

BEFORE THE BOARD OF MEDICAL EXAMINERS
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2015-MED-LIC-931 REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 690-2016
TREATMENT OF THE LICENSE OF)	
MARK CATALANELLO,)	
Medical Doctor, License No. 7315.)	
)	

**ORDER
ENTERING RESPONDENT'S DEFAULT AND
RECOMMENDED FINAL ORDER**

I. INTRODUCTION

This matter last came before the Hearing Officer on February 17, 2016, for a final pretrial conference in preparation for the contested case hearing scheduled for February 23-24, 2016. Notice of the hearing was served on Dr. Catalanello using the only mailing address available. Prior to the hearing on February 17, both the Hearing Officer and the Department unsuccessfully attempted to reach Dr. Catalanello on his telephone number of record and a second number acquired through the Department of Labor's unemployment claims office. Dr. Catalanello failed to appear at the conference and failed to contact either the Office of Administrative Hearings or counsel for the Department to offer any justification for his failure to participate in this matter in any fashion since his request for a hearing in October 2015.

On January 15, 2016, the Department filed its alternative motions for default or summary judgment. On January 28, 2016, the Hearing Officer entered his Order Granting Rule 36 Motion deeming certain facts to be conclusively established for all purposes. When Dr. Catalanello failed to appear for the final pretrial conference, the Hearing Officer entered Dr. Catalanello's default and declared the matter ripe for entry of a final order by default.

Based on Dr. Catalanello's utter failure to participate in any aspect of this case, pleadings and orders of record, allegations and exhibits deemed conclusively

established and admitted into evidence, and supporting affidavits filed by the Department, the Hearing Officer enters the following:

II. FINDINGS OF FACT

1. In its alternative motions for summary judgment or default judgment, the Department sought findings of fact based on facts derived from requests for admission 6 and 12 which were deemed admitted in the Hearing Officer's ruling granting the Department's Rule 36 motion. However, the Department proposed to restrict the use of some of the exhibits identified in request for admission 12. Based on that voluntary restriction, the Hearing Officer rules on the treatment of the ten exhibits at issue:

- Exhibits 1, 2, 3, 9, and 10 are admitted as part of the public record;
- Exhibits 4 and 5 are admitted but sealed to preserve confidential medical references which may be contained; and
- Exhibits 6, 7, and 8 were withdrawn and, therefore, are not part of the record in this case.

2. The following procedural events factor into this decision:

- **September 29, 2015** - MPAP issued a report to the Board, advising of Dr. Catalanello's refusal to comply with a reasonable MPAP request. Later that same day, the Board of Medical Examiners served notice on Respondent Mark Catalanello, M.D., of an emergency screening panel meeting to be conducted on October 2, 2015. That notice was served via regular U.S. Post and certified mail to Dr. Catalanello's address of record on file with the Department. The Office of Administrative Hearings has used that same address throughout this proceeding.

- **October 2, 2015** - The Screening Panel Chair conducted an emergency meeting. That same day, the Chair signed the summary suspension order and the Department issued its Notice of Proposed Board Action. The combined document was mailed to Dr. Catalanello at his address of record, and e-mailed to Dr. Catalanello at his e-mail address on file with the Department.

- **October 11, 2015** - Using his e-mail noted above, Dr. Catalanello requested a hearing to challenge his summary suspension.

- **October 15, 2015** - Hearing Officer issued Notice of Hearing and Telephone Conference.
- **November 2, 2015** - Hearing Officer issued his Scheduling Order, noting that Dr. Catalanello could not be reached at the one telephone number known to the Hearing Officer and granting Dr. Catalanello's request, contained in his demand for a contested case hearing, for ample time to prepare for trial. That Order directed that discovery was to close on January 8, 2016.
- **December 2, 2015** - The Department served its discovery requests by mailing them to Dr. Catalanello at his postal mailing address of record.
- **January 4, 2016** - Dr. Catalanello's discovery responses were due, but he supplied nothing and failed to contact the Department to arrange for an extension.
- **January 8, 2016** - Discovery closed. The Department moved under Mont. R. Civ. P. 36 for an order declaring that certain requests for admission are deemed admitted and established for all purposes of this litigation.
- **January 15, 2016** - Motions deadline. The Department moved for summary judgment or, in the alternative, a default judgment.
- **January 28, 2016** - Finding that Dr. Catalanello failed to answer requests for admission and failed to respond to the Rule 36 motion, the Hearing Officer entered this Order: "Requests for Admission No. 6 and No. 12 are admitted and conclusively established." The findings of fact below are drawn from those requests for admission.
- **February 17, 2016** - Dr. Catalanello failed to appear for the final pretrial conference.
- **February 19, 2016** - The Department supplemented its motions with the Affidavits of LaVelle Potter and Michael J. Ramirez which are deemed part of the administrative record in this case.

3. On or about May 22, 1993, the Montana Board of Medical Examiners (Board) issued Licensee a Medical Doctor license, number 7315. Licensee's license runs through March 31, 2017.

4. By letter dated September 29, 2015, Michael J. Ramirez, M.S., clinical director of the Montana Professional Assistance Program (MPAP), advised the Board that Mark Catalanello, M.D., had breached his contract with MPAP. MPAP is required by Montana regulations to report suspected relapses to the Board. Admin. R. Mont. 24.156.444. Mr. Ramirez catalogued a number of issues that could amount to unprofessional conduct, including Dr. Catalanello's refusal to undergo a toxicology screening through urine and hair follicle samples monitored and collected by Mr. Ramirez personally.

5. Based on MPAP's report, on September 29, 2015, staff scheduled an emergency meeting of the Board's Screening Panel. Staff sent notice of that meeting by regular post and certified mail on September 29 and contacted Dr. Catalanello by phone and email. Dr. Catalanello received notice of the Screening Panel meeting as evidenced by the voice message reply left with Board staff at 3:05 p.m. on October 1, 2015. Dr. Catalanello did not submit a written response to the complaint. The Screening Panel attempted to call Dr. Catalanello's telephone number just prior to and at the beginning of the meeting to allow him to participate, but only reached his voice mail message.

6. In March 2004, the Department initiated disciplinary action against Dr. Catalanello, alleging that Dr. Catalanello's substance abuse amounted to unprofessional conduct. In the Matter of the Disciplinary Treatment of the License of Mark Jay Catalanello, M.D., License No. 7315, Board of Medical Examiners Docket No. CC-04-0118-MED. Dr. Catalanello admitted committing unprofessional conduct and the Board entered a Final Order dated May 21, 2004, approving the parties' stipulation and ordering an indefinite suspension of Dr. Catalanello's Montana medical license. The Board revisited the matter and by Final Order Reinstating License, dated May 25, 2007, the Board reinstated Dr. Catalanello's Montana medical license.

7. After he was suspended, Dr. Catalanello engaged with MPAP. On December 14, 2005, Dr. Catalanello entered an Aftercare Agreement with MPAP which was renewed on January 7, 2011 by a written Extended Continuing Care Agreement for Chemical Dependency. In that agreement, Dr. Catalanello admitted that he suffered from chemical dependency as well as certain psychological disorders. That MPAP Agreement imposed a number of binding restrictions and conditions on

Dr. Catalanello's conduct and practice, including his agreement to submit to toxicology testing.

10. I agree to participate in a random body fluid and/or bloodscreening, breath analysis or hair analysis program. All requested specimens will be submitted on demand voluntarily and without question in the presence of a MPAP approved observer. I understand that initially there will be a minimum of forty (40) random screens per year. I understand that failure to submit a specimen will be construed as a "positive test result" and reported to the Board as provided herein. Poppy seed ingestion is not an acceptable explanation for an opiate positive urine. I agree that the MPAP staff and/or the other parties listed in this agreement may request additional breath, urine, saliva, blood or hair specimens for testing on demand at any time. I authorize release of the results of any said testing to MPAP.

(emphasis added). That Agreement specifically provided that Dr. Catalanello understood that any violation of the agreement would be reported to the Board.

8. The Screening Panel heard the un rebutted report from Mr. Ramirez of MPAP charging that:

- Beginning in August 2015, MPAP began to receive reports of concern about Dr. Catalanello from associates regarding delinquent charting, disheveled appearance, and distractions in the workplace, but a toxicology study of August 10, 2015 was negative;
- Following an MPAP retreat on September 11 to 13, 2015, the manager of the host facility contacted MPAP to report that a housekeeper found a cosmetic bag that contained what appeared to be illicit drugs in the hotel room that Dr. Catalanello and his girlfriend had occupied;
- Dr. Catalanello tested negative for drugs on a September 21, 2015 toxicology screen, but there was no assurance of the validity of the sample because the collection process was not monitored;
- The following day, September 22, 2015, Mr. Ramirez confronted Dr. Catalanello about his concerns and Dr. Catalanello denied any use, but stated that his girlfriend, a former drug user, had relapsed and was using marijuana and hydrocodone;

- On September 26, 2015, an anonymous source reported to Mr. Ramirez that Dr. Catalanello had not appeared for duty when called in to treat a patient and had been exhibiting bizarre behavior;
- Mr. Ramirez corroborated that report through an official at the Montana Chemical Dependency Center in Butte where Dr. Catalanello was employed who confirmed that Dr. Catalanello did not report for duty on September 25, 2015, and when the official questioned Dr. Catalanello in a telephone call, Dr. Catalanello slurred his speech and did not respond with coherent thoughts, leaving the official with the conclusion that he was under the influence of some form of intoxicant; and
- That same official at MCDC reported that Dr. Catalanello was behind on many of his patient charts.

9. Based on the foregoing facts, Mr. Ramirez traveled to Warm Springs, Montana, to meet with Dr. Catalanello on September 28, 2015. Dr. Catalanello admitted that working at both the State Hospital and MCDC was a strain and issues with his girlfriend were time-consuming, but he rated his work as satisfactory. Dr. Catalanello conceded that if tested he might test positive for cannabinoids, the active ingredient in marijuana, because his girlfriend regularly smoked marijuana in his presence. Mr. Ramirez noted that the longer they spoke the more pressured, tangential, and animated Dr. Catalanello became.

10. Mr. Ramirez demanded urine and hair samples collected under his supervision to insure forensic integrity of the toxicology testing. Dr. Catalanello refused and pleaded for “a pass.” Mr. Ramirez insisted upon collecting the samples and cautioned Dr. Catalanello that a refusal to undergo an examination is deemed a positive test. Dr. Catalanello refused the request for samples, exited his office, and left the Warm Springs campus.

11. At the Screening Panel meeting, Mr. Ramirez reported that he had offered Dr. Catalanello the chance to change his mind and submit to testing by the following day. Dr. Catalanello did not relent and has not supplied the samples necessary to conduct verifiable toxicology testing.

12. Mr. Ramirez offered the Screening Panel his opinions that:

- He cannot assure the Screening Panel of Dr. Catalanello’s ability to practice medicine with reasonable safety;
- Dr. Catalanello has demonstrated relapse behavior sufficient to warrant further forensic evaluation;

- There is strong evidence that he may have returned to use of illicit substances in proximity to performing his duties as a physician; and
- Dr. Catalanello's refusal to submit to toxicology demonstrates his inability to comport himself with the requirements of continued practice.

13. Based on the foregoing, Mr. Ramirez advised the Screening Panel that MPAP could no longer serve as an advocate for Dr. Catalanello. Mr. Ramirez recommended that Dr. Catalanello immediately cease practicing medicine or, failing that, that the Screening Panel summarily suspend Dr. Catalanello's license to practice medicine in Montana.

14. The Screening Panel considered all of the facts presented in the written materials, as well as the report Mr. Ramirez offered at the meeting, and concluded that Dr. Catalanello's conduct presented an immediate risk to the public requiring emergency action because there was un rebutted evidence that he had failed to report for duty, he may have practiced medicine while under the influence of an intoxicant, he refused a reasonable request from MPAP for a toxicology test leading to the presumption of a positive test, there was significant evidence that he had relapsed, and he had failed to keep current on charting in his work with a particularly vulnerable patient population.

15. The Scheduling Order in this case includes the following order and admonition:

7. A party's failure to appear for any conference, and/or failure to obey orders issued by the hearing officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, imposition of liability or other appropriate sanctions.

The Hearing Officer finds that Dr. Catalanello has failed to participate in any aspect of this case since his demand for a hearing submitted via e-mail on October 11, 2015. Dr. Catalanello failed to appear at the scheduling conference and pretrial conference, failed to respond to the Department's discovery, and failed to answer any of the motions and briefs filed by the Department. Consequently, the Hearing Officer finds that Dr. Catalanello is in default and is subject to a final order by default.

16. The Department submitted the affidavits of Michael J. Ramirez and LaVelle Potter to offer facts concerning terms of possible reenrollment in MPAP and

the Board of Medical Examiner's routine sanctioning practices in cases with similar facts.

17. Mr. Ramirez's affidavit recommended that the Board's disposition prohibit Dr. Catalanello from practicing in the State of Montana "until he has demonstrated stability for a sufficient period to assure the safety of patients in Montana." Mr. Ramirez's affidavit declared that MPAP has withdrawn its advocacy for Dr. Catalanello, and MPAP deems his breach of the contract to amount to abrogation, voiding the contract. Nevertheless, MPAP is entitled to recoup certain fees and charges to MPAP totalling \$1,767.18 for which Dr. Catalanello remains in arrears.

18. Ms. Potter's affidavit reviewed the Board's typical sanction policy of "graduated discipline" – increasingly severe sanctions for a second or subsequent infraction. Ms. Potter's affidavit, and an exhibit of record, demonstrate that Dr. Catalanello's medical license was suspended in 2004 and reinstated in 2007 with no disciplinary history since 2007. As an example of previous similar Board action, Ms. Potter's affidavit cited to a November 2015 case involving a default order against an impaired physician who had relapsed and was indefinitely suspended and ordered ineligible to apply for reactivation for a minimum of 12 months.

19. Dr. Catalanello has offered no evidence to explain his conduct or to mitigate the sanction which may be imposed by the Board.

III. CONCLUSIONS OF LAW

1. The Board of Medical Examiners has jurisdiction over this matter. Mont. Code Ann. § 37-3-203(1)(b).

2. This matter was properly referred to the Office of Administrative Hearings for a contested case hearing. Mont. Code Ann. §§ 37-1-131(1)(b); 37-1-121(1).

3. This action is a licensing disciplinary case subject to the Montana Administrative Procedure Act, which was properly and regularly employed. Mont. Code Ann. §§ 37-1-136(2), 37-1-310.

4. Dr. Catalanello is in default for his failure to participate or defend against the proposed Board action and for his violation of the Hearing Officer's order compelling timely participation in the case and adherence to the Hearing Officer's orders.

5. The Office of Administrative Hearings has, where appropriate, previously entered the default of a respondent who failed to participate in the case. In re Martina J. Nelson, OAH Case Nos. 2105-2009 and 771-2010, Board of Social Worker Examiners and Professional Counselors, Findings of Fact; Conclusions of Law; and Recommended Order of Default, March 8, 2010 (Hanchett, HO). Under the facts of this case, the Hearing Officer concludes that a similar order is appropriate.

6. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; Ulrich v. St. ex rel. Bd. of Funeral Serv., 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show any sanction, which it seeks, is appropriate under the circumstances of the case. The Department has sustained its burden.

7. The following authority is applicable in this matter:

Montana Code Annotated

§ 37-1-316. Unprofessional conduct. The following is unprofessional conduct for a licensee or license applicant governed by this part:

...

(10) use of alcohol, a habit-forming drug, or a controlled substance as defined in Title 50, chapter 32, to the extent that the use impairs the user physically or mentally in the performance of licensed professional duties;

...

(18) conduct that does not meet the generally accepted standards of practice.

§ 37-3-323. Suspension of license -- investigation. (1) The department may investigate whenever the department learns of a reason to suspect that a license applicant or a person having a license to practice medicine in this state:

(a) is mentally or physically unable to safely engage in the practice of medicine, has procured a license to practice medicine by fraud or misrepresentation or through mistake, has been declared incompetent by

a court of competent jurisdiction and has not later been lawfully declared competent, or has a condition that impairs the person's intellect or judgment to the extent that the condition incapacitates the person for the safe performance of professional duties;

Administrative Rules of Montana

24.156.625 UNPROFESSIONAL CONDUCT (1) In addition to those forms of unprofessional conduct defined in 37-1-316, MCA, the following is unprofessional conduct for a licensee or license applicant under Title 37, chapter 3, MCA:

- (c) conduct likely to deceive, defraud, or harm the public;
- (i) habitual intemperance or excessive use of an addictive drug, alcohol, or any other substance to the extent that the use impairs the user physically or mentally;
- (v) failing to comply with an agreement the licensee has entered into with the program established by the board under 37-3-203, MCA;
- (ad) any other act, whether specifically enumerated or not, that in fact constitutes unprofessional conduct.

8. The Montana Professional Assistance Program is obligated by regulation to report participant relapses which may result in withdrawal from practice, additional monitoring and treatment, modification of an MPAP contract, or discipline. Admin. R. Mont. 24.156.444. Additionally, Montana statutes mandate that the Board take disciplinary action against a licensee enrolled in MPAP in named circumstances. Mont. Code Ann. § 37-1-131.

9. Dr. Catalanello committed sanctionable unprofessional conduct in violation of the foregoing statutes and regulations by breaching his MPAP contract when he refused to supply samples for testing to determine whether he had ingested intoxicants. Further, that refusal is deemed the equivalent of a positive test exposing the public to possible harm. Additionally, evidence exists that Dr. Catalanello's work performance deteriorated further exposing the public to harm and amounting to conduct that does not meet generally accepted standards of practice.

10. Mont. Code Ann. § 37-1-312 provides:

Sanctions -- stay -- costs -- stipulations.

(1) Upon a decision that a licensee or license applicant has violated this part or is unable to practice with reasonable skill and safety due to a

physical or mental condition or upon stipulation of the parties as provided in subsection (3), the board may issue an order providing for one or any combination of the following sanctions:

- (a) revocation of the license;
- (b) suspension of the license for a fixed or indefinite term;
- (c) restriction or limitation of the practice;
- (d) satisfactory completion of a specific program of remedial education or treatment;
- (e) monitoring of the practice by a supervisor approved by the disciplining authority;
- (f) censure or reprimand, either public or private;
- (g) compliance with conditions of probation for a designated period of time;
- (h) payment of a fine not to exceed \$1,000 for each violation. Fines must be deposited in the state general fund.
- (i) denial of a license application;
- (j) refund of costs and fees billed to and collected from a consumer.

(2) A sanction may be totally or partly stayed by the board. To determine which sanctions are appropriate, the board shall first consider the sanctions that are necessary to protect or compensate the public. Only after the determination has been made may the board consider and include in the order any requirements designed to rehabilitate the licensee or license applicant.

(3) The licensee or license applicant may enter into a stipulated agreement resolving potential or pending charges that includes one or more of the sanctions in this section. The stipulation is an informal disposition for the purposes of [2-4-603](#).

(4) A licensee shall surrender a suspended or revoked license to the board within 24 hours after receiving notification of the suspension or revocation by mailing it or delivering it personally to the board.

11. The following is the public policy of the State of Montana as declared by the Legislature:

37-3-101. Purpose. It is hereby declared, as a matter of legislative policy in the state of Montana, that the practice of medicine within the state of Montana is a privilege granted by the legislative authority and is not a natural right of individuals and that it is deemed necessary, as a matter of such policy and in the interests of the health, happiness, safety, and welfare of the people of Montana, to provide laws and

provisions covering the granting of that privilege and its subsequent use, control, and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized, and unqualified practice of medicine and to license competent physicians to practice medicine and thereby provide for the health needs of the people of Montana.

Mont. Code Ann. § 37-3-101.

12. The Board is obligated by statute to “maintain reasonable and continuing supervision and surveillance over all licensees” and maintain standards of conduct “in the greatest public interest.” Licensure as a physician is a privilege. Mont. Code Ann. § 37-3-202.

13. The Board is obligated by statute to “establish a medical assistance program to assist and rehabilitate licensees who are subject to the jurisdiction of the board and who are found to be physically or mentally impaired by habitual intemperance or the excessive use of addictive drugs, alcohol, or any other drug or substance or by mental illness or chronic physical illness.” Mont. Code Ann. § 37-3-203(2). MPAP fulfills that obligation.

14. “To determine which sanctions are appropriate, the board shall first consider the sanctions that are necessary to protect or compensate the public. Only after the determination has been made may the board consider and include in the order any requirements designed to rehabilitate the licensee or license applicant.” Mont. Code Ann. § 37-1-312(2).

IV. RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends the Board of Medical Examiners adopt the following Final Order by Default:

1. Dr. Catalanello’s license to practice medicine in Montana is **INDEFINITELY SUSPENDED**. Mont. Code Ann. § 37-1-312(1)(b).

2. Dr. Catalanello may not petition for reinstatement any earlier than 12 months from the Board’s final order.

3. As required by Mont. Code Ann. § 37-1-312(4), Dr. Catalanello is ordered to surrender his Montana medical license within 24 hours of receipt of notice of the Board's final order to:

Montana Board of Medical Examiners
301 South Park Avenue
P.O. Box 200514
Helena, MT 59620-0514

4. All of Dr. Catalanello's prior contracts with the Montana Professional Assistance Program are declared void and neither that program nor any of its staff owe a duty of any sort to Dr. Catalanello for advocacy or support under the system created by Mont. Code. Ann. § 37-3-203.

5. MPAP is entitled to recoup certain fees and charges to MPAP totalling \$1,767.18.

6. Should Dr. Catalanello petition for reinstatement, he first must have the advocacy of the Montana Professional Assistance Program or its successor before the Board will consider that petition. Additionally, Dr. Catalanello may be required to present sufficient prerequisite proofs and to comply with certain conditions as may be required by the Board in its discretion at the time of his petition. Nothing in this paragraph, however, suggests that Dr. Catalanello has a right to licensure or that the Board is required or predisposed to grant such a petition.

DATED this 4th day of March, 2016.

DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.