BEFORE THE ARIZONA MEDICAL BOARD

In the Matter of David A. Wilbirt, M.D. Holder of License No. 9920 For the Practice of Medicine In the State of Arizona	**Docket No. 07A-9920-MDX** **Case No. MD-03-0749A** **MD-05-0798A** **MD-05-0173A** **MD-05-0888A** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR REVOCATION**

On February 7, 2008 this matter came before the Arizona Medical Board ("Board") for oral argument and consideration of the Administrative Law Judge ("ALJ") Diane Mihalsky's proposed Findings of Fact and Conclusions of Law and Recommended Order involving David A. Wilbirt, M.D. ("Respondent"). Respondent was notified of the Board's intent to consider this matter at the Board's public meeting. Respondent did not appear. The State was represented by Philip A. Overcash, Esq. Christopher Munns, Assistant Attorney General with the Solicitor General's Section of the Attorney General's Office provided independent legal advice to the Board.

The Board having considered the ALJ's recommended decision and the entire record in this matter hereby issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

1. The Arizona Medical Board ("the Board") is the duly constituted authority for licensing and regulating the practice of allopathic medicine in the State of Arizona.

2. David A. Wilbert, M.D. ("Respondent") is the holder of License No. 9920 for practice as an Allopathic Physician in the State of Arizona.

3. Certain prescription medications are subject to the Uniform Controlled Substances Act, A.R.S. § 36-2451 *et seq.* Those medications are categorized as Schedule II-V

controlled substances according to their potential for abuse. Schedule II-V medications have a high potential for abuse. Their use may lead to severe physical or psychological dependence. Schedule III medications have some potential for abuse. Their use may lead to low-to-moderate physical dependence or high psychological dependence.

4. Since 2003, the Board has conducted at least four separate investigations into Respondent's alleged improper prescription of controlled substances and fitness to practice medicine, which were denominated Complaints Nos. MD-03-0749, MD-05-0173, MD-05-0798, and MD-05-0888.

5. The four complaints were consolidated and referred to the Office of Administrative Hearings. On October 25, 2007, the Board issued a Complaint and Notice of Hearing on the complaints, which charged Respondent with having committed acts of unprofessional conduct under A.R.S. §§ 32-1401(27)(a), (e), (j), (q), (r), (hh), (ss) and requested that Respondent's license be revoked.

6. The Complaint and Notice of Hearing also set an administrative hearing on December 12, 2007 at 9:00 a.m. The Board mailed the Complaint and Notice of Hearing to Respondent at his address of record and to Respondent's attorney.

7. On November 15, 2007, Respondent's attorney sent a letter to the Board and to its attorney, which stated that he had allowed his license to expire in August 2007, that he did not intend to practice medicine in the future, and that, "[r]ather than incur the fees and costs associated with being represented in the proceedings for which you have given notice, he wishes to formally advise you that he will not participate in the proceedings."[1]

8. An administrative hearing was held on December 12, 2007 at 9:00 a.m., at which the Board appeared through its attorney. Although the beginning of the duly noticed hearing was

[1] The Board's Ex. 3.

delayed fifteen minutes to allow Respondent additional travel time, he neither appeared, personally or through an attorney, contacted the Office of Administrative Hearings to request a continuance or that the time for the hearing be further delayed, nor presented any evidence to defend his license.

9. The Board presented the testimony of its Case Manager Anita Shepherd and Chief Medical Consultant Kelly Sems, M.D. and had admitted into evidence seventeen exhibits.

HEARING EVIDENCE
Case No. MD-03-0749
Patient R.C.

10. The Board initiated case number MD-03-0749 in August 2003, after a pharmacist reported that Respondent had prescribed to patient R.C. excessive amounts of OxyContin and Norco, which are Scheduled II and III controlled substances.

11. Between July 8 and August 5, 2003, R.C. had received six prescriptions for 195 OxyContin (40 mg) tablets. OxyContin contains a semisynthetic narcotic analgesic with multiple actions qualitatively similar to those of morphine. Its use is indicated for the relief of moderate to moderately severe pain.

12. R.C. also received 240 Norco 10 mg tablets from four prescriptions filled between July 20 and July 31, 2003. Between July 20, 2003 and January 14, 2004, R.C. received twelve prescriptions for 840 Norco (10/325 mg) tablets. Norco contains a semisynthetic narcotic analgesic and antitussive with multiple actions qualitatively similar to those of codeine. Its use is indicated for relief of moderate to moderately severe pain.

13. The Board's Medical Consultant Dr. Sems reviewed Respondent's patient records for R.C. Respondent first saw R.C., a 31-year-old male, on November 19, 2002 for a complaint of pain in his left ankle.[2] Respondent's records for R.C. do not include a formal history of

[2] Dr. Sems' report was the Board's Ex. 13.

present illness or review of systems regarding the possible cause or etiology of R.C.'s complaint of left ankle pain, for example, a fracture or arthritis, or the effect of the prescribed medications. The records include no assessment or alternative treatment plan, for example, rehabilitation or splints. Dr. Kelly testified at the hearing that a recurrent theme was Respondent's "sparse records," which were not sufficient to allow another physician to understand Respondent's treatment.

14. Dr. Sems testified that, especially for controlled substances, a physician should keep adequate records. The pitfalls of improper prescription of controlled substances to a patient who does not require them include physical and psychological addiction. In addition, if the underlying cause of the pain is not identified or treated, the patient's condition is unlikely to improve.

15. Dr. Sems testified that the pharmacy records showed signs, such as early refills and use of multiple pharmacies, that R.C. was abusing the controlled substances that Respondent had prescribed. But Respondent's medical records for R.C. did not note such signs. Although Respondent's 2003 response to the complaint noted that some of the pharmacists had contacted him about their concerns, Respondent's medical records for R.C. do not include any documentation of calls concerning R.C.'s suspicious behavior. If Respondent were monitoring patients for chronic pain management, he should have noticed R.C.'s pattern of conduct. These omissions from Respondent's records were below the standard of care.

16. Dr. Sems testified that, in addition, the pharmacy surveys indicate R.C. received prescriptions from Respondent for Viagra on numerous occasions. There is no indication in Respondent's records for R.C. of erectile dysfunction or other problem or any discussion of blood pressure monitoring and the possible cardiovascular effects of Viagra.

17. In his response to the complaint involving R.C., Respondent reported that he was unaware that the Norco doses he prescribed to R.C. contained a potentially harmful amount of Acetaminophen until a pharmacy technician alerted him to the fact. Respondent also indicated he

questioned R.C.'s behavior regarding the acquisition of the medication, but did not act upon his suspicions until after the Board notified him of its inquiry.

Patient M.K.

18. As the Board continued its investigation, it discovered that Respondent had also prescribed excessive amounts of Norco and Effexor to Patient M.K. M.K. received 150 Norco 10 mg tablets from two prescriptions, filled between June 17, 2003 and July 25, 2003, and 150 Effexor tablets, filled between July 17, 2003 and July 18, 2003. M.K. also received from Respondent prescriptions for 1250 Norco 10 mg tablets, which M.K. filled at five different pharmacies between October 26, 2003 and January 6, 2004.

19. Dr. Sems testified that Respondent initially saw M.K. on October 8, 2002, but did not record M.K.'s chief complaint, history of present illness, assessment, or plan. On several occasions thereafter, M.K. complained of musculoskeletal pain in his neck, spine, and other areas. Respondent's records included copies of x-rays and MRIs, which documented a history of ligamentous tears. Respondent's treatment notes indicated that these injuries had occurred in "training," from which Dr. Sems inferred that M.K. was involved in body building.

20. Dr. Sems testified that Respondent also prescribed Percocet and Clonidine, which may be used to regulate blood pressure, and Nexium to M.K. Respondent's treatment record does not indicate any hypertension or other conditions that these drugs could have been used to treat.

21. Dr. Sems testified that, several months into Respondent's doctor-patient relationship with M.K., Respondent's records reflect that M.K. stated that he wanted to "detox" in January 2004. Respondent started M.K. on Suboxone 8mg and Nexium and Clonidine. In a separate entry dated January 26, 2004, Respondent noted opiate abuse history and symptoms and history of previous drug abuse treatment in 1999.

22. Dr. Sems testified that the standard of care requires a history of substance abuse to be obtained with the patient first presents for treatment, not several months later, after the doctor has been prescribing narcotics. Although it is not below the applicable standard of care to prescribe narcotics to a patient with a drug abuse history, the best practice is to involve an addiction specialist in the patient's care.

23. At a minimum, if a doctor is providing chronic pain management to a patient, he should monitor the patient's use of pain medications. Respondent did not monitor M.K.'s use of pain medication. M.K. used five different pharmacies within a span of three months, which was a cause for concern that Respondent apparently never noticed until it was called to his attention.

24. Dr. Sems testified that Respondent did not keep adequate patient records for M.K. As another example, M.K.'s lab work indicated an elevated Creatine Kinese ("CK"), which is a muscle enzyme. Although an elevated level of CK, if untreated, presents potential for renal failure, Respondent did nothing.

25. During Respondent's treatment, M.K. became narcotic dependent and subsequently required drug rehabilitation.

Case Number MD 05-0798

26. The Board initiated Case Number MD-05-0798 on August 8, 2005, after receiving a newspaper article describing a federal Drug Enforcement Administration ("DEA") investigation of Respondent. The article stated that Respondent had written thousands of illegal prescriptions over the preceding four years for steroids and human growth hormones for bodybuilders and that the DEA confiscated three plastic bags of marijuana from Respondent's home.

27. The Board subsequently obtained the search warrant in United States District Court for the District of Arizona Case No. 05-7154MB, which recited the facts that led to the search of Respondent's home.[3]

28. Pursuant to the DEA's investigation, Respondent improperly sold controlled substances to undercover law enforcement agents without conducting physical examinations.

29. Respondent admitted to prescribing controlled substances without performing medical examinations.

30. Without having the results of an adequate medical history or physical examination before prescribing medications to patients or other persons and without the requisite doctor/patient relationship, Respondent prescribed controlled substance medications to patients for other than accepted therapeutic purposes.

31. While continuing to prescribe controlled substances to patients, Respondent failed to monitor them for possible overuse or abuse.

32. By failing to obtain an adequate medical history or perform an adequate physical examination before prescribing medications to patients, and by failing to monitor them for possible overuse or abuse, Respondent unreasonably exposed patients to an increased risk of potential harm that he would prescribe contraindicated or otherwise inappropriate medications for them.

33. When prescribing controlled substances to patients, Respondent failed or refused to maintain adequate records on the patients. His sparse notes did not provide sufficient information to support the diagnosis, justify the treatment, accurately document the results, indicate advice and cautionary warnings provided to the patients, or enable another practitioner to assume continuity of the patients' care at any point in the course of treatment.

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[3] *See* the Board's Ex. 11.

34. Pursuant to the DEA's investigation, Respondent was found to be in illegal possession of marijuana, which he admitted using.

Case Number MD-05-0173

35. The Board initiated Case Number MD-05-0173 on March 19, 2005, after receiving an anonymous complaint that alleged that Respondent had been prescribing medication to bodybuilders for non-therapeutic purposes.[4]

36. Respondent prescribed Arimidex, Oxandrolene, Descanoate, Stanozolol, Cypionate, Novarel, Dyazide, Triamterene, Tamoxifen, Winstral, Nondrolone, and Cytomel. These prescriptions were filled by an out-of-state pharmacy for use by a bodybuilder. Respondent prescribed many of these drugs to the clientele of a company called Bodybuilders.

Case Number MD-05-0888

37. On April 13, 2005, Respondent entered into an Interim Consent Agreement for a Non-Disciplinary Practice Limitation ("the Consent Agreement")[5] after he suffered a stroke on February 16, 2005 and subsequently experienced cognitive impairment.[6] The Consent Agreement prohibited Respondent from engaging in the practice of clinical medicine, including prescribing treatment or medications.

38. Respondent continued to prescribe controlled substances to patients after he signed the Consent Agreement, in violation of its provisions prohibiting him from engaging in the practice of clinical medicine, including prescribing medications.[7]

39. The Board initiated Case Number MD-05-0888 on August 25, 2005, after a pharmacist reported that Respondent had telephoned him on August 22, 2005 with a prescription for Xanax for Patient B.P. The pharmacist noted suspicions about B.P. and concern about B.P.'s drug-seeking behavior.

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[4] *See* the Board's Ex. 17.
[5] *See* the Board's Ex. 6.
[6] *See* the Board's Ex. 7.
[7] *See* the Board's Ex. 8 (8/22/05 prescription for Xanax and 5/25/05 prescription for Vicodin).

Respondent's Invocation of His Fifth Amendment Privilege

40. The Board consolidated Case Nos. MD-03-0749, MD-05-0173, MD-05-0798, and MD-05-0888 for consideration at its August 30, 2005 meeting. It informed Respondent's attorney that these matters had been placed on the agenda in a letter dated August 26, 2005.[8]

41. In response, Respondent's attorney informed the Board that, because Respondent could face criminal charges in the future, he would invoke his Fifth Amendment right against self-incrimination and would not testify on his own behalf or answer the Board's questions at the meeting.

CONCLUSIONS OF LAW

1. This matter lies within the Board's jurisdiction.[9]

2. The notice of the hearing that the Board mailed to Respondent at his address of record and to his attorney was reasonable and it appears that Respondent actually received notice of the hearing.[10]

3. The Board bears the burden of proof and must establish Respondent's unprofessional conduct and cause to discipline his license by a preponderance of the evidence.[11] "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[12] A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[13]

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[8] *See* the Board's Ex. 4.
[9] A.R.S. §§ 32-1451 *et seq.* and 41-1092 *et seq.*
[10] *See* A.R.S. §§ 41-1092.04; 41-1092.05(D); 41-1061(A).
[11] *See* A.R.S. § 41-1092.07(G)(1); A.A.C. R2-19-119; *see also Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).
[12] Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960).
[13] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

4. The privilege against self-incrimination under the Fifth Amendment of the United States Constitution is not applicable to administrative licensing actions; the Board therefore may draw an adverse inference from Respondent's assertion of the privilege.[14] The Board may infer from Respondent's invocation of the Fifth Amendment in this action that, if he had appeared before the Board, he would have admitted all allegations of unprofessional conduct that have been charged in the complaints that have been made against him.

5. The Board therefore has established that Respondent committed unprofessional conduct as defined by A.R.S. § 32-1401(27)(a), (e), (j), (q), (r), (hh), (ss).[15]

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[14] *See Begay v. Arizona Dept. of Economic Security*, 128 Ariz. 407, 409-10, 626 P.2d 137, 139-40 (App. 1981).

[15] This statute provides as follows:

> "Unprofessional conduct" includes the following, whether occurring in this state or elsewhere:
>
> (a) Violating any federal or state laws, rules or regulations applicable to the practice of medicine.
>
> (e) Failing or refusing to maintain adequate records on a patient.
>
> (j) Prescribing, dispensing or administering any controlled substance or prescription-only drug for other than accepted therapeutic purposes.
>
> (q) Any conduct or practice that is or might be harmful or dangerous to the health of the patient or the public.
>
> (r) Violating a formal order, probation, consent agreement or stipulation issued or entered into by the board or its executive director under this chapter.
>
> (hh) Prescribing, dispensing or administering anabolic-androgenic steroids to a person for other than therapeutic purposes.
>
> (ss) Prescribing, dispensing or furnishing a prescription medication or a prescription-only device as defined in section 32-1901 to a person unless the licensee first conducts a physical examination of that person or has previously established a doctor-patient relationship. . . .

The legislature has defined "adequate records" to mean a "legible medical record" containing "at a minimum, sufficient information to identify the patient, support the diagnosis, justify the treatment, accurately document the results, indicate the advice or cautionary warnings provided to the patient, and provide sufficient information for another practitioner to assume continuity of the patient's care at any point in the course of treatment." A.R.S. § 32-1401(2).

6. Respondent's persistent acts of unprofessional conduct and disregard of the Consent Agreement indicate that he is unwilling to be subject to the Board's regulatory powers.

ORDER

Based upon the Findings of Fact and Conclusions of Law as adopted, the Board hereby enters the following Order:

1. Respondent's License No. 9920 is revoked on the effective date of this Order and Respondent shall return his wallet card and certificate of licensure to the Board.

2. Under A.R.S. § 32-1451(M), Respondent shall be assessed the costs of the formal hearing paid by Respondent to the Board within thirty (30) days of being invoiced by the Board, unless such deadline date is extended by the Board or authorized Board Staff.

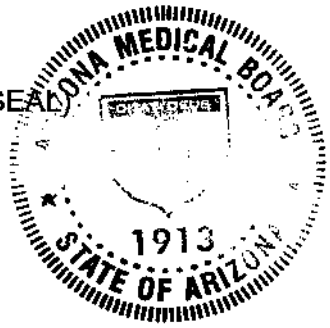
RIGHT TO PETITION FOR REHEARING OR REVIEW

Respondent is hereby notified that he has the right to petition for a rehearing or review by filing a petition with the Board's Executive Director within thirty (30) days after service of this Order. A.R.S. § 41-1092.09. The petition must set forth legally sufficient reasons for granting a rehearing. A.C.C. R4-16-103. Service of this order is effective five (5) days after date of mailing. If a motion for rehearing is not filed, the Board's Order becomes effective thirty-five (35) days after it is mailed to Respondent.

Respondent is further notified that the filing of a motion for rehearing is required to preserve any rights of appeal to the Superior Court.

Dated this 7TH day of February, 2008.

(SEAL)



ARIZONA MEDICAL BOARD

By: _____
Lisa Wynn
Executive Director

Original of the foregoing filed this
7th day of February, 2008, with:

Arizona Medical Board
9545 East Doubletree Ranch Road
Scottsdale, AZ 85258

Copy of the foregoing filed this
7th day of February, 2008, with:

Cliff J. Vanell, Director
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Executed copy of the foregoing mailed
by US Mail this 7th day of February, 2008, to:

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