BEFORE THE BOARD OF MEDICAL EXAMINERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-04-0121-MED REGARDING:

THE DISCIPLINARY TREATMENT OF THE LICENSE OF TOMMATHEW THOMAS, MD, License No. 4495.	)	Case No. 2473-2004

PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

I. INTRODUCTION

In this matter, the Business Standards Division (BSD) has filed a complaint against the license of Dr. Tommathew Thomas alleging that his failure to cooperate with an investigation into his use of EDTA chelation therapy on six of his patients violated Mont. Code Ann. § 37-1-316(15) (interference with an investigation or disciplinary proceeding) and Admin. R. Mont. 24.156.625(1)(j) (failing to cooperate with a lawful investigation conducted by the board). The Department further asserts that Dr. Thomas engaged in unprofessional conduct by utilizing EDTA chelation therapy where it was not medically warranted in violation of Mont. Code Ann. § 37-1-316(18).

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on April 14, 2010, April 28, 2010, and June 16, 2010. Michael Fanning, agency legal counsel, represented BSD. Dr. Thomas appeared on his own behalf. Dr. Thomas, Dr. Quida Draine, M.D., Brent Jones, and Lavelle Potter all testified under oath. BSD's Exhibits 1 through 8 and 10 and 11 were admitted into evidence.

The parties requested and were accorded the opportunity to present post-hearing briefing. That briefing has been completed and the matter submitted for determination. Based on the evidence and arguments adduced at hearing and in the parties' post-hearing briefing, the hearing examiner makes the following findings of fact, conclusions of law, and recommended decision.

II. FINDINGS OF FACT

A. *Allegations of Failure to Cooperate with the Board's Investigation*.

1. At all times material to this matter, and up to the present, Dr. Thomas has been a licensed Montana physician. He has not retired from practice and intends to keep practicing.

2. Dr. Thomas maintains a solo practice in an office in Glendive, Montana.

3. On May 22, 2002, Dr. Thomas entered into a consent decree with the Montana Board of Medical Examiners where he admitted that he had engaged in conduct that did not meet the generally accepted standards of practice with respect to the treatment of a patient. Exhibit 7B. As result of the consent decree, sanctions were imposed against Dr. Thomas' license. The sanctions provided that his license was placed on probation for a period of two years (from May 22, 2002 until May 21, 2004) with the proviso that he obey and comply with all laws and rules regulating physicians (Admin R. Mont. Title 24, Chapter 156, Sub chapter 6).

4. In 2002, the Board received a complaint regarding Dr. Thomas' alleged failure to timely forward a patient's medical records to the patient's new physician.[1] As a result of this complaint, the Montana Board of Medical Examiners dispatched a Board investigator, Brent Jones, to Glendive to meet with Dr. Thomas and obtain the patient's records.

5. Jones went to Dr. Thomas' office in Glendive on October 1, 2002. Upon entering the office, he observed several patients in the office waiting room who were hooked up to inter venous (IV) devices receiving what was subsequently discovered to be chelation therapy.

6. Upon meeting with Dr. Thomas, Jones identified himself with proper state issued identification. Jones told Dr. Thomas that he was there to retrieve the patient's records as directed by the Board of Medical Examiners. Dr. Thomas was agitated with Jones and refused to turn over the records.

7. Jones followed Dr. Thomas to a treatment room and continued to request the patient's records. Dr. Thomas again refused to produce the records. After some additional discussion, Dr. Thomas changed his story and indicated that he thought

[1] That complaint is unrelated to this matter.

he had already sent the records to the Board. Thomas never turned over the records, so Jones returned to Helena.

8. After returning to Helena, Jones sent Thomas a letter explaining the Board's statutory authority for the patient's information and again requested that Thomas forward the patient's information to the Board. Exhibit 4. Thomas never responded to this request.

9. Based on Jones' observation of the patients receiving chelation therapy, the Screening Panel of the Board of Medical Examiners opened an investigation into whether Dr. Thomas was properly treating these patients with chelation therapy. As a result, the Screening Panel authorized a new investigation in order to conduct peer review to determine if the chelation therapy was medically warranted for the patients.

10. On July 21, 2003, Compliance Specialist Lavelle Potter forwarded Dr. Thomas a letter advising him of the Board's investigation. Exhibit 1. In the letter, Potter asked Dr. Thomas to forward to the Screening Panel no later than August 23, 2003 copies of all medical records of patients seen by Dr. Thomas on October 1, 2002. The Board noted that it was specifically interested in the diagnosis and treatment of each patient in relation to the chelation therapy. Potter's letter further invited Dr. Thomas to attend the Screening Panel's October 10, 2003 meeting where the matter of his chelation therapy would be considered.

11. In response to Potter's letter, Dr. Thomas responded on August 20, 2003 by stating that he had not kept an appointment book at his office since 1995. He did not provide any information or respond at all to Potter's request to provide the diagnosis or treatment of patients receiving chelation therapy.

12. Because Dr. Thomas' August 20, 2003 letter was not responsive to the request to produce the diagnosis and treatment information about the patients receiving chelation therapy, the Board sent Dr. Thomas another letter on August 21, 2003, advising him that he must provide a certified copy of his appointment book "for October 1, 2002 and copies of all patient's [sic] medical records seen on that day." The letter further advised Dr. Thomas that the failure to provide the requested information constituted unprofessional conduct and that the failure to cooperate could result in the filing of a new complaint against his license. Exhibit 3.

13. Despite the July 2003 letter, Dr. Thomas, though fully aware of the need to provide the requested information, failed to do so. As a result, in March 2004, in order to secure the records that the Board sought, the Board filed the present action seeking sanctions against Dr. Thomas' license. It was not until July 2004, nearly two years after the Board first sought the records from Dr. Thomas, that Dr. Thomas'

attorney finally turned over the medical records on the six patients receiving chelation therapy in October 2002.

B. *Allegations Related to Improper Use of EDTA Chelation Therapy*.

14. After receiving the treatment plans and medical records for the six patients observed receiving chelation therapy in Dr. Thomas' waiting room on October 1, 2002, the Medical Board forwarded the information to Dr. Quida Draine, M.D., for peer review. Dr. Draine's testimony discloses, and the hearing examiner finds, that Dr. Draine is eminently qualified as an expert regarding the medically reasonable utilization of chelation therapy with respect to internal medicine.

15. The chelation therapy utilized for all six patients in the office on October 1, 2002 involved the inter venous administration of a chemical known as ethylenediamine tetraacetic acid (EDTA). The only time that EDTA treatment is medically proper to a reasonable degree of medical certainty is when it is used for the treatment of heavy metal toxicity (e.g., excessive concentrations of lead in the patient). Several entities such as the American Heart Association, the American College of Physicians, the National Heart, Lung and Blood Institute, the Federal Trade Commission, and the Food and Drug Administration have conducted various studies relating to EDTA therapy. None of those studies has demonstrated that EDTA chelation therapy has any beneficial effect in the treatment of atherosclerotic heart disease.

16. Dr. Draine reviewed Dr. Thomas' medical treatment charts of the six patients and determined from those charts that all six patients were patients having some "primary internal medicine problem." RT p. 108, ll. 11-12. The charts showed that most of the patients were suffering from hypertension and high cholesterol.

17. With respect to patient #1, the medical charts created and maintained by Dr. Thomas contained no objective data from which to conclude that this patient suffered from heavy metal toxicity. The patient's medical history did show a history of coronary artery disease, and old myocardial infarction (heart attack), hypertension, and some symptoms of angina. Exhibit 6. There was no basis in the patient's medical history to conclude that EDTA therapy was appropriate in treating this patient. In administering this therapy, Dr. Thomas' treatment of this patient with EDTA chelation therapy failed to meet generally accepted standards of practice for licensed physicians in Montana.

18. Patient #2 was a 67 year old being treated for atherosclerotic disease, including hypertension and congestive heart failure. There was no objective indicia of heavy metal toxicity in the patient's charts or any of the patient's medical history.

A review of his chart did not support EDTA chelation therapy. Instead, aggressive treatment for the congestive heart failure condition and a more aggressive evaluation and therapy to reverse the factors contributing to the congestive heart failure was medically indicated. Thomas' treatment of this patient with EDTA chelation therapy failed to meet generally accepted standards of practice for licensed physicians in Montana.

19. Patient #3 was a 56 year old being treated for hypertension, dyspnea with exertion (shortness of breath), and complaints of fatigue. This patient received one EDTA chelation therapy but had no medially indicated heavy metal toxicity. Thomas' treatment of this patient with EDTA chelation therapy failed to meet generally accepted standards of practice for licensed physicians in Montana.

20. Patient #4 was suffering from hypothyroid disease. There was no medical indication that treatment for heavy metal toxicity was necessary or even indicated. Nonetheless, Dr. Thomas administered EDTA therapy to this patient on at least one occasion. Thomas' treatment of this patient with EDTA chelation therapy failed to meet generally accepted standards of practice for licensed physicians in Montana.

21. Patient #5 suffered from hypertension, hyperlipidemia, obesity, and an enlarged prostate. There was no objective evidence in his medical charts or in any medical history that he suffered from heavy metal toxicity or that EDTA chelation therapy was medically warranted. Nonetheless, Dr. Thomas provided this patient 87 treatments of EDTA chelation therapy. Thomas' treatment of this patient with EDTA chelation therapy failed to meet generally accepted standards of practice for licensed physicians in Montana.

22. Patient #6 suffered from hypertension, dyspnea (shortness of breath), and complaints of nervousness. Again, there was no objective data to show that this person was suffering from heavy metal toxicity. Dr. Thomas, however, provided EDTA chelation therapy on an episodic basis. Thomas' treatment of this patient with EDTA chelation therapy failed to meet generally accepted standards of practice for licensed physicians in Montana.

23. Each of these six patients had other primary care doctors and saw Dr. Thomas only for EDTA chelation therapy.

C. *The Lapse of Time Between the Filing of the Complaint and the Hearing in this Matter.*

24. The complaints in this matter were filed in 2003 and 2004. The matter was properly noticed for scheduling conference by this tribunal on August 24, 2004. The licensee was represented by counsel at that time.

25. At the request of the parties who indicated that they had entered into a settlement agreement, the matter was returned to the Board for further disposition on July 1, 2005.

26. After the matter was returned to the Board, the parties worked at but were unable to reach agreement on a stipulated settlement. Throughout this time period, the licensee continued to be represented by counsel. However, despite several requests to sign the stipulation and several promises that he would do so, the licensee failed to return a signed stipulation.

27. After it became apparent that Dr. Thomas would not enter into a stipulation, the Department, on September 30, 2009, advised the hearing examiner that the matter needed to be reset for hearing. The matter was immediately set for a scheduling conference. Both agency legal counsel and previous counsel for the licensee were advised of the scheduling conference.

28. The licencee's previous counsel indicated that he no longer represented the licensee. Thereafter, a scheduling conference was held in the matter on October 14, 2009. The licensee represented himself and the matter was set for hearing with the input of the licensee.

29. The licensee then filed a motion to dismiss for failure timely to prosecute the sanctions requested against his license. At the time of the final pre-hearing conference in this matter, the hearing examiner held oral argument on the licensee's motion to dismiss for failure to prosecute the complaints. At the hearing, the hearing examiner specifically asked the licensee if he had lost any evidence or the ability to defend against any of the charges due to the passage of time. The licensee indicated that he had not lost the ability to present evidence due to the passage of time. In addition, the Department asserted that the long lapse in the case was due to the licensee's failure to sign a stipulated disposition despite assurances that he would.

30. At hearing, the licensee was presented with adequate opportunity to present all evidence on the complaints. At no time was there any indication that the licensee's ability to defend this case was impeded in any way by the amount of time that elapsed between the time that the complaint was filed and the time that the hearing was held.

III. CONCLUSIONS OF LAW[2]

A. *The Passage of Time Between the Filing of the Complaints and the Hearing is Not a Basis for Dismissing the Complaints.*

1. Dr. Thomas filed a motion to dismiss the instant matter due to the amount of time that elapsed between the filing of the complaint and the time the matter went to hearing. While the hearing examiner does not condone the amount of time that elapsed between the filing of the complaint and the hearing in this matter, there is no basis for dismissing the matter as Dr. Thomas was not prejudiced in the presentation of his defense by the passage of time, Dr. Thomas was at least in part at fault for the delay, and the interest of the state in ensuring the protection of its citizens from the conduct alleged in this case is compelling.

2. Courts have generally held that "in the absence of a statute [of limitations] which is applicable to license revocation proceedings, statutes of limitations do not apply to . . . disciplinary proceedings." *Sahu v. Iowa Board of Medical Examiners*, 537 N.W. 2d 674, 676 (Iowa 1995). *See also*, 61 Am. Jur. 2d *Physicians, Surgeons and Other Healers* § 91. Likewise, the mere passage of time is insufficient to bar sanction proceedings unless the delay creates prejudice to the licensee. *Id*. The party asserting a defense of laches must show prejudice to his case and prejudice "'cannot be inferred merely from the passage of time.'" *Id., citing Committee on Professional Ethics & Conduct v. Wunschel*, 461 N.W. 2d 840, 846 (Iowa 1990). In *Sahu*, the medical board delayed filing a complaint against the licensee for a period of seven years while awaiting the completion of federal criminal charges related to the conduct alleged as the basis for the disciplinary proceeding. Despite the passage of this amount of time, the *Sahu* court found that because the proceedings were commenced within a reasonable time after the conclusion of the criminal proceedings and because there was no evidence that the licensee was prejudiced by the delay, there was no basis for dismissing the proceeding either on the basis of some implied statute of limitations or on the basis of laches.

3. There is no statute of limitations applicable to disciplinary proceedings in Montana. Dr. Thomas has failed to show any prejudice that accrued to his case as a result of the delay that occurred between the filing of the complaint and the hearing. There was no indication at hearing that Dr. Thomas was in any way prejudiced by the delay. Moreover, Dr. Thomas was at least in part at fault for the delay as he represented repeatedly that he would enter into a stipulation with the Department

[2] Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

but then failed to return a signed stipulation of settlement despite several opportunities and promises to do so. The nature of the allegations of the complaint in this matter, which involve unprofessional conduct by administering a treatment which is not medically recognized as appropriate to treat the maladies from which the patients suffered, are substantial and directly impact the health, safety, and welfare of Montana's citizens. In light of all of these factors, there is no legally cognizable basis for dismissing the complaints based upon the mere passage of time.

B. *The Licensee Committed Unprofessional Conduct*.

4. Mont. Code Ann. § 37-1-316 provides in pertinent part:

> The following is unprofessional conduct for a licensee . . . governed by this chapter:
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> * * *
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> (15) interference with an investigation or a disciplinary proceeding by willful misrepresentation of facts . . .
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> * * *
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> (18) conduct that does not meet the generally accepted standards of practice.

5. Admin. R. Mont. 24.156.625(1)(j) defines unprofessional conduct as failing to cooperate with a lawful investigation conducted by the board. Admin. R. Mont. 24.156.625(1)(v) defines unprofessional conduct as any other act, whether specifically enumerated or not, that in fact constitutes unprofessional conduct.

6. The Department bears the burden of proof in this matter to demonstrate by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service* 1998 MT 196, ¶8, 289 Mont. 407, 961 P.2d 126.

7. To establish that Dr. Thomas' use of EDTA chelation therapy did not meet professional standards, the agency must demonstrate both the proper standard of care and the manner in which the licensee deviated from that standard of care. Mont. Code Ann. § 37-1-316(18). *Cf. Montana Deaconess Hosp. V. Gratton,* 169 Mont. 185, 545 P.2d 670 (1976) (holding that in a medical malpractice case, the medical standard of care must be established by expert medical testimony unless the conduct complained of is readily ascertainable by a layman, citing *Evans v. Bernhard,* 23 Ariz. App. 413, 533 P.2d 721 (1975)). *See also, Webb v. Board of Medical Ex.*, 202 Ariz. 555, 48 P.3d 505 (App. 2002) (holding that due process in an administrative licensing

proceeding requires that both the standard of care and the deviation from that standard must be established in the record).[3]

8. The Board has met its burden of proof with respect to the issue of Dr. Thomas' failure to cooperate with a lawful investigation conducted by the Board. The Board requested on numerous occasions that Dr. Thomas supply it with all medical records of the six patients he was treating with chelation therapy on October 1, 2002. Dr. Thomas steadfastly refused and obfuscated for almost two years before turning over his records to the Board of Medical Examiners. Jones' testimony at hearing is credible. It took the filing of a complaint to finally wrest the medical records requested by the Board from Dr. Thomas. Dr. Thomas' conduct violated Mont. Code Ann. § 37-1-316(15) and Admin. R. Mont. 24.156.625.

9. The Department has also carried its burden of proving preponderantly that Dr. Thomas' use of EDTA chelation therapy fell below the standard of care required of the licensee. Dr. Draine's testimony is very credible and is, as the Department points out, essentially unrefuted. Utilization of EDTA chelation therapy was not appropriate for the six patients upon whom it was used. There was no demonstrated medical history in any of the six patients to support a diagnosis of heavy metal toxicity. There is no recognized medical basis to support the use of EDTA chelation therapy when treating patients for atherosclerotic heart disease. Indeed, utilization of EDTA chelation therapy is in itself detrimental since use of the treatment has its own side effects which may be injurious to the patient. By utilizing chelation therapy without a proper diagnosis of heavy metal toxicity or without the goal of treating heavy metal toxicity, Dr. Thomas fell below the standard of care required by Mont. Code Ann. § 37-1-316(18).

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[3] In light of the statutory language in Mont. Code Ann. § 37-1-316(18), *Webb's* utility in this case is clear. The rule in *Webb* derives from the requirement in medical malpractice cases that a plaintiff establish both the standard of care and that the physician deviated from that standard of care. *Webb, supra*, 202 Ariz. at 510, 48 P.3d at 560, citing, *Croft v. Arizona Board of Dental Examiners*, 157 Ariz. 203, 755 P.2d 1191 (App. 1988) (recognizing that a doctor is not liable in negligence for mere mistakes in judgment, but is liable only where the treatment falls below the recognized standard of care for good medical practice). The terms of Mont. Code Ann. § 37-1-316(18) require a showing that the licensee "has not met the generally accepted standards of practice" in order to prove unprofessional conduct. Obviously, in order to make a case under this statute, the agency must demonstrate both the standard of care and the licensee's deviation from that standard, the very requirements set out in *Webb*.

C. *The Appropriate Sanction in this Case.*

10. A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a regulatory board may suspend a licensee's license, impose probation, and levy a fine not to exceed $1,000.00.

11. 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).

12. BSD has argued for imposition of an indefinite suspension. In support of this argument, BSD correctly pointed out that Dr. Thomas was on probation for unprofessional conduct related to the treatment of a patient when he administered chelation therapy to six patients for whom it was not medically appropriate. This treatment in itself could and perhaps did have unhealthful side effects for the patients. Dr. Thomas' conduct convinces the hearing examiner that he cannot be permitted to practice until such time as the Board of Medical Examiners can determine that it is safe for him to practice medicine. Thus, in order to protect the public health, safety, and welfare of the public, indefinite suspension is appropriate. To further ensure the protection of the public and to ensure that Dr. Thomas is properly rehabilitated in his ability to practice medicine, his license must be placed on probation for a period of five (5) years.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board enter its order placing Dr. Thomas' license on probation for a period of five years with the terms:

1. That Dr. Thomas' license shall be placed on indefinite suspension until such time as the Board of Medical Examiners determines that he can safely practice medicine;

2. That Dr. Thomas shall comply with any monitoring of his practice implemented by the Board, including entering into any contracts or agreements with appropriate entities, which may include the Montana Physicians Assistance Program (MPAP), as required by the Board. Dr. Thomas shall provide such documentation or access to case files as deemed appropriate by the Board. Dr. Thomas shall also

provide case files or disclose any information or undertake any action required by the Board with respect to monitoring;

3. That Dr. Thomas shall obey (a) all provisions of Title 37, Chapters 1 and 3, Montana Codes Annotated, (b) all provisions of Title 24, Chapter 156, and (c) all requirements or directives imposed by the Board; and

4. That in the event Dr. Thomas fails to comply with any of the above terms and conditions of his probation, that his license be revoked.

DATED this 30th day of November, 2010.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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.