

PROTHONOTARY

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

BEFORE THE STATE BOARD OF MEDICINE

COMMONWEALTH OF PENNSYLVANIA,  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

v.

JOHN INGUI, M.D.,  
LICENSE NO. MD-029768-E  
Respondent

DOCKET NO. 0621-49-00  
FILE NO. 98-49-02057

COPY

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FINAL ADJUDICATION AND ORDER

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BASIL L. MERENDA, COMMISSIONER  
BUREAU OF PROFESSIONAL AND  
OCCUPATIONAL AFFAIRS

CHARLES D. HUMMER, JR., M.D., CHAIRMAN  
STATE BOARD OF MEDICINE

2601 North Third Street  
Post Office Box 2649  
Harrisburg, Pennsylvania 17105-2649

GSS

## HISTORY

This matter comes before the State Board of Medicine on an application for review filed by the Respondent seeking review of the September 24, 2004, adjudication and order issued by the Board's hearing examiner hearing. The prosecution office of the Department of State issued an order to show cause (OSC) filed September 14, 2000, alleging that John Ingui, M.D. (Respondent) is subject to disciplinary action under the Health Care Services Malpractice Act (HCSMA), Act of October 15, 1975, P.L. 390, *as amended*, 40 P.S. §1301.701 *et seq.* (HCSMA), and the Medical Practice Act of 1985 (Act), Act of December 20, 1985, P.L. 457, *as amended*, 63 P.S. §422.1 *et seq.*, as a result of Respondent's failure to maintain the required amount of professional liability insurance and his failure to pay the surcharge levied by the Medical Professional Liability Catastrophe Loss Fund (CAT Fund) when more than 50% of his medical practice was in Pennsylvania, as a result of Respondent prescribing medications for himself and his wife on an expired Drug Enforcement Administration (DEA) permit, and without physical evaluations or maintaining medical records, as a result of Respondent treating and/or prescribing for patient J.C. and approximately 28 other patients without physical evaluations or maintaining medical records and on an expired DEA permit; and as a result of Respondent prescribing for himself and his wife on a lapsed license, and treating and/or prescribed for patient J.C. and approximately 28 other patients during a time when his license was lapsed.

Respondent filed an answer to the OSC on October 13, 2000, denying most of the factual allegations and requesting a formal administrative hearing. A hearing was held on April 29, 2003. Bernadette Paul, Esquire appeared on behalf of the Commonwealth. Respondent appeared at the hearing *pro se*.

The hearing examiner issued her adjudication in which she determined that the Respondent was subject to disciplinary action under the Act: At 63 P.S. § 422.41(8) in that he prescribed for himself in violation of the Principles of Medical Ethics; At 63 P.S. § 422.10 in that Respondent prescribed for himself without having a current license to practice medicine in the Commonwealth; At 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances to himself and others without having a valid DEA permit; At 63 P.S. § 422.41(8) in that Respondent prescribed for his wife contrary to the Principles of Medical Ethics; At 63 P.S. § 422.10 in that Respondent practiced without a license; At 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances for his wife without having a valid permit from the DEA; At 63 P.S. § 422.41(6) in that Respondent violated the Board's regulations at 49 Pa. Code §§16.92 and 16.95 by failing to perform patient evaluations prior to dispensing controlled substances to himself, his wife, and patient J.C., and by failing to keep adequate medical records; At 63 P.S. §422.10 in that Respondent prescribed or performed professional services for 28 patients when his license was not current; At 63 P.S. § 422.41(6) in that Respondent violated the Board's regulations at 49 Pa. Code §§16.92 and 16.95 by failing to perform physical evaluations on those 28 patients prior to prescribing controlled substances, or to document those evaluations or keep medical records for his patients; At 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances for multiple patients when he did not have a current DEA registration.

The hearing examiner also determined that Respondent was subject to disciplinary action under the HCSMA, 40 P.S. §1301.701(f), in that Respondent practiced medicine in Pennsylvania without maintaining the required amount of professional liability insurance in violation of the HCSMA at 40 P.S. §1301.701(a); that Respondent was subject to disciplinary action under the

HCSMA at 40 P.S. §1301.701(f), in that more than 50% of Respondent's medical practice was in Pennsylvania during the period from January 1, 1998 through April 30, 2001, and Respondent did not pay the required CAT Fund surcharge in violation of the HCSMA at 40 P.S. §1301.701(e).

The hearing examiner indefinitely suspended Respondent's license until Respondent was able to demonstrate that he was in full compliance with all statutory and regulatory requirements concerning professional liability insurance. The hearing examiner also required Respondent to appear before the Board to offer proof by way of a mental and physical evaluation that his monitored practice does not pose any threat to the health and safety of the citizens of this Commonwealth. Lastly the hearing examiner imposed a civil penalty of \$11,074.61 against Respondent.

Respondent's application for review acknowledges that Respondent practiced during a time when his license, DEA registration and insurance had lapsed. He asserts that because of the fact that he has been blind since the age of four that he must rely on others for assistance on administrative matters such as renewals of license and processing of insurance documents. That the medical records he maintained on his patients were destroyed in a flood; and that there is no basis in the allegations or charges for a requirement for a mental or physical examination. Respondent also acknowledges that he is subject to some discipline but requests the Board take into consideration certain mitigating factors.

### FINDINGS OF FACT

1. Respondent holds a license to practice medicine and surgery in the Commonwealth of Pennsylvania, license no. MD-029768-E. (Board records)
2. Respondent's license is current through December 31, 2004. (Board records)
3. At all times pertinent to the factual allegations, Respondent was eligible to renew and hold a license to practice medicine and surgery in the Commonwealth.
4. Respondent's address on file with the Board is 29 Hansen Court, Narberth, PA 19072. (Board records)
5. Respondent's license to practice medicine and surgery in Pennsylvania was expired from December 31, 1996 until November 16, 1999. (Commonwealth's Exhibit C-3)
6. Respondent's DEA license to prescribe controlled substances lapsed in 1997. (N.T. 19)
7. Respondent was notified on November 4, 1999 that his DEA license was expired and that he was not authorized to prescribe controlled substances. (N.T. 20-21, 24)
8. Respondent had not renewed his DEA license as of the date of the hearing. (N.T. 28, 101)
9. Respondent prescribed controlled substances, specifically Percocet, for his wife, Wilma Noland, during the period September 3, 1997 until at least August 25, 1999. (N.T. 22-24; Commonwealth's Exhibit C-4)
10. Respondent prescribed Percocet in quantities of 100 or 120 for his wife, Wilma Noland, on July 12, 15, 18, 19 and 23, 1999, and on August 1, 7, 13, 13, 25, 1999. (N.T. 22-24; Commonwealth's Exhibit C-4)

11. Between January 8, 1997 and August 13, 1999, Respondent wrote 62 prescriptions for himself for controlled substances, specifically Percocet and Ritalin, at the University of Pennsylvania Hospital out-patient pharmacy. (N.T. 26, 29-30; Commonwealth's Exhibit C-11)

12. Between November 18, 1999 and February 11, 2000, Respondent wrote 15 different prescriptions for Xanax and Percocet for patient J.C. (N.T. 25, 132-133; Commonwealth's Exhibit C-12)

13. From December 31, 1996 to at least October 1999, Respondent professionally treated approximately 28 patients. (N.T. 96, 113, 131-132)

14. The Medical records Respondent maintained on his patients were destroyed by flood. (Exhibit R-10, N.T. 127)

15. Respondent has been blind since the age of four and relies on administrative staff to assist him in the processing of paperwork such as his license renewal and insurance applications. (N.T. 10)

16. Respondent has a very limited practice in the field of psychiatry that had been further limited due to complications with cancer related health problems. (N.T. 10)

17. Respondent did not have professional liability insurance coverage from January 1, 1998 through April 30, 2001. (Commonwealth's Exhibits C-5, C-7; N.T. 69-70)

18. More than 50% of Respondent's practice of medicine was performed in the Commonwealth of Pennsylvania from January 1, 1998 through April 30, 2001. (N.T. 130)

19. Respondent failed to pay the Medical CAT Fund surcharge due on professional liability insurance coverage for the periods from January 1, 1998 through April 30, 2001.

(Commonwealth's Exhibit C-5; N.T. 70)

20. By correspondence dated July 26, 2000 and November 13, 2000 , the CAT Fund notified Respondent that he was in noncompliance with the statutory requirement to maintain professional liability insurance. (N.T. 76-78; Commonwealth's Exhibit C-8)

21. Respondent's CAT Fund surcharge for the period January 1, 1998 through January 1, 1999 was \$4,756.50 for full time practice, or \$3,567.38 for practice of 16 hours or less per week. (N.T. 73-74; Commonwealth's Exhibit C-6)

22. Respondent's CAT Fund surcharge for the period of January 1, 1999 through January 1, 2000 was \$4,823.80 for full time practice, \$3,859.04 for practice of 24 hours or less per week, \$3,135.47 for practice of 16 hours or less per week, or \$2,411.90 for eight hours or less per week. (N.T. 74; Commonwealth's Exhibit C-6)

23. Respondent's CAT Fund surcharge for the period of January 1, 2000 through January 1, 2001 was \$4,987.36 for full time practice, \$3,989.89 for practice of 24 hours or less per week, \$3,241.78 for practice of 16 hours or less per week, or \$2,493.68 for eight hours or less per week. (N.T. 74-75; Commonwealth's Exhibit C-6)

24. Respondent's pro-rated CAT Fund surcharge for the period of January 1, 2001 through April 30, 2001 was \$1,743.43 for full time practice, \$1,390.74 for practice of 24 hours or less per week, \$1,129.98 for practice of 16 hours or less per week, or \$869.22 for eight hours or less per week. (N.T. 74-75; Commonwealth's Exhibit C-6)

25. Respondent was served with the order to show cause issued in this matter and all subsequent pleadings and orders filed of record in this proceeding. (Docket No. 0621-49-00).

### CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact Nos. 1-3)
2. Respondent was given notice and an opportunity to be heard in accordance with the Administrative Agency Law, 2 Pa. C.S. §504. (Findings of Fact No. 25)
3. Respondent is not subject to disciplinary action for providing treatment to himself or his wife in that section 711(j) of the Mcare Act, 35 P.S. §1303.711(j) and the provisions of the Volunteer Health Services Act, 35 P.S. § 449.51, recognize that physicians may provide treatment (including prescription drugs) to family members.
4. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances without having a valid DEA permit. (Findings of Fact Nos. 6,7,9-12)
5. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.10 in that Respondent practiced without holding a current license. (Findings of Fact Nos. 5-13)
6. Respondent is not subject to disciplinary action under the Act at 63 P.S. § 422.41(6) in that Respondent in that the medical record he was required to maintain were destroyed by flood. (Findings of Fact No. 14)
7. Respondent is subject to disciplinary action under the HCSMA, 40 P.S. §1301.701(f), in that Respondent practiced medicine in Pennsylvania without maintaining the required amount of professional liability insurance in violation of the HCSMA at 40 P.S. §1301.701(a). (Findings of Fact Nos. 5-13, 17-19)
8. Respondent is subject to disciplinary action under the HCSMA at 40 P.S.



§1301.701(f), in that more than 50% of Respondent's medical practice was in Pennsylvania during the period from January 1, 1998 through April 30, 2001, and Respondent did not pay the required CAT Fund surcharge in violation of the HCSMA at 40 P.S. §1301.701(e). (Findings of Fact Nos. 5-13, 17-19)

9. The Board is authorized to impose disciplinary or corrective measures or a civil penalty pursuant to section 42 of the MPA, 63 P.S. §422.42, and the HCSMA at 40 P.S. §1301.701(f).

## DISCUSSION

This action is brought in part under the HCSMA at 40 P.S. §1301.701, and under the Act at 63 P.S. §§ 422.10, 422.41(6) and 422.41(8), which provide in part as follows:

### **§1301.701. Professional liability insurance and fund**

(a) Every health care provider as defined in this act, practicing medicine or podiatry or otherwise providing health care services in the Commonwealth shall insure his professional liability only with an insurer licensed or approved by the Commonwealth of Pennsylvania, or provide proof of self-insurance in accordance with this section.

(1)(i) A health care provider, other than hospitals, who conducts more than 50% of his health care business or practice within the Commonwealth of Pennsylvania shall insure or self-insure his professional liability in the amount of \$100,000 per occurrence and \$300,000 per annual aggregate. . . .

\* \* \*

(e)(1) The fund shall be funded by the levying of an annual surcharge on or before January 1 of every year on all health care providers entitled to participate in the fund . . . .

(f) The failure of any health care provider to comply with any of the provisions of this section or any of the rules and regulations issued by the director shall result in the suspension or revocation of the health care provider's license by the licensure board.

### **§ 422.10. Unauthorized practice of medicine and surgery.**

No person other than a medical doctor shall engage in any of the following conduct except as authorized or exempted in this act:

- (1) Practice medicine and surgery.
- (2) Purport to practice medicine and surgery.
- (3) Hold forth as authorized to practice medicine and surgery through use of a title, including, but not necessarily limited to, medical doctor, doctor of medicine, doctor of medicine and surgery, doctor of a designated disease, physician, physician of a designated disease, or any abbreviation for the foregoing.

(4) Otherwise hold forth as authorized to practice medicine and surgery.

The Commonwealth charged that Respondent practiced medicine and surgery in the Commonwealth from December 31, 1996 and November 16, 1999, during which time Respondent's license to practice medicine in Pennsylvania was lapsed. Those charges against Respondent arose from allegations that Respondent prescribed controlled substances for himself and his wife regularly during that period, and treated patient J.C. and 28 other patients during that period. Respondent also prescribed controlled substances for patient J.C. during that time frame. Respondent's DEA registration, authorizing him to prescribe controlled substances, expired on November 30, 1997 and had not been renewed as of the date of the hearing in this matter.

The Commonwealth's evidence in this matter consisted of testimony from Stephen Dougherty, a Diversion Investigator with the United States Department of Justice, Drug Enforcement Administration, and William Harris, Deputy Regional Director for the Bureau of Enforcement and Investigations of the Department of State in the Philadelphia Region. Both witnesses testified to Respondent's treatment and prescribing of controlled substances during the time Respondent's license to practice medicine and his DEA registration were expired. In addition, Respondent admitted that he prescribed controlled substances for himself and his wife over an extended period of time while his license and DEA registration were expired, and also admitted to treating and prescribing for patient J.C. and at least 28 other patients during the same period of time. Respondent also admitted that he could not produce medical records for himself, his wife, patient J.C. or the 28 other patients he admitted to treating during that time.

Respondent testified in his own defense that he repeatedly wrote prescriptions for Percocet for himself and his wife, and Ritalin for himself, in conjunction with treatment they received by other health care providers. Respondent also testified that he is an expert in treating chronic pain patients, and that he continued to treat patient J.C. and the 28 other patients he admitted to treating during the time his license and DEA registration were expired because he did not know his license and DEA registration were expired. When Mr. Dougherty notified him on November 4, 1999 that he could not continue to prescribe controlled substances without a DEA registration, he continued to prescribe Xanax and Percocet for patient J.C., and believed he had Mr. Dougherty's permission to do so. Respondent asserted that J.C. was a patient with complex psychiatric issues who was extraordinarily reluctant to being referred to another physician.

Respondent further testified that he could not produce medical records for the patients in question because a large flood destroyed many of his records. Respondent corroborated this testimony with photographs and documentation.

Respondent has been blind since he was four years old and must rely on others for assistance. Because of illness Respondent curtailed his already limited practice and had to let his long-term full time assistant go. Respondent acknowledges he was not as attentive to the activities of his part-time assistants as he should have been, and as a consequence his license, DEA registration and insurance lapsed without his knowledge

A review of the evidence and testimony reveals, and Respondent admits, that Respondent's license to practice medicine was expired from December 31, 1996 until November 16, 1999, and that his DEA registration expired on November 30, 1997 and had not been

renewed as of the date of the hearing, and that Respondent continued to practice and to prescribe controlled substances during that period.

The hearing examiner's decision to impose discipline on Respondent for practicing on a lapsed license, prescribing controlled substances without a current DEA registration, and practicing without the requisite medical malpractice insurance are well supported by the record and the law. While the Board appreciates the significant mitigating evidence, in regard to the circumstances leading to the lapse of these requisites to practice, none-the-less some sanction is appropriate to impress upon Respondent and others the importance of attending to the administrative requisites to the practice of medicine. The Board respects that Dr. Ingui has overcome significant challenges in his life and gives mitigating weight to the circumstances leading to the lapse of his license, DEA registration and insurance. However, Dr. Ingui is responsible, as he acknowledges, for making certain these obligations are met. The Board agrees with the hearing examiner that generally a civil penalty that is equivalent to the insurance premiums that were avoided is an appropriate deterrent. However, in light of the mitigating evidence presented a reduced civil penalty is adequate in this case.

The charges against Respondent for treating himself and his wife are dismissed. Section 711(j) of the Mcare Act, 35 P.S. §1303.711(j) and the provisions of the Volunteer Health Services Act, 35 P.S. § 449.51, recognize that physicians may provide treatment (including prescription drugs) to family members. These recently enacted statutory provisions supersede the AMA Code of Medical Ethics relied upon by the hearing examiner. Absent evidence of abuse, diversion, or substandard care, there is no per se violation when a physician provides care to his family.

Lastly, asserting that Respondent placed his health at issue, the hearing examiner ordered Respondent undergo a mental and physical examination by a Board approved provider prior to his license being reinstated. The allegations and charges contained in the Commonwealth's Order to Show Cause do not reflect any challenge to Respondent's ability to safely practice medicine. Accordingly, the hearing examiner's order in this regard is not supported.<sup>1</sup>

Based upon the above findings of fact, conclusions of law and discussion, the following order shall issue.

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<sup>1</sup> The Board also notes that Respondent submitted a favorable report from his treating physician.

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania,  
Bureau of Professional and  
Occupational Affairs

v.

John Ingui, M.D.,  
Respondent

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Docket No. 0621-49-00  
File No. 98-49-02057

ORDER

NOW, this *26<sup>th</sup>* day of January, 2005, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is hereby **ORDERED** that Respondent's license no. MD-029768-E, shall be placed on probation for a period of 24 months and assessed a **CIVIL PENALTY** of \$6,000 payable, in 24 monthly installments of \$250, to the Commonwealth of Pennsylvania by certified check, attorney's check or U.S. Postal Service money order. Respondent's license to practice medicine in the Commonwealth may not be reinstated to unrestricted status until the civil penalty is paid in full.

This order shall be effective immediately.

**BY ORDER:**

**BUREAU OF PROFESSIONAL AND  
OCCUPATIONAL AFFAIRS**  
*Basil L. Merenda*  
BASIL L. MERENDA,  
COMMISSIONER

**STATE BOARD OF MEDICINE**  
*Charles D. Hummer, Jr.*  
CHARLES D. HUMMER, JR., M.D.,  
CHAIRMAN

Respondent: John Ingui, M.D.  
29 Hansen Court  
Narberth, PA 19072

For the Commonwealth: Bernadette Paul, Esquire  
P.O. Box 2649  
Harrisburg, PA 17105-2649

Board Counsel: Gerald S. Smith, Esquire  
P.O. Box 2649  
Harrisburg, PA 17105-2649

Date of Mailing:

*January 26, 2005*



**COPY**

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
STATE BOARD OF MEDICINE

PROTHONOTARY

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Department of State

Commonwealth of Pennsylvania,  
Bureau of Professional and  
Occupational Affairs

v.

John Ingui, M.D.,  
Respondent

Docket No. 0621-49-00  
File No. 98-49-02057

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**ADJUDICATION AND ORDER**

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Suzanne Rauer, Esquire  
Hearing Examiner

Commonwealth of Pennsylvania  
GOVERNOR'S OFFICE OF GENERAL COUNSEL  
Department of State  
P.O. Box 2649  
Harrisburg, PA 17105-2649  
(717) 772-2686

## HISTORY

This matter comes before the hearing examiner for the Department of State on an order to show cause (OSC) filed September 14, 2000, alleging that John Ingui, M.D. (Respondent) is subject to disciplinary action under the Health Care Services Malpractice Act (HCSMA), Act of October 15, 1975, P.L. 390, *as amended*, 40 P.S. §1301.701 *et seq.* (HCSMA), and the Medical Practice Act of 1985 (Act), Act of December 20, 1985, P.L. 457, *as amended*, 63 P.S. §422.1 *et seq.*, as a result of Respondent's failure to maintain the required amount of professional liability insurance and his failure to pay the surcharge levied by the Medical Professional Liability Catastrophe Loss Fund (CAT Fund) when more than 50% of his medical practice was in Pennsylvania, as a result of Respondent prescribing medications for himself and his wife, on a long term basis for other than an emergency, on an expired Drug Enforcement Administration (DEA) permit, and without physical evaluations or maintaining medical records, as a result of Respondent treating and/or prescribing for patient J.C. and approximately 28 other patients without physical evaluations or maintaining medical records and on an expired DEA permit; and as a result of Respondent prescribing for himself and his wife on a lapsed license, and treating and/or prescribed for patient J.C. and approximately 28 other patients during a time when his license was lapsed.

Respondent filed an answer to the OSC on October 13, 2000, denying most of the factual allegations and requesting a formal administrative hearing. A hearing was held on April 29, 2003. Bernadette Paul, Esquire appeared on behalf of the Commonwealth. Respondent appeared at the hearing *pro se*. The record closed on August 15, 2003 with the filing of Respondent's post-hearing brief, upon representation by the Commonwealth that no reply brief would be filed.

### FINDINGS OF FACT

1. Respondent holds a license to practice medicine and surgery in the Commonwealth of Pennsylvania, license no. MD-029768-E. (Board records)
2. Respondent's license is current through December 31, 2004. (Board records)
3. At all times pertinent to the factual allegations, Respondent held a license to practice medicine and surgery in the Commonwealth.
4. Respondent's address on file with the Board is 29 Hansen Court, Narberth, PA 19072. (Board records)
5. Respondent's license to practice medicine and surgery in Pennsylvania was expired from December 31, 1996 until November 16, 1999. (Commonwealth's Exhibit C-3)
6. Respondent's DEA license to prescribe controlled substances lapsed in 1997. (N.T. 19)
7. Respondent was notified on November 4, 1999 that his DEA license was expired and that he was not authorized to prescribe controlled substances. (N.T. 20-21, 24)
8. Respondent had not renewed his DEA license as of the date of the hearing. (N.T. 28, 101)
9. Respondent prescribed controlled substances, specifically Percocet, for his wife, Wilma Noland, during the period September 3, 1997 until at least August 25, 1999. (N.T. 22-24; Commonwealth's Exhibit C-4)
10. Respondent prescribed Percocet in quantities of 100 or 120 for his wife, Wilma Noland, on July 12, 15, 18, 19 and 23, 1999, and on August 1, 7, 13, 13, 25, 1999. (N.T. 22-24; Commonwealth's Exhibit C-4)
11. Respondent did not keep medical records of his treatment of his wife, Wilma

Noland. (N.T. 57, 129)

12. Between January 8, 1997 and August 13, 1999, Respondent wrote 62 prescriptions for himself for controlled substances, specifically Percocet and Ritalin, at the University of Pennsylvania Hospital out-patient pharmacy. (N.T. 26, 29-30; Commonwealth's Exhibit C-11)

13. Between November 18, 1999 and February 11, 2000, Respondent wrote 15 different prescriptions for Xanax and Percocet for patient J.C. (N.T. 25, 132-133; Commonwealth's Exhibit C-12)

14. From December 31, 1996 to at least October 1999, Respondent professionally treated and/or prescribed for approximately 28 other patients. (N.T. 96, 113, 131-132)

15. Respondent did not produce written evaluations or medical records for those patients. (N.T. 126-128, 133-134)

16. Respondent did not have professional liability insurance coverage from January 1, 1998 through April 30, 2001. (Commonwealth's Exhibits C-5, C-7; N.T. 69-70)

17. More than 50% of Respondent's practice of medicine was performed in the Commonwealth of Pennsylvania from January 1, 1998 through April 30, 2001. (N.T. 130)

18. Respondent failed to pay the Medical CAT Fund surcharge due on professional liability insurance coverage for the periods from January 1, 1998 through April 30, 2001. (Commonwealth's Exhibit C-5; N.T. 70)

19. By correspondence dated July 26, 2000 and November 13, 2000, the CAT Fund notified Respondent that he was in noncompliance with the statutory requirement to maintain professional liability insurance. (N.T. 76-78; Commonwealth's Exhibit C-8)

20. Respondent's CAT Fund surcharge for the period January 1, 1998 through

January 1, 1999 was \$4,756.50 for full time practice, or \$3,567.38 for practice of 16 hours or less per week. (N.T. 73-74; Commonwealth's Exhibit C-6)

21. Respondent's CAT Fund surcharge for the period of January 1, 1999 through January 1, 2000 was \$4,823.80 for full time practice, \$3,859.04 for practice of 24 hours or less per week, \$3,135.47 for practice of 16 hours or less per week, or \$2,411.90 for eight hours or less per week. (N.T. 74; Commonwealth's Exhibit C-6)

22. Respondent's CAT Fund surcharge for the period of January 1, 2000 through January 1, 2001 was \$4,987.36 for full time practice, \$3,989.89 for practice of 24 hours or less per week, \$3,241.78 for practice of 16 hours or less per week, or \$2,493.68 for eight hours or less per week. (N.T. 74-75; Commonwealth's Exhibit C-6)

23. Respondent's pro-rated CAT Fund surcharge for the period of January 1, 2001 through April 30, 2001 was \$1,743.43 for full time practice, \$1,390.74 for practice of 24 hours or less per week, \$1,129.98 for practice of 16 hours or less per week, or \$869.22 for eight hours or less per week. (N.T. 74-75; Commonwealth's Exhibit C-6)

24. Respondent was served with the order to show cause issued in this matter and all subsequent pleadings and orders filed of record in this proceeding. (Docket No. 0621-49-00)

### CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact Nos. 1-3)
2. Respondent was given notice and an opportunity to be heard in accordance with the Administrative Agency Law, 2 Pa. C.S. §504. (Findings of Fact No. 24)
3. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances for himself on a long term basis for other than an emergency, in violation of the Principles of Medical Ethics. (Findings of Fact No. 12)
4. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.10 in that Respondent prescribed controlled substances for himself without having a current license to practice medicine in the Commonwealth. (Findings of Fact Nos. 5, 12)
5. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances to himself and others without having a valid DEA permit to prescribe controlled substances. (Findings of Fact, Nos. 6-10, 12-14)
6. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances for his wife on a long term basis for other than minor problems, contrary to the Principles of Medical Ethics. (Findings of Fact, Nos. 9-10)
7. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.10 in that Respondent practiced without a license. (Findings of Fact, Nos. 5, 9-10, 12-14)
8. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances for his wife without having a valid permit from the DEA to prescribe controlled substances. (Findings of Fact, Nos. 6-10)
9. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(6) in that Respondent violated the Board's regulations at 49 Pa. Code §§16.92 and 16.95 by failing

to perform patient evaluations prior to dispensing controlled substances to himself, his wife, and patient J.C., and by failing to keep adequate medical records. (Findings of Fact, Nos. 11-15)

10. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.10 in that Respondent prescribed or performed professional services for 28 patients when his license was not current. (Findings of Fact, Nos. 5, 9-10, 12-14)

11. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(6) in that Respondent violated the Board's regulations at 49 Pa. Code §§16.92 and 16.95 by failing to perform physical evaluations on those 28 patients prior to prescribing controlled substances, or to document those evaluations or keep medical records for his patients. (Findings of Fact, Nos. 11-15)

12. Respondent is subject to disciplinary action under the Act at 63 P.S. § 422.41(8) in that Respondent prescribed controlled substances for multiple patients when he did not have a current DEA registration. (Findings of Fact, Nos. 6-10, 12-14)

13. Respondent is subject to disciplinary action under the HCSMA, 40 P.S. §1301.701(f), in that Respondent practiced medicine in Pennsylvania without maintaining the required amount of professional liability insurance in violation of the HCSMA at 40 P.S. §1301.701(a). (Findings of Fact Nos. 16)

14. Respondent is subject to disciplinary action under the HCSMA at 40 P.S. §1301.701(f), in that more than 50% of Respondent's medical practice was in Pennsylvania during the period from January 1, 1998 through April 30, 2001, and Respondent did not pay the required CAT Fund surcharge in violation of the HCSMA at 40 P.S. §1301.701(e). (Findings of Fact Nos. 17-23)

15. The Board is authorized to impose disciplinary or corrective measures or a civil

penalty pursuant to section 42 of the MPA, 63 P.S. §422.42, and the HCSMA at 40 P.S.

§1301.701(f).



## DISCUSSION

This action is brought in part under the HCSMA at 40 P.S. §1301.701, and under the Act at 63 P.S. §§ 422.10, 422.41(6) and 422.41(8), which provide in part as follows:

### **§1301.701. Professional liability insurance and fund**

(a) Every health care provider as defined in this act, practicing medicine or podiatry or otherwise providing health care services in the Commonwealth shall insure his professional liability only with an insurer licensed or approved by the Commonwealth of Pennsylvania, or provide proof of self-insurance in accordance with this section.

(1)(i) A health care provider, other than hospitals, who conducts more than 50% of his health care business or practice within the Commonwealth of Pennsylvania shall insure or self-insure his professional liability in the amount of \$100,000 per occurrence and \$300,000 per annual aggregate. . . .

\* \* \*

(e)(1) The fund shall be funded by the levying of an annual surcharge on or before January 1 of every year on all health care providers entitled to participate in the fund . . . .

(f) The failure of any health care provider to comply with any of the provisions of this section or any of the rules and regulations issued by the director shall result in the suspension or revocation of the health care provider's license by the licensure board.

### **§ 422.10. Unauthorized practice of medicine and surgery.**

No person other than a medical doctor shall engage in any of the following conduct except as authorized or exempted in this act:

- (1) Practice medicine and surgery.
- (2) Purport to practice medicine and surgery.
- (3) Hold forth as authorized to practice medicine and surgery through use of a title, including, but not necessarily limited to, medical doctor, doctor of medicine, doctor of medicine and surgery, doctor of a designated disease, physician, physician of a designated disease, or any abbreviation for the foregoing.

(4) Otherwise hold forth as authorized to practice medicine and surgery.

**§ 422.41. Reasons for refusal, revocation, suspension or other corrective actions against a licensee or certificate holder.**

The board shall have authority to impose disciplinary or corrective measures on a board-regulated practitioner for any or all of the following reasons:

\* \* \*

(6) Violating a lawful regulation promulgated by the board or violating a lawful order of the board previously entered by the board in a disciplinary proceeding.

\* \* \*

(8) Being guilty of immoral or unprofessional conduct. Unprofessional conduct shall include departure from or failing to conform to an ethical or quality standard of the profession. In proceedings based on this paragraph, actual injury to a patient need not be established.

The Board's regulations at 49 Pa. Code §§16.92 and 16.95 provide in pertinent part as follows:

**§ 16.92. Prescribing, administering and dispensing controlled substances.**

(a) A person licensed to practice medicine and surgery in this Commonwealth or otherwise licensed or regulated by the Board, when prescribing, administering or dispensing controlled substances, shall carry out, or cause to be carried out, the following minimum standards:

(1) *Initial medical history and physical examination.* In a health care facility regulated by the Department of Health, the Department of Public Welfare or the Federal government, an initial medical history shall be taken and an initial physical examination shall be conducted to the extent required by the Department of Health in 28 Pa. Code (relating to health and safety) or Department of Public Welfare in 55 Pa. Code (relating to public welfare) or the Federal government in appropriate Federal regulations, whichever is applicable, and bylaws of the health care facility and its medical staff. In other practice settings, before commencing treatment that involves prescribing, administering or dispensing a

controlled substance, an initial medical history shall be taken and an initial physical examination shall be conducted unless emergency circumstances justify otherwise. Alternatively, medical history and physical examination information recorded by another health care provider may be considered if the medical history was taken and the physical examination was conducted within the immediately preceding 30 days. The physical examination shall include an evaluation of the heart, lungs, blood pressure and body functions that relate to the patient's specific complaint.

(2) *Reevaluations.* Among the factors to be considered in determining the number and frequency of follow-up evaluations that should be recommended to the patient are the condition diagnosed, the controlled substance involved, expected results and possible side effects. For chronic conditions, periodic follow-up evaluations shall be recommended to monitor the effectiveness of the controlled substance in achieving the intended results.

(3) *Patient counseling.* Appropriate counseling shall be given to the patient regarding the condition diagnosed and the controlled substance prescribed, administered or dispensed. Unless the patient is in an inpatient care setting, the patient shall be specifically counseled about dosage levels, instructions for use, frequency and duration of use and possible side effects.

(4) *Medical records.* In a health care facility regulated by the Department of Health, the Department of Public Welfare or the Federal government, information pertaining to the prescription, administration or dispensation of a controlled substance shall be entered in the medical records of the patient and the health care facility under 28 Pa. Code or 55 Pa. Code or appropriate Federal regulations, whichever is applicable, and bylaws of the health care facility and its medical staff. In other practice settings, certain information shall be recorded in the patient's medical record on each occasion when a controlled substance is prescribed, administered or dispensed. This information shall include the name of the controlled substance, its strength, the quantity and the date it was prescribed, administered or dispensed. On the initial occasion when a controlled substance is prescribed, administered or dispensed to a patient, the medical record shall also include a specification of the symptoms observed and reported, the diagnosis of the condition for which the controlled substance is being given and the directions given to the patient for the use of the controlled substance. If the same controlled substance continues to be prescribed, administered or dispensed, the medical record shall reflect changes in the symptoms observed and reported, in the

diagnosis of the condition for which the controlled substance is being given and in the directions given to the patient.

(5) *Emergency prescriptions.* In the case of an emergency phone call by a known patient, a prudent, short-term prescription for a controlled substance may be issued. Neither a refill nor a consecutive issuance of this emergency prescription may be given unless a physical examination and evaluation of the patient are first conducted. The results of this examination and evaluation shall be set forth in the patient's medical record together with the diagnosis of the condition for which the controlled substance is being prescribed. An emergency oral prescription for a Schedule II controlled substance shall be covered by a written prescription delivered to the pharmacist within 72 hours. In certain health care facilities regulated by the Department of Health, the Department of Public Welfare and the Federal government, orders for the immediate, direct administration of a Schedule II controlled substance to a patient are not considered prescriptions and are, therefore, not subject to the requirements in this paragraph. Further information regarding this exclusion can be found in The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-144) and 28 Pa. Code Chapter 25 (relating to controlled substances, drugs, devices and cosmetics).

(b) This section establishes minimum standards for the prescription, administration and dispensation of controlled substances by persons licensed to practice medicine and surgery in this Commonwealth or otherwise licensed or regulated by the Board. This section does not restrict or limit the application of The Controlled Substance, Drug, Device and Cosmetic Act or of another statute or regulation, and does not relieve a person from complying with more stringent standards that may be imposed by another statute or regulation.

(c) Compliance with this section will not be treated as compliance with the standards of acceptable and prevailing medical practice when medical circumstances require that the practitioner exceed the requirements of this section.

#### § 16.95. Medical records.

(a) A physician shall maintain medical records for patients which accurately, legibly and completely reflect the evaluation and treatment of the patient. The components of the records are not required to be maintained at a single location. Entries in the medical record shall be made in a timely manner.

(b) The medical record shall contain information sufficient to clearly identify the patient, the person making the entry if the person is not the physician—such as a physician assistant or a certified registered nurse

practitioner—the date of the medical record entry and patient complaints and symptoms.

(c) Clinical information pertaining to the patient which has been accumulated by the physician, either by himself or through his agents, shall be incorporated in the patient's medical record.

(d) The medical record shall also include diagnoses, the findings and results of pathologic or clinical laboratory examination, radiology examination, medical and surgical treatment and other diagnostic, corrective or therapeutic procedures.

(e) A patient's medical record shall be retained by a physician for at least 7 years from the date of the last medical service for which a medical record entry is required. The medical record for a minor patient shall be retained until 1 year after the minor patient reaches majority, even if this means that the physician retains the record for a period of more than 7 years.

(f) The components of a patient's medical record, which are prepared by a physician or his agent and which are retained by a health care facility regulated by the Federal government, or by the Department of Health or the Department of Public Welfare are considered to be a part of the patient's medical record which is required to be maintained by a physician, but are otherwise exempt from the requirements in subsections (a)—(e). These components of a patient's medical record shall contain information required by applicable Federal regulations, or by 28 Pa. Code (relating to health and safety) or 55 Pa. Code (relating to public welfare)—see for example, Department of Health regulations at 28 Pa. Code §§ 115.31—115.34 (relating to policies and procedures for patient medical records)—and health care facility and medical staff bylaws.

The Commonwealth charged that Respondent practiced medicine and surgery in the Commonwealth from December 31, 1996 and November 16, 1999, during which time Respondent's license to practice medicine in Pennsylvania was lapsed. Those charges against Respondent arose from allegations that Respondent prescribed controlled substances for himself and his wife regularly during that period, and treated patient J.C. and at least 28 other patients during that period. Respondent also prescribed controlled substances for patient J.C. and at least 28 other patients during that time frame. Respondent's DEA registration, authorizing him to

prescribe controlled substances, expired on November 30, 1997 and had not been renewed as of the date of the hearing in this matter.

The Commonwealth's evidence in this matter consisted of testimony from Stephen Dougherty, a Diversion Investigator with the United States Department of Justice, Drug Enforcement Administration, and William Harris, Deputy Regional Director for the Bureau of Enforcement and Investigations of the Department of State in the Philadelphia Region. Both witnesses testified to Respondent's treatment and prescribing of controlled substances during the time Respondent's license to practice medicine and his DEA registration were expired. In addition, Respondent admitted that he prescribed controlled substances for himself and his wife over an extended period of time while his license and DEA registration were expired, and also admitted to treating and prescribing for patient J.C. and at least 28 other patients during the same period of time. Respondent also admitted that he could not or would not produce medical records for himself, his wife, patient J.C. or the 28 other patients he admitted to treating during that time.

Respondent testified in his own defense that he repeatedly wrote prescriptions for Percocet for himself and his wife, and Ritalin for himself, in conjunction with treatment they received by other health care providers. Respondent failed, however, to provide any evidence of treatment by other licensed practitioners. Respondent also testified that he is an expert in treating chronic pain patients, and that he continued to treat patient J.C. and the 28 other patients he admitted to treating during the time his license and DEA registration were expired because he did not know his license and DEA registration were expired. When he was notified by Mr. Dougherty on November 4, 1999 that he could not continue to prescribe controlled substances

without a DEA registration, he continued to prescribe Xanax and Percocet for patient J.C., and believed he had Mr. Dougherty's permission to do so. Respondent failed to explain why he did not refer the patient in question to another licensed provider to continue his care. Respondent further testified that he could not produce medical records for the patients in question either because the records in question were psychiatric records he would not share with the investigator, or because a police search at an apartment he maintained resulted in a disruption of medical records, and a large flood in his home destroyed other medical records. Respondent admitted he kept no charts on either his wife or himself. Respondent also testified that his practice was limited during the time period in question because he was undergoing treatment for cancer.

Respondent also testified that his license and DEA registration were allowed to lapse during this time period because his illnesses resulted in his being less attentive to the business aspects of his practice, and because his office location had changed. Respondent had part-time employees to run the practice, and faulted those employees with allowing his licensure and DEA registration to expire. Respondent further testified that he had tried to renew his license in December 1997 and, because local pharmacies had continued to fill prescriptions that he wrote for himself and others, he assumed his attempt to renew in December 1997 had been successful. Respondent's only evidence that he had tried to renew in 1997 consisted of a copy of a letter to the Board dated December 10, 1997 on his letterhead; no copy of the renewal application or cancelled check was included.

A review of the evidence and testimony clearly reveals, and Respondent admits, that Respondent's license to practice medicine was expired from December 31, 1996 until November 16, 1999, and that his DEA registration expired on November 30, 1997 and had not been

renewed as of the date of the hearing, and that Respondent continued to practice and to prescribe controlled substances during that period. Respondent attempted during his testimony to shift the blame for those lapses onto his office employee(s), the Board and the DEA, but the fact remains that Respondent, and only Respondent, is responsible for ensuring that he is properly licensed by the Board and registered with the DEA. Respondent failed to maintain his license and DEA registration, and continued to practice and to prescribe controlled substances during the time his license and DEA registration were expired.

The Commonwealth's evidence also showed that Respondent prescribed Schedule II controlled substances for himself and his wife on a long term basis. This is contrary to the American Medical Association's Code of Medical Ethics, which states as follows:

**E-8.19 Self-Treatment or Treatment of Immediate Family Members.**

Physicians generally should not treat themselves or members of their immediate families. Professional objectivity may be compromised when an immediate family member or the physician is the patient; the physician's personal feelings may unduly influence his or her professional medical judgment, thereby interfering with the care being delivered. Physicians may fail to probe sensitive areas when taking the medical history or may fail to perform intimate parts of the physical examination. Similarly, patients may feel uncomfortable disclosing sensitive information or undergoing an intimate examination when the physician is an immediate family member. This discomfort is particularly the case when the patient is a minor child, and sensitive or intimate care should especially be avoided for such patients. When treating themselves or immediate family members, physicians may be inclined to treat problems that are beyond their expertise or training. If tensions develop in a physician's professional relationship with a family member, perhaps as a result of a negative medical outcome, such difficulties may be carried over into the family member's personal relationship with the physician.

Concerns regarding patient autonomy and informed consent are also relevant when physicians attempt to treat members of their immediate family. Family members may be reluctant to state their preference for another physician or decline a recommendation for fear of offending the physician. In particular, minor children will generally not feel free to refuse care from their parents. Likewise,



physicians may feel obligated to provide care to immediate family members even if they feel uncomfortable providing care.

It would not always be inappropriate to undertake self-treatment or treatment of immediate family members. In emergency settings or isolated settings where there is no other qualified physician available, physicians should not hesitate to treat themselves or family members until another physician becomes available. In addition, while physicians should not serve as a primary or regular care provider for immediate family members, there are situations in which routine care is acceptable for short-term, minor problems.

Except in emergencies, it is not appropriate for physicians to write prescriptions for controlled substances for themselves or immediate family members. (I, II, IV) Issued June 1993.

(Commonwealth's Exhibit C-9) It is clear that Respondent's conduct in prescribing Schedule II controlled substances for himself and his wife on a long term basis is contrary to the AMA's Code of Medical Ethics. Section 8.19 states that, except in emergencies, physicians should not write prescriptions for controlled substances for themselves or immediate family members, and that physicians should not provide treatment for themselves or immediate family members except for short-term, minor problems. As the prosecuting attorney pointed out, that Respondent testified he was unable to say "no" to his wife regarding the prescribing of Percocet is a prime example of the reason for this ethical tenet.

The appropriate standard in assessing the evidence in this proceeding is the preponderance standard. *Lyness v. Com., State Board of Medicine*, 561 A.2d 362, 369 (Pa. Commw. Ct. 1989), *reversed on other grounds*, 606 A.2d 1204 (Pa. 1992). After a review of the evidence and testimony presented in this matter, the hearing examiner finds that the Commonwealth has sustained its burden of proving Counts One, Two, Three, Four, Five, Six,

Seven, Eight, Nine and Ten of the order to show cause by a preponderance of the evidence, subjecting Respondent's license to practice medicine in Pennsylvania to disciplinary action.

### Professional Liability Coverage

The Commonwealth also charged that Respondent violated the HCSMA at 40 P.S. §1301.701(a) and (e) in that he failed to purchase liability insurance and failed to pay the CAT Fund surcharge due on that coverage from January 1, 1998 through April 30, 2001 when more than 50% of his medical practice was in Pennsylvania. The Commonwealth further charged that Respondent's license to practice medicine and surgery in Pennsylvania is subject to suspension or revocation pursuant to the HCSMA at §1301.701(f) and the Act at 63 P.S. §422.41(6) as a result of his failure to comply with the malpractice insurance requirements of the HCSMA and the Act.

The Pennsylvania General Assembly enacted the HCSMA to establish a system in which a patient who has sustained injuries as a result of tort or breach of contract by his health care provider can obtain a "prompt determination and adjudication of his claim and the determination of fair and reasonable compensation."<sup>1</sup> Failure of health care providers to purchase and maintain malpractice insurance deprives patients of this important opportunity. Health care providers are therefore required to maintain malpractice insurance to afford their patients this opportunity should the need arise. And, when providers do not paid the CAT Fund surcharge, those patients cannot seek excess coverage from the CAT Fund. The harmed patients are left with no malpractice insurance coverage and no redress. In this case, Respondent failed to purchase the requisite coverage, which leaves all individuals treated by Respondent from January 1, 1998

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<sup>1</sup>Section 102 of the Act, 40 P.S. § 1301.102. See also *McCoy v. Com., Bd. of Medical Ed. and Licensure*, 391 A.2d 723 (Pa. Cmwlth. 1978)