BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Petition for Interim Suspension Order Against: JUDE THADDEUS WATERBURY, Physician's and Surgeon's Certificate Number A 90991, Respondents.	OAH No. 2012031100

DECISION ON PETITION FOR INTERIM SUSPENSION ORDER

This petition for interim suspension order (ISO) was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 31, 2012, in Sacramento, California.

Jannsen Tan, Deputy Attorney General, represented Linda K. Whitney, Executive Director, (petitioner), Medical Board of California (Board).

Timothy J. Aspinwall, Attorney at Law, represented Jude Thaddeus Waterbury, M.D. (respondent), who was present.

Pursuant to Government Code section 11529, subdivision (d), testimony, affidavits and other documentary evidence were received, oral and written arguments were presented, the record was closed, and the matter was submitted for decision on May 31, 2012.

SUMMARY OF DECISION

Petitioner seeks an ISO under Government Code section 11529 against respondent for his use of alcohol on January 22, 2012, while he was on call and treating patients. As set forth below, petitioner established that: (1) respondent engaged in acts and omissions constituting a violation of the Medical Practice Act; and (2) permitting respondent to continue to engage in the licensed activity until an accusation is served and a decision rendered thereon would endanger the public health, safety, and welfare. Petitioner therefore demonstrated that an ISO should be issued against respondent under Government Code section 11529.

FACTUAL FINDINGS

Procedural History

1. On March 28, 2012, petitioner's petition for an ex parte ISO was heard. Respondent's counsel appeared at the hearing. An order granting an ex parte ISO (Ex Parte ISO) was issued, which: (1) suspended respondent's license until such time as a noticed hearing could be held pursuant to Government Code section 11529; and (2) scheduled a noticed hearing for April 6, 2012, unless the parties agreed otherwise. Pursuant to the agreement of the parties, the noticed ISO hearing was initially rescheduled to April 20, 2012, and thereafter continued to May 31, 2012. Respondent waived the time deadline set forth in Government Code section 11529, subdivision (c), for conducting a noticed hearing until May 31, 2012, and agreed that the Ex Parte ISO and the immediate suspension set forth therein would remain in effect until the noticed hearing on the ISO petition was held and an order issued thereon.

Respondent's License

2. On April 22, 2005, the Board issued Physician's and Surgeon's Certificate Number A 90991 (license) to respondent. Respondent's license was in full force and effect at all times relevant to the charges brought in this proceeding and will expire on June 30, 2012, unless renewed.

January 21 and 22, 2012 Incidents

3. Respondent was the on-call night physician in the intensive care unit (ICU) at Methodist Hospital in Sacramento from 6:00 p.m. on January 21, 2012, until 6:00 a.m. on January 22, 2012. A patient, who had previously coded in the operating room, was transferred to the ICU for recovery. A nurse informed respondent that he would need to place a central line in the patient. Respondent decided to place the central line in the femoral area/groin. The nurse was concerned that this was not the usual site for a central line. While preparing for the procedure, the nurse observed respondent making "strange gestures." As he tried to place the central line, respondent left the bed rail up, leaned in very close, and was "wobbly." He poked the patient with the needle several times and was unsuccessful in placing the line. While trying to place the line, respondent uttered profanities, including the "f-word." He was wearing regular clothes and compromised the sterile field of the procedure. He gave up trying to place the line, and said to another doctor that it was "your turn." Respondent told the other doctor that he had to get the central line in, or "I'll hit you." After the other doctor placed the central line, respondent left the patient's room and squatted on the floor. A nurse asked him if he was drunk, and he replied, "No, I'm fine."

4. Respondent was asked to provide care to another patient that night. A nurse informed respondent about the patient and the need for a critical lab value. Respondent

pulled the patient's chart up on the computer and was "very animated." He looked at the bi-carb lab value. The nurse informed him that he was not looking at the most recent lab value. Respondent ordered "2 amps of bi-carb, a liter of saline x3," which the nurse believed to be "crazy." The nurse asked respondent whether he really wanted to give the patient that amount of bi-carb, and respondent replied, "if we mess her up, we'll intubate her." The nurse took respondent's order to another nurse for review, who paged another doctor. That doctor gave a different order.

5. During the course of the night, respondent was paged several times, but did not respond to his pages. At approximately 0400, a nurse received a call from security informing her that respondent was in the hospitalist office. Respondent returned to the ICU. A nurse observed that respondent was in a "daze," "swaying," and had an "unsteady gait." She believed that respondent was impaired. The nurse asked respondent to follow her out of the ICU to the administrative conference room. She placed a hand on him to steady him. She could smell the odor of alcohol coming from him. Respondent was informed of the staff's complaints regarding his behavior. He stated that he had difficulty sleeping, was tired, had not been eating well, and the night shift was hard on him. His speech was slurred, he appeared confused, and he had difficulty focusing and answering questions. The hospital tested respondent for alcohol and other drugs. When the test results were received, they were communicated to respondent. A taxi was called and respondent was asked to leave the hospital's premises.

6. At the hearing, respondent did not dispute the facts set forth above. He stated that he was intoxicated when he was on-call the night of January 21 and 22, 2012. At the time, respondent had a solo, office-based primary care practice. He occasionally moonlighted as a hospitalist. He rarely spent the entire night at the hospital, but agreed to on the night in question as a favor to another doctor. He had had a stressful day and went to work "on edge." He had a bottle of vodka in his car, and drank from it prior to starting work as the on-call doctor in the ICU. He described the beginning of his shift as "stress-filled." He had difficultly getting a pager, and there were multiple patients with chest pain. At one point during the evening, he returned to his car and drank more vodka. He could not remember how much he drank. He stated that he either had no memory or just a "patchy" memory of the remainder of the night, and he could not distinguish between what he actually remembered and what he was told by others.

7. Respondent testified that he was asked to submit a urine sample and that he confided in the doctor who made the request that he did not want to take the test because he had consumed alcohol that evening. He submitted to the testing, and was informed that he had a "markedly elevated" blood alcohol content.

Respondent's History of Alcohol Abuse

8. At hearing, respondent described his long history of alcohol abuse. He testified that he was a weekend "binge drinker" in college, but did not drink mid-week. After college, starting in about the fall of 1991, he began having one to two beers at the end of each workday. Over the next two years, his drinking progressed to the point where he was drinking six to 10 beers a night. In the fall of 1993, he went to medical school in Hungary. He reduced the amount he was drinking, but still drank two to three one-half liters of beer each evening. He would drink more than this when he was with friends. In two years, he was drinking three to five beers every night. At this point, his then girlfriend – current wife – confronted him about his excessive drinking. He eventually agreed that his consumption was excessive, and reduced his intake to four or five beers a week. At the end of his final year of medical school, when he came to the United States for rotations, he increased his consumption.

9. Respondent graduated from medical school in 2000, and moved back to the United States in January 2001. He began an internal medicine residency in September 2001. At the time, he had a habit of drinking one to two beers every evening. This stayed consistent until his wife and daughter went back to Hungary for a trip in the spring of 2003. While they were gone, he drank more, consuming four to eight beers every night. When they returned from Hungary, he reduced his consumption to one beer a day.

10. Respondent maintained this one-beer-a-night habit until after he began his private practice in November 2005. He began to feel that one beer a night was not enough to make him feel relaxed. But because he did not want to argue with his wife about his alcohol consumption, he started hiding a bottle of whiskey to supplement his one beer a night. This pattern of drinking escalated to the point in 2007 or 2008 where he drank so much, he passed out in his walk-in closet. He discussed his drinking with his wife, and quit drinking completely until the next time his wife and daughter went on their summer vacation to Hungary. According to respondent, he was abstinent for about six months. He stated that there was no particular stressor that caused him to return to drinking. He believed at that time that he could maintain control of his consumption and would be able to return to abstinence again.

11. After his wife and daughter returned from Hungary, respondent began hiding hard liquor in the book shelf. His wife discovered it in a few months. Respondent had another period of abstinence for some months, but then returned to drinking again. His wife found out about his drinking, but eventually stopped searching through his things for alcohol and stopped confronting him about his consumption. He had periods of abstinence and drinking until the summer of 2011, when his wife and daughter went on their annual trip to Hungary, at which time he began his binge drinking again.

12. Respondent began a pattern of drinking throughout the day. When he was drinking, he had difficulty sleeping. He began taking sips in the morning and then again on

his way to work. He described his consumption as "maintenance drinking." He stated that he followed this pattern of drinking during the work week, but not on the weekend. He thought that he had his drinking under control. At hearing, he recognized the "insanity" of practicing medicine while drinking, but rationalized that his behavior was temporary. He believed that he would be able to stop when he had less stress in his life. He followed this pattern of drinking until January 21 and 22, 2012.

Respondent's Conduct Since January 22, 2012

13. The night after the January 22, 2012 incidents, respondent called Dr. Dennis McKibben, a podiatrist and friend, who was the previous chair of the hospital's wellness committee. Respondent asked Dr. McKibben for help. Dr. McKibben contacted Dr. India Fleming, an active member of the hospital's wellness committee and a staff psychologist. Dr. Fleming suggested that respondent begin counseling with Dr. Steven McCormick, a neuropsychologist. It was respondent's intent to meet with Dr. McCormick to establish a therapy and monitoring program that would ensure safety in the workplace. One week later, respondent was informed that the hospital was going to notify the Board about the January 21 and 22, 2012 incidents. Respondent contacted counsel, who advised him to call Francine Farrell and Dr. Michael Parr, and to begin attending Alcoholics Anonymous (AA) meetings. Respondent kept his meeting with Dr. McCormick on February 14, 2012, and made appointments to meet with Ms. Farrell on February 15, 2012, and with Dr. Parr on February 17, 2012.

14. Ms. Farrell is a licensed Marriage and Family Therapist. She is also a certified Alcohol and Drug Abuse Counselor. For 20 years, she worked with the Board's Diversion Program. When she worked with the Diversion Program, she attended the program's Diversion Evaluation Committee (DEC) meetings as a group facilitator for the Sacramento area. When one of her patients was being evaluated, she would meet with the DEC and give them her recommendations. In 2008, when the Board's Diversion Program was discontinued, she became the Area Administrator for Pacific Assistance Group, which provides comprehensive monitoring and support for doctors and other professionals with substance abuse issues.

15. On February 15, 2012, respondent met with Ms. Farrell for five hours. For two to three hours, respondent completed the Pacific Assistance Group's intake process with Ms. Farrell. Respondent also attended his first group meeting.

16. Respondent has signed a five-year agreement with Pacific Assistance Group. The terms of this agreement include: (1) "zero tolerance" for any alcohol or drug use without the prior authorization of an addiction medicine specialist; (2) verification of abstinence through daily check-ins and random drug testing; (3) attendance at two health professional support groups a week; (4) 90 AA meetings in 90 days; (5) five AA meetings a week; (6) status reports to the hospital's well-being committee and work-site monitors at all locations at which respondent works; and (7) a nonrevocable release pursuant to which Ms. Farrell will

tell respondent's employer and the hospital's well-being committee if respondent has a positive test.

17. Respondent has been compliant with the terms of his agreement with Pacific Assistance Group. Because he has not worked since the January incidents, the provisions relating to the hospital and his employer have not come into play.

18. Respondent met with Dr. Parr on February 17, 2012. Dr. Parr is board-certified in Addiction Medicine. He has been the Medical Director of Sutter Hospital's Outpatient Drug & Alcohol Program since 1990. He was appointed to the Board's DEC from 1994 to 2002, and reappointed from 2005 to 2008. At his meeting with respondent on February 17, 2012, Dr. Parr recommended that respondent be admitted to a residential treatment program.

19. On March 1, 2012, respondent entered the in-patient treatment program at St. Helena Recovery Center. He completed treatment on March 29, 2012. His treatment included lectures, films, group therapy sessions and health support education, daily 12-step recovery meetings, behavioral training, and daily spiritual support.

20. Dr. Parr met with respondent on April 3, 2012, after respondent had completed St. Helena's residential treatment program. Dr. Parr discussed with respondent participating in New Dawn, an after-treatment program for individuals who have completed St. Helena's residential treatment program. In addition, Dr. Parr has had two visits with respondent and respondent's wife to get her perspective on the changes respondent has made in his life. According to Dr. Parr, there was a "lot of conflict" between respondent and his wife over the issue of respondent's alcohol consumption. Respondent has come to accept that he has a disease of chemical dependency. In all, Dr. Parr has met with respondent a total of six and one-half hours, which includes the meetings that respondent's wife attended. In addition, Dr. Parr has attended AA meetings for 28 years, and sees respondent at these meetings on a weekly basis.

21. Respondent has remained sober since January 22, 2012.

Respondent's Desire to Return to Work

22. Respondent's license is currently suspended. He wishes to return to work on a part-time basis. He submitted offers of employment from two private internal medicine practices. The first offer is from Douglas Young, M.D. The offer requires that respondent meet all the following restrictions:

a. Respondent will not be able to work more than 20-24 hours per week, until approved to work more hours by Ms. Farrell and Dr. Parr.

b. Respondent will work in an office where Dr. Young will be present at least 50 percent of the hours respondent works each week.

c. Dr. Young will be assigned as respondent's practice monitor.

d. Respondent will check with Dr. Young each day before work and at the end of respondent's shift and submit to an "Alco-strip" test both times, at respondent's expense.

e. If Dr. Young is at a work location different from respondent's work location, respondent will go to the location where Dr. Young is located to submit a urine sample.

f. If respondent tests positive on the Alco-strip, Dr. Young will immediately notify Ms. Farrell, who will then require respondent to submit a urine sample.

g. Respondent will cooperate with random drug and alcohol testing for approximately 48 tests per year at respondent's expense until further directed.

The second offer is from Alvin Sockolov, M.D. It contains almost identical restrictions, but is contingent on Dr. Sockolov's receiving approval from his partners and office manager.

23. Ms. Farrell testified that she would be able to monitor respondent's recovery and abstinence if he were to return to work under the restrictions set forth in the offers he has received. In addition, Ms. Farrell agreed that she would be willing to notify the Board in the event that respondent relapses, if respondent agrees to such notification.

24. Dr. Parr opined that the terms of monitoring set forth in the two offers provide adequate assurances of public safety if respondent were to return to work under the offers' restrictions. In addition, Dr. Parr stated that he would continue to participate in respondent's treatment and would want respondent to continue his ongoing participation in Ms. Farrell's assistance groups twice a week. Dr. Parr is "optimistic" that respondent would continue to remain sober under the monitoring included in the offer letters he has received. Dr. Parr stated that if the hearing had proceeded in April as originally scheduled, he would not have been able to give as optimistic an opinion because he would not have had sufficient observation time subsequent to respondent's completion of St. Helena's residential program. Dr. Parr feels more "reassured" now. In addition, Dr. Parr believes that it would be "therapeutic" for respondent to work so that he can use his medical skills and be of benefit to the public, and so that his recovery activities would not be "compromised."

25. Laurene Spencer, M.D., reviewed the information relevant to this matter as an expert reviewer for the Board and issued a declaration setting forth her review and opinions. Dr. Spencer is board-certified in Addiction Medicine. In her declaration, Dr. Spencer noted that respondent's blood alcohol level at 4:45 a.m. on January 22, 2012, was .224 G/L. According to Dr. Spencer, respondent's caring for patients while he was under the influence of alcohol constituted an extreme departure from the standard of care. In her declaration, Dr. Spencer stated that:

> Once Respondent's drinking was brought out into the open, Respondent appears to have followed the best course of action immediately seeking the care of an addiction physician, successfully completing a 28 day alcohol dependency treatment program, following through with aftercare with both his addiction physician, and with an addiction counselor. During Respondent's interview, he showed insight into his problems, and after initial concern about legal exposure, his responses were open and complete, without apparent attempts to minimize his behavior or the extent of his problem. Indeed, he self disclosed information about his prior drinking in a way that could have done harm to his medical-legal position. All of this is laudable and shows what appears to be a complete and genuine transformation within Respondent. Also during his interview, it became clear that Respondent is an otherwise thoughtful and capable physician working in a challenging medical setting. Medically, Respondent should be encouraged to continue with his addiction aftercare, both with the counselor and with his physician. He should be monitored regularly for as long a period of time as is practicable.

Dr. Spencer did not include in her declaration an opinion about whether she believes it would be safe for respondent to return to the practice of medicine at this time.

Discussion

26. Respondent engaged in an extreme and very dangerous departure from the standard of practice when he drank vodka while on-call in an ICU on January 21 and 22, 2012. He attempted to treat very ill patients while he was under the influence of alcohol.

27. Since that night, respondent has received and followed excellent advice from his attorney, Ms. Farrell and Dr. Parr. Respondent's testimony during the hearing was direct and candid. He described his long history of alcohol abuse, and showed insight into his alcoholism. As Dr. Spencer noted in her declaration, the transformation in which respondent has engaged since January 22, 2012, is laudable and appears genuine.

28. But even though respondent should be commended for the changes he has made since January 22, 2012, the evidence presented at the hearing showed that permitting him to engage in the practice of medicine before an accusation is issued and a decision is rendered thereon would endanger the public health, safety and welfare. It has been less than five months since respondent drank while on-call. He has had a very long history of alcohol abuse and hiding his alcohol consumption. He has also had a long history of drinking when his wife and daughter travel to Hungary and he is no longer under their watchful eyes. His wife and daughter are scheduled to take their annual vacation on July 1 through August 19 this year.

In addition, the restrictions set forth in the offers that respondent has received are not as complete or stringent as the probationary terms and conditions that the Board generally imposes upon physicians who have engaged in the types of behavior in which respondent has engaged. The Board has not had the opportunity to approve the doctors who have offered to employ and monitor respondent, or to assign a probation monitor to ensure the respondent remains compliant. In addition, the agreement that respondent has entered into with Ms. Farrell and the offers he has received for part-time employment do not carry with them the consequences for non-compliance that Board-ordered probation would. The offers that respondent has received do not provide sufficient assurances that the public would be adequately safeguarded if respondent returned to work before a full probationary order can be put in place.

When all the evidence submitted at the hearing is considered, petitioner established that: (1) there is a reasonable probability that petitioner will prevail if an accusation is filed against respondent; and (2) the likelihood of injury to the public in not issuing an ISO outweighs the likelihood of injury to respondent in issuing the order. Consequently, respondent must be suspended from practicing medicine until such time as an accusation is issued, a hearing held, and a decision rendered thereon in accordance with Government Code section 11529, subdivision (f), or this matter is otherwise resolved.

LEGAL CONCLUSIONS

1. Pursuant to Government Code section 11529, subdivision (a), an ISO may be issued:

> only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, or is unable to practice safely due to a mental or physical condition, and that permitting the licensee to

> continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

Government Code section 11529, subdivision (e), provides that:

> (e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the administrative law judge shall grant the interim order where, in the exercise of discretion, the administrative law judge concludes that:
>
> (1) There is a reasonable probability that the petitioner will prevail in the underlying action.
>
> (2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

2. Pursuant to Business and Profession Code section 2234, the Board "shall take action against any licensee who is charged with unprofessional conduct." Business and Professions Code section 2239, subdivision (a), defines "unprofessional conduct" to include the use of "alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely."

3. Respondent used alcohol on January 21 and 22, 2012, to an extent as to be dangerous to his patients and the public. His alcohol consumption impaired his ability to practice medicine safely. His conduct constituted unprofessional conduct and subjects him to discipline under Business and Professions Code sections 2234 and 2239. His alcohol use and actions to treat patients while he was under the influence of alcohol on January 21 and 22, 2012, constituted violations of the Medical Practice Act.

4. Petitioner established that: (1) there is a reasonable probability that petitioner will prevail if an accusation is filed against respondent; and (2) the likelihood of injury to the public in not issuing an ISO outweighs the likelihood of injury to respondent in issuing the order. Permitting respondent to continue to practice medicine would endanger the public health, safety, and welfare. To protect the public health, safety and welfare, respondent's license must be suspended until an accusation is filed and a decision is rendered thereon pursuant to Government Code section 11529, subdivision (f), or this matter is otherwise resolved.

ORDER

Petitioner's petition for an interim suspension order is GRANTED. Physician's and Surgeon's Certificate Number A 90991 issued to Jude Thaddeus Waterbury is SUSPENDED until an accusation is issued and a decision is rendered thereon in accordance with Government Code section 11529, subdivision (f), or this matter is otherwise resolved. Failure to comply with any of the requirements of Government Code section 11529, subdivision (f), shall nullify the interim suspension order, unless good cause can be shown for the delay.

DATED: June 14, 2012

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings