon, as set forth in Factual Findings 9 through 11 and Legal Conclusions 15 and 16.

18. The third cause for discipline relates to Respondent's discipline by the Utah Division. There were two such incidents, which must be analyzed separately. As discussed in more detail below, the MBC is barred by the statute of limitations to seek discipline based on the Utah Division's 2002 and 2003 orders. However, cause for discipline is established based on the Utah Division's 2012 order denying Respondent's application for license renewal.

19. Under section 2230.5, any accusation must be filed within three years after the MBC discovers the act of omission alleged as a ground for disciplinary action, or within seven years of the actual act or omission, whichever occurs first. None of the statutory exceptions to these time limits apply to the Utah Division's 2002 and 2003 orders related to his internet prescriptions. In 2002, Respondent voluntarily surrendered his prescribing privileges, and in 2003 his license was placed on probation for one year, as set forth in Factual Findings 12 and 13. The statute of limitations based on the actual acts therefore expired in 2009 and 2010, respectively. The MBC was aware of the 2002 and 2003 Utah disciplinary actions when it filed an accusation against Respondent in 2002 and an amended accusation in 2003, as set forth in Factual Finding 14. The statute of limitations based on the MBC's discovery of actual acts therefore expired in 2005 and 2006. The 2002 and 2003 Utah disciplinary actions were first alleged as a basis for discipline in California in the Second Amended Accusation, filed April 22, 2014. (Compare the initial Accusation (Exhibit 1), and First Amended Accusation (Exhibit 17) to the Second Amended Accusation (Exhibit 17), and see Factual Finding 7.) Further, as a practical matter, the MBC was fully aware of the 2002 and 2003 Utah discipline, which was described in some detail in the 2006 Decision reinstating Respondent's California license, when it considered and adopted the ALJ's proposed decision recommending reinstatement. It is inconsistent to now consider that same Utah discipline as a basis for new discipline in California.

20. Cause does not exist to suspend or revoke Respondent's California license for violation of sections 141, 2227, 2234 or 2305, based on the 2002 and 2003 Utah disciplinary orders, for the reasons set forth in Factual Findings 7, 12 and 14 and Legal Conclusions 18 and 19.

21. The Utah decision denying Respondent's license renewal occurred in 2012 and, therefore, is within the statutes of limitations. It fits within the analyses of sections 141 and 2305, above. Cause exists to suspend or revoke Respondent's California license for violation of sections 141, 2227, 2234 and 2305, based on the 2012 Utah disciplinary order for the reasons set forth in Factual Findings 16, 17 and 18 and Legal Conclusions 2 through 12 and 18. However,

relatively little weight is attributed to this discipline, as it is based on, among other things, the earlier Utah disciplinary orders which are barred by the statute of limitations, and is duplicative to the extent it is based on the Arizona discipline and the Arizona conviction, already established above as bases for discipline in this matter.

22. The MBC's Manual of Disciplinary Orders and Disciplinary Guidelines (Guidelines, Exhibit 11) has been considered. The relevant maximum penalties for the violations here are revocation. The minimum penalty for sections 141 and 2305, discipline by another state, is to refer to the recommended minimum as for a similar offense in California. This is not practicable here as the other states' disciplines were issued with no admissions of any acts or violations. The minimum penalty for section 2236, conviction of a felony, is seven years' probation with various terms.

23. Also considered is section 2229, which states in pertinent part that protection of the public shall be the MBC's highest priority and that an ALJ when exercising his disciplinary authority "shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee . . ."

*****

Dated: September 2, 2014.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings