

BEFORE THE BOARD OF MEDICAL EXAMINERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-0299-MED REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 62-2008
TREATMENT OF THE LICENSE OF)	
PORFIRIO ORTA-ROSARIO,)	FINDINGS OF FACT;
License No. 6752.)	CONCLUSIONS OF LAW;
)	AND PROPOSED ORDER
)	
)	

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I. INTRODUCTION

In this matter, the Department of Labor and Industry (hereinafter Department) seeks to impose sanctions against the medical license of Porfirio Orta-Rosario (hereinafter Licensee), License No. 6752, issued by the Montana Board of Medical Examiners. The hearing in this matter occurred on October 24, 2007. Gene Allison, agency legal counsel, represented the Department. The Licensee failed to appear despite having received proper notice of the hearing. Exhibits 1 through 6 were admitted into evidence. Lavelle Potter testified under oath on behalf of the Department. Based on the evidence and arguments adduced at the hearing in this matter, the hearing examiner makes the following findings of fact, conclusions of law, and proposed order recommending probation and rehabilitation of the Licensee's medical license.

II. FINDINGS OF FACT

1. At all times relevant to this proceeding, the Licensee was a medical doctor licensed to practice in the State of Montana, holding License No. 6752.
2. Based upon the Licensee's failure to respond to the Department's request for admission, the following facts are deemed admitted:
 - A. Exhibits 1-6 are true, complete, and authentic copies of the original documents.
 - B. Dr. Orta-Rosario is or was licensed as a physician by the Wisconsin Medical Examining Board.
 - C. Dr. Orta-Rosario is or was licensed as a physician by the New York Department of Health, Board for Professional Medical Conduct.

- D. On or about August 16, 2006, pursuant to stipulation with Dr. Orta-Rosario, the Wisconsin Medical Examining Board reprimanded Dr. Orta-Rosario, limited Dr. Orta-Rosario's medical license, and assessed costs against Dr. Orta-Rosario in the sum of \$9,000.00.
- E. The August 16, 2006 Wisconsin Medical Examining Board's Final Order dictates that Dr. Orta-Rosario can only practice in Wisconsin in a residency program approved by the Accreditation Council for Graduate Medical Education and that, in order to return to active practice, Dr. Orta-Rosario must take two of six educational courses which are identified in Wisconsin's Final Order.
- F. The bases for the heretofore-mentioned Wisconsin discipline were:
- that Dr. Orta-Rosario had deviated from the standard of care by engaging in internet/telephone prescribing; and
 - that Dr. Orta-Rosario had provided inaccurate information on his Wisconsin renewal form by stating on his renewal form that he had completed all of his CME when, in fact, he had not completed any.
- G. Dr. Orta-Rosario told the Montana Board, "At time of renewal of license I had one choice yes or not (sic) CME credits. If I said no, I would lose the license and I needed the license for my work to support my children."
- H. At the time of the Montana Screening Panels, Dr. Orta-Rosario still had not fulfilled Wisconsin's Order as follows:
- Dr. Orta-Rosario had not completed the required education courses;
 - Dr. Orta-Rosario had not paid his financial obligation to the Wisconsin Board; and
 - Dr. Orta-Rosario had not enrolled in the residency program.
- I. On or about April 19, 2007, pursuant to a stipulation with Dr. Orta-Rosario, the New York Department of Health, Board for Professional Medical Conduct restricted Dr. Orta-Rosario from the practice of medicine in New York.
- J. Dr. Orta-Rosario has been out of the practice of medicine for two or more years.
- K. At the current time, Dr. Orta-Rosario still has not fulfilled Wisconsin's Order as follows:
- Dr. Orta-Rosario has not completed the required education courses;
 - Dr. Orta-Rosario has not paid his financial obligation to the Wisconsin Board; and
 - Dr. Orta-Rosario has not enrolled in or completed the residency program.

3. Dr. Orta-Rosario prescribed medication without meeting face-to-face with his patients.

III. DISCUSSION

At the time of hearing, the hearing examiner ruled on the Department's summary judgment motion finding that pursuant to Mont. R. Civ. Pro. 36 the Licensee's failure to respond to the Department's request for admission were admitted. Those admissions then formed the basis for the Department's motion for summary judgment. The hearing examiner granted the Department's motion as to whether the Licensee was subject to discipline, but not as to what the appropriate discipline should be.

The Montana Supreme Court held that when a party fails to answer requests for admission within thirty days and is not granted an extension by the Court, the matter is considered admitted. *Rogers v. Relyea*, 184 Mont. 1, 601 P.2d 37 (1979). The Court went further in *Moody v. Northland Royalty Co.*, 286 Mont. 89, 951 P.2d 18 (1997), where it stated that, "[i]n the event that requests for admission are not answered within thirty days, the facts the party is requested to admit are deemed true." 286 Mont. 89, 95, 951 P.2d 18, 22 (1997). Most recently, the Court opined in *Spooner Construction and Tree Service v. Maner* that, "[a] party's failure to respond to a request for admission within 30 days is automatically deemed to be an admission of the matter set forth in the request for admission." 57 Mont. St. Rep. 674, 677, ___ Mont. ___, 3 P.3d 641, 645-646 (2000) (citing *American Technology Corp. v. Mah*, 174 F.R.D. 687, 689 (D. Nev. 1997) (citing 8A Charles A. Wright et al., Federal Practice and Procedure § 2259, at 549-550 (2nd ed. 1994)).

In *Garrett v. Paccar Financial Corp.*, 245 Mont. 379, 380-381, 801 P.2d 605, 605-606 (1990), the plaintiffs failed to answer requests for admission for three months. The defendants moved for summary judgment based on the sanction of Rule 36 that requests for admission unanswered for thirty days are deemed admitted and thus no genuine issues of fact remained and defendants were entitled to judgment as a matter of law. The Court found that summary judgment for the defendants was properly granted by the district court based on the plaintiff's failure to answer and held that, "[d]elay or failure to respond to the requests for admission justifies summary judgment under Rule 56, M.R.Civ.P." *Garrett*, 245 Mont. at 381, 801 P.2d at 606 (citing *Morast v. Auble*, 164 Mont. 100, 105, 519 P.2d 157, 160 (1974)).

Moreover, the Montana Supreme Court has specifically endorsed summary judgment proceedings in licensure cases. *Matter of Peila*, 249 Mont. 272, 280-281, 815 P.2d 139, 144-45 (1991). Thus, Orta-Rosario's failure to respond to the Department's requests for admission resulted in those facts being deemed admitted and based on those facts it is proper to grant summary judgment to the Department regarding the Licensee's actions that make sanctions appropriate.

IV. CONCLUSIONS OF LAW

1. Jurisdiction of this matter is vested in the Montana Board of Medical Examiners under § 37-1-121, MCA, Title 37, Chapter 1, Part 3, MCA, and § 37-3-203, MCA.

2. As the Department seeks to impose sanctions against a license, it must demonstrate the existence of the allegations contained in the complaint by a preponderance of the evidence. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 289 Mont. 407, 961 P.2d 126 (1998). Orta-Rosario's admissions are sufficient to justify sanctions against his license.

3. Section 37-1-316, MCA, provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

. . .

(7) denial, suspension, revocation, probation, fine, or other licenses restriction or discipline against a licensee by a state, province, territory, or Indian tribal government if the action is not on appeal, under judicial review, or has been satisfied.

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

The limitations, restrictions, fines, and other disciplinary actions taken by the Wisconsin Medical Examining Board and the New York Board for Professional Medical Conduct establish that Orta-Rosario committed unprofessional conduct.

4. Orta-Rosario violated the standard of care for a physician by prescribing medication to a patient without first having met with the patient face-to-face.

5. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

6. Mont. Code Ann. § 37-1-312, MCA, provides that upon a determination that the licensee has violated Title 37, Chapter 1, Part 3, the board may issue an order providing for, among other things, suspension of a professional license for a fixed or indefinite term, compliance with conditions of probation, and satisfactory completion of a specific program of treatment.

7. Suspension for an indefinite term with specific conditions for possible reinstatement are appropriate in this case. Orta-Rosario's conduct demonstrates that he believes it appropriate to lie in order to retain his license to practice in Wisconsin. His prescribing medications over the internet without a face-to-face meeting with his patient is a

substantial violation of the standard of care to which physicians must comport their conduct. In the absence of suspension and other measures, the public cannot be assured that the Licensee will conduct his medical practice in a way that protects its health, safety, and welfare.

V. PROPOSED ORDER

Based on the foregoing, the hearing examiner recommends that the Board enter its order suspending Orta-Rosario's license for an indefinite period subject to the following terms and conditions:

(1) Prior to requesting to practice medicine in Montana, Orta-Rosario shall fully satisfy the 8/16/06 *Final Decision and Order* of the Wisconsin Medical Examining Board in docket number LS-0607311-MED;

(2) That Orta-Rosario shall provide evidence to the Montana Board that he has received unrestricted licenses from both the Wisconsin Medical Examining Board and the New York Board of Medicine;

(3) Orta-Rosario must graduate from a residency program as approved by the Montana Board of Medical Examiners;

(4) That Orta-Rosario shall review and follow all laws and rules under the Board of Medical Examiner's jurisdiction and ensure that his conduct meets the generally accepted standards of practice;

(5) Orta-Rosario shall, before requesting to practice medicine in Montana, take and successfully complete the SPEX exam; and

(6) That in the event the Montana Board determines to give Orta-Rosario a license in the future, he will be required to present sufficient proofs and to comply with certain additional conditions as may be required by the Board in its discretion at the time of application or petition for reinstatement.

DATED this 14th day of February, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

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

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.