

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE STATE BOARD OF MEDICINE

PROCLAMATORY
2006 AUG 23 PM 12:00
Department of State

Commonwealth of Pennsylvania, :
Bureau of Professional and :
Occupational Affairs :
 : Docket No. 0186-49-05
v. :
 : File No. 04-49-04005
Harvey Walter Brookman, M.D., :
Respondent :

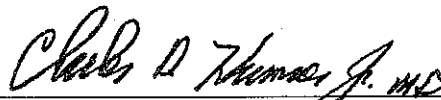
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Final Order Adopting Hearing Examiner's
Adjudication and Order

AND NOW, this 23rd day of August, 2006, the State Board of Medicine (Board), having reviewed the entire record of this case established before the hearing examiner adopts the Adjudication and Order of the hearing examiner as the Final Adjudication and Order in this case. A copy of the Adjudication and Order is attached as Attachment A.

This order shall take effect immediately.

**BY ORDER:
STATE BOARD OF MEDICINE**

A handwritten signature in cursive script that reads "Charles D. Hummer, Jr., M.D.".

Charles D. Hummer, Jr., M.D., Chairman

Respondent's Address: 12 Moon Circle
Yardley, PA 19067

Prosecuting Attorney: Kerry E. Maloney, Esquire
P.O. Box 2649
Harrisburg, PA 17105-2649

Board Counsel: Sabina I. Howell, Esquire

Date of Mailing: August 23, 2006

DATE DISTRIBUTED 6.30-06
PROSECUTION _____
COUNSEL / COMMONWEALTH OF PENNSYLVANIA
HEARING EXAMINER _____ DEPARTMENT OF STATE
OTHER _____ STATE BOARD OF MEDICINE

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2006 JUL 29 PM 2:35
Department of State

Commonwealth of Pennsylvania, :
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v. :
Harvey Walter Brookman, M.D., :
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Docket No. 0186-49-05
File No. 04-49-04005

PROPOSED ADJUDICATION AND ORDER

Suzanne Rauer
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 State Board of Medicine (Board) on an order to show cause (OSC1) filed February 4, 2005. The Commonwealth then filed an amended order to show cause (OSC2) on April 14, 2005, alleging that Harvey Walter Brookman, M.D., License No. MD-026946-E (Respondent), is subject to disciplinary action under the Medical Care Availability and Reduction of Error Act (Mcare Act), Act of March 20, 2002, P.L. 154, codified at 40 P.S. §§1303.101-1303.910, specifically at 40 P.S. §§1303.711(a) and (j), 1303.903(1), 905, and 908, 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.*, based upon Respondent's failure to secure medical malpractice insurance after June 28, 2001, and unprofessional conduct due to actions that departed from the quality standards of the profession.

The Board, on April 15 2005, issued an Order of Temporary Suspension of Respondent's license. On March 31, 2005, Respondent filed an answer to OSC1. On May 13, 2005, Respondent filed an answer to the amended OSC2.

A formal hearing was held in Harrisburg on December 19, 2005. The Commonwealth was represented by Kerry E. Maloney, Esquire. Neither Respondent nor his counsel appeared at the hearing. The Commonwealth waived the filing of a post-hearing brief, and the record in this matter was closed on December 30, 2005 with the filing of the hearing transcript.

FINDINGS OF FACT

1. Respondent holds a license to practice medicine and surgery in the Commonwealth of Pennsylvania, License No. MD-026946-E. (Board records)
2. Respondent's license is active through December 31, 2006, and has been suspended by Board order since April 15, 2005. (Board records)
3. At all times pertinent to the factual allegations, Respondent held a license to practice medicine and surgery in the Commonwealth of Pennsylvania. (Board records)
4. Respondent's last known address on record with the Board is 12 Moon Circle, Yardley, PA 19067. (Board records)
5. On April 26, 1994, the Pennsylvania State Board of Medicine approved a Consent Agreement and Order providing for a public reprimand and civil penalty of \$2,500 against Respondent. (Exhibit C-1).
6. On January 10, 1995, the Pennsylvania State Board of Medicine issued an Order of Temporary Suspension of Respondent's license pursuant to a Petition filed by the Commonwealth. (Exhibit C-1)
7. By Order dated February 22, 1996, the Pennsylvania State Board of Medicine confirmed and continued the Order of Temporary Suspension, and actively suspended Respondent's medical license. (Exhibit C-1)
8. By Amended Order dated May 13, 1996, the Pennsylvania State Board of Medicine lifted the active suspension of Respondent's license and placed him on a 2-year period of suspension which was stayed in favor of probation. (Exhibit C-1)
9. Respondent is not Board-certified in obstetrics and gynecology. (N.T. 23)

10. At all relevant times, Respondent provided medical services to various patients for and on behalf of American Women's Services (a licensed abortion provider) at one or more of their offices in Pennsylvania. (Answer)

11. American Women's Services and Associates in Obstetrics and Gynecology had offices located in King of Prussia, Allentown, Pittsburgh, Erie, and State College, Pennsylvania. (Answer)

12. Respondent, beginning in 2001 or earlier, performed a number of abortion procedures on patients at the King of Prussia, Pittsburgh, Erie and State College offices of American Women's Services. (Answer)

13. On or about February 15, 2002, T.M. requested Respondent, at the King of Prussia American Women's Services, to perform an elective abortion procedure. (Exhibit C-5)

14. At the time, T.M. was a minor, 17 years of age. (Exhibit C-5)

15. T.M. returned on February 16, 2002 for the performance of the elective abortion procedure by Respondent at the King of Prussia American Women's Services Facility. (N.T. 15)

16. The King of Prussia American Women's Services facility was solely an outpatient facility. (Exhibit C-5)

17. Respondent administered IV sedation anesthesia to his patient T.M. for purposes of this procedure. (N.T. 15-16)

18. On February 16, 2002, Respondent attempted to perform a dilation and suction aspiration in order to terminate T.M.'s pregnancy, under IV sedation anesthesia administered by Respondent. (N.T. 21-22)

19. Respondent assumed the role of an anesthesiologist during the procedure, but did not appropriately monitor T.M.'s vital signs during the time that she was under IV sedation anesthesia. (N.T. 23-26)

20. During the procedure, a loop of bowel and fat were sucked in the vagina and tubing, and T.M.'s blood pressure reached unstable levels. (N.T. 16)

21. The procedure had to be immediately stopped and 911 was called. (N.T. 16)

22. T.M. was transported by helicopter to Hahnemann University Hospital in Philadelphia for further treatment. (N.T. 17)

23. During the procedure, Respondent had perforated T.M.'s uterus numerous times, as well as perforating her bowel. (N.T. 16)

24. In the Emergency Room, Dr. Forouzan, an OB/GYN attending physician noted in the record: "look of bowel in vagina." (Exhibit C-6)

25. T.M. underwent surgery shortly thereafter by Dr. Forouzan and Dr. Castellanos, who is a general surgeon; the surgical procedures took approximately 3 hours and 20 minutes to complete. (Exhibit C-6)

26. The surgical procedures undertaken at that time were in the nature of an exploratory laparotomy with left hemicolectomy, primary anastomosis in the transverse and sigmoid areas and a small bowel segment resection, as well as repair of the uterine perforation. (Exhibit C-6)

27. During these procedures, the surgeons noted a "two foot segment of bowel protruding through the vagina." (Exhibit C-6)

28. In addition, during the procedure, the distal transverse and left colon to the sigmoid were areas found to be necrotic, and the patient's bowels exhibited hemorrhage compatible with traumatic injury and small bowel serosal hemorrhage. (Exhibit C-6)

29. During the procedures, T.M. received transfusions of both red blood cells and fresh frozen plasma. (Exhibit C-6)

30. At all times subsequent to June 28, 2001, Respondent's Pennsylvania medical license was active, and he was engaged in providing health care services to various individuals in Pennsylvania. (Answer)

31. Respondent informed the Mcare division of the Pennsylvania Insurance Department that he was retired effective December 16, 2000 and was exempt from the requirement for medical professional liability insurance coverage. (N.T. 7-8)

32. After June 28, 2001 and until on or about February 14, 2005, Respondent did not maintain medical professional liability insurance coverage, as required by Section 711(a) of the Mcare Act, 40 P.S. § 1303.711(a). (Exhibit C-2)

33. On or about February 14, 2005, Respondent obtained a temporary 30-day policy of medical professional liability insurance coverage. (Exhibit C-2)

34. During the period of June 29, 2001 through October 31, 2004, Respondent performed in excess of 2400 abortions at the various American Women's services facilities identified above. (Exhibit C-3)

35. In December 2002, and again in January 2005, Respondent submitted license renewal applications to the Pennsylvania State Board of Medicine. (Board Records)

36. Respondent answered the following question "YES" on both of these license renewal applications: "I am in compliance with the professional liability insurance requirements

under Section 711 of the Medical Care Availability and Reduction of Error (Mcare) Act No. 13 of 2002.” (Board Records)

37. At no time between June 28, 2001 and February 14, 2005 did Respondent maintain medical professional liability insurance coverage, as required by Section 711(a) of the Mcare Act, 40 P.S. § 1303.711(a). (Exhibit C-2)

38. 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. 0186-49-05)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Finding of Fact, Nos. 1-4)
2. Respondent has been afforded reasonable notice of the charges against him and an opportunity to be heard in this proceeding, in accordance with the Administrative Agency Law at 2 Pa. C.S. §504. (Findings of Fact, No. 38)
3. Pursuant to Count One, Respondent is subject to disciplinary action under the Act at 63 P.S. §422.41(8) and/or the Mcare Act at 40 P.S. §1303.905 and 1303.908, in that Respondent breached the standards of care in his treatment of T.M. and performance of the abortion procedure, including perforation of T.M.'s uterus and colon, all of which constitutes unprofessional conduct in the practice of medicine. (Findings of Fact, Nos. 9-29)
4. Pursuant to Count Two, Respondent is subject to disciplinary action under the Act at 63 P.S. §422.41(8) and/or the Mcare Act at 40 P.S. §§1303.905 and 1303.908, in that Respondent breached the standards of care in his treatment of T.M. and performance of the abortion procedure, including performance of the procedure in an outpatient setting under IV sedation anesthesia, and not close to any hospitals, all of which constitutes unprofessional conduct in the practice of medicine. (Findings of Fact, Nos. 9-29)
5. Pursuant to Count Three, Respondent is subject to disciplinary action under the Mcare Act at 40 P.S. §1303.908, by and through Respondent's violation of Section 711(a) and (j) of the Mcare Act, 40 P.S. §1303.711(a) and (j), in that at no time between June 28, 2001 and February 14, 2005 did Respondent maintain medical professional liability insurance coverage, and that during that same period Respondent performed in excess of 2400 abortions in Pennsylvania. (Findings of Fact Nos. 9-11, 30-37)

6. Pursuant to Count Four, Respondent is subject to disciplinary action under the Act at 63 P.S. §422.41(8) and the Board's regulations at 49 Pa. Code §16.61(a)(10) in that Respondent is guilty of unprofessional conduct in the continued practice of medicine beyond the scope of his license, by and through Respondent's violation of Section 711(a) and (j) of the Mcare Act, 40 P.S. §1303.711(a) and (j). (Findings of Fact Nos. 5-29)

7. Pursuant to Count 5, Respondent is subject to disciplinary action under the Act at 63 P.S. §422.41(8) and the Board's regulations at 49 Pa. Code §16.61(b)(1) in that Respondent is guilty of immoral or unprofessional conduct as a consequence of his misrepresentation or concealment of a material fact in obtaining a license to practice medicine or a renewal thereof. (Findings of Fact Nos. 30-37)

8. The Commonwealth did not offer evidence in support of the allegations in Counts Six and Seven of the Amended Order to Show Cause sufficient to prove those allegations by a preponderance of the evidence, and Counts Six and Seven are dismissed.

9. The Board is authorized to impose a civil penalty pursuant to section 908 of the Mcare Act, 40 P.S. §1303.908.

DISCUSSION

This action is brought under sections 711 (a), 903(1), 905 and 908 of the Mcare Act, 40

P.S. §§1303.711, 903, 905, and 908, which provide as follows:

§ 1303.711 Medical professional liability insurance

(a) Requirement – A health care provider providing health care services in this Commonwealth shall:

- (1) Purchase medical professional liability insurance from an insurer which is licensed or approved by the department, or
- (2) Provide self-insurance

§ 1303.903 Reporting

A physician shall report to the State Board of Medicine ... within 60 days of the occurrence of any of the following:

- (1) Notice of a complaint in a medical professional liability action against the physician. The physician shall provide the docket number of the case, where the case is filed and a description of the allegations in the complaint.

§ 1303.905 Action on negligence

If the licensure board determines, based on actions taken pursuant to section 904, that a physician has practiced negligently, the licensure board may impose disciplinary sanctions or corrective measures.

§ 1303.908 Licensure board – imposed civil penalty

In addition to any other civil remedy or criminal penalty provided for in this act... the State Board of Medicine..., by a vote of the majority of the maximum number of the authorized membership of each board as provided by law or by a vote of the majority of the duly qualified and confirmed membership or a minimum of five members, whichever is greater, may levy a civil penalty of up to **\$10,000** on any current licensee who violates any provision of this act, the Medical Practice Act of 1985...

This action is also brought under the Act at 63 P.S. §422.41(8), which provides as follows:

§ 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:

* * *

(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.

(i) The ethical standards of a profession are those ethical tenets which are embraced by the professional community in this Commonwealth.

(ii) A practitioner departs from, or fails to conform to, a quality standard of the profession when the practitioner provides a medical service at a level beneath the accepted standard of care. The board may promulgate regulations which define the accepted standard of care. In the event the board has not promulgated an applicable regulation, the accepted standard of care for a practitioner is that which would be normally exercised by the average professional of the same kind in this Commonwealth under the circumstances, including locality and whether the practitioner is or purports to be a specialist in the area.

The Board's regulations at 49 Pa. Code §§16.61(a)(10) and 16.61(b)(1) provide in pertinent part as follows:

§ 16.61. Unprofessional and immoral conduct.

(a) A physician who engages in unprofessional or immoral conduct is subject to disciplinary action under section 41 of the act (63 P. S. § 422.41). Unprofessional conduct includes, but is not limited to, the following:

* * *

(10) Impersonating another health-care practitioner.

* * *

(b) Immoral conduct includes, but is not limited to, the following:

(1) Misrepresentation or concealment of a material fact in obtaining a license to practice medicine or a reinstatement thereof.

The Commonwealth charged in the amended OSC2 that Respondent failed to maintain medical professional liability insurance between June 28, 2001 and February 14, 2005. The Commonwealth also charged in the amended OSC2, that Respondent failed to conform to quality standards of care and/or accepted standards of care of the profession.

The Commonwealth's evidence consisted of certified documents from the Department of Insurance, as well as the testimony of Sheila Fuller, who is a policy examiner for Mcare under the Department of Insurance; expert testimony from Michael Goodman, M.D. contrasting the standard of care used by professionals in the field and that standard implemented by the Respondent; American Women's Services Patient information for T.M.; T.M.'s medical records from Hahnemann Hospital in Philadelphia concerning the surgeries performed on T.M. on February 16, 2002; and Board documents concerning prior disciplinary action taken against the Respondent by the Board.

Respondent, in his Answer to the OSC, argued that the procedure that he performed on T.M. was within all applicable statutes and regulations. Respondent admitted in his Answer to failing to acquire and maintain medical professional liability insurance, but contended that he made attempts to become self-insured. Respondent, in his Answer, raised the affirmative defenses of laches, as well as a lack of specificity in the OCS.

Neither Respondent nor his counsel was present for the scheduled hearing on December 19, 2005. Respondent sent correspondence to the Prothonotary for the Department of State on December 14, 2005 indicating that Respondent was officially surrendering his license, that Respondent did not intend to practice in the Commonwealth in the future, and that Respondent

would not be attending the hearing held on December 19, 2005. Respondent did not provide any evidence or testimony to defend against the Commonwealth's allegations in the OSC2, or to support his affirmative defense of laches or his claim of lack of specificity in the OSC2. Accordingly, neither of those claims will be discussed further.

The Commonwealth's expert witness, Michael Goodman, M.D., testified that Respondent's care of T.M. was egregiously below the standard of care of the profession. Respondent administered IV sedation anesthesia and then failed to monitor T.M.'s vital signs during the procedure. Respondent then proceeded with the abortion procedure, and failed to recognize that he perforated T.M.'s uterus multiple times, causing two feet of colon to be sucked into her uterus, thereby causing serious necrosis of her colon and bowel. As a result of Respondent's substandard care, T.M. had to be rushed via helicopter to Hahnemann Hospital's emergency room, where she underwent almost four hours of reparative surgery, blood and plasma transfusions, and spent six days recovering in the hospital.

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). This hearing examiner finds that based on the evidence presented by the Commonwealth, as well as the lack of evidence and testimony and any mitigation from Respondent, that the Commonwealth has proven the allegations of Counts One through Five in its amended OSC2 by a preponderance of the evidence, subjecting Respondent's license to practice medicine and surgery in Pennsylvania to disciplinary action or corrective measure pursuant to the Act at 63 P.S. §422.41(8) and the Mcare Act at 40 P.S. §1303.908.

Under its professional licensing statute, the Board is charged with the responsibility and authority to oversee the profession and to regulate and license professionals to protect the public health and safety. *Barran v. State Board of Medicine* 670 A.2d 765, 767 (Pa.Cmwlth. 1996), *appeal denied* 679 A.2d 230 (Pa. 1996). The Board also has a duty to enforce the provisions of the Mcare Act. That duty is best carried out by recognizing the seriousness of Respondent's actions and imposing an appropriate disciplinary sanction against Respondent's license to practice medicine and surgery in Pennsylvania. Respondent admitted that he practiced for a period of almost four years when he did not possess the proper medical insurance. Respondent performed at least 2,400 abortions during that period when he did not possess professional liability insurance. The prosecution also presented testimony from an expert witness that Respondent's actions when performing abortion procedures fell below the standard of care for the medical profession. The procedures were performed in an outpatient setting under IV sedation anesthesia, when Respondent was not competent to administer anesthesia, and without proper monitoring of patients under IV sedation anesthesia. Respondent also performed those abortions in a facility that was not close to any hospitals. Furthermore, in one instance, Respondent perforated a patient's uterus and sucked two feet of her colon into the uterus, also perforating the colon, without recognizing that he had done so. Although he has been given ample opportunity, Respondent has chosen not to defend himself in the matter now before the Board or to provide any mitigating evidence or testimony in this matter. The prosecuting attorney recommended that the Respondent's license be revoked, and the hearing examiner agrees in light of the egregious nature of Respondent's conduct that this is an appropriate sanction under the circumstances of this case.

In addition, the Board has previously found, in *In the Matter of the License to Practice Medicine and Surgery of Kevin A Chavarria, M.D., License No. MD-044909-E*, Docket No. 0015-49-95, that “the failure of a physician to maintain the requisite professional liability insurance for the protection of his patients constitutes irresponsible behavior of a high magnitude.” In this case, all of Respondent’s patients from June 28, 2001 through February 14, 2005 are left without the necessary protection against potential mistakes affecting their health and their lives. At the same time, Respondent benefited financially from treatment of the patients he left without the necessary protection against his mistakes, while providing care that did not meet the standard of care. The hearing examiner finds that the Board would be remiss in its duty to the citizens of the Commonwealth if it does not impose a substantial civil penalty in addition to the revocation of Respondent’s license to practice medicine and surgery in Pennsylvania.

Accordingly, based upon the above findings of fact, conclusions of law and discussion, and in the absence of mitigation, the following order will issue.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania, :
Bureau of Professional and :
Occupational Affairs :
 : Docket No. 0976-49-05
v. : File No. 05-49-01594
 :
Harvey Walter Brookman, M.D., :
Respondent :

PROPOSED ORDER

NOW, this 29th day of June, 2006, upon consideration of the foregoing findings of fact, conclusions of law and discussion, Respondent **Harvey Walter Brookman, M.D.**, is subject to disciplinary action pursuant to the Act at 63 P.S. §422.41(8) and the Mcare Act at 40 P.S. §1303.711, 1303.903, 1303.905, and 1303.908, and it is hereby **ORDERED** that Respondent's license, license no. **MD-026946-E**, is **REVOKED**.

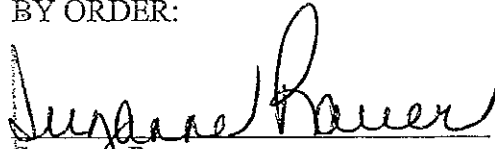
It is **FURTHER ORDERED** that Respondent is assessed a **CIVIL PENALTY** of **\$50,000.00**, payable to the Commonwealth of Pennsylvania by certified check, attorney's check or U.S. Postal Service money order within 30 days of the date of the Final Order issued in this matter.

Respondent is to cease practicing medicine and surgery in the Commonwealth of Pennsylvania and return all licensure documents, including wall certificates and wallet card, to the following address:

Board Counsel
State Board of Medicine
P.O. Box 2649
Harrisburg, PA 17105-2649

The State Board of Medicine has announced its intention to review this Proposed Adjudication and Order in accordance with 1 Pa. Code §35.226(a)(2).

BY ORDER:


Suzanne Rauer
Hearing Examiner

For the Commonwealth:
Kerry E. Maloney, Esquire
Commonwealth Of Pennsylvania
OFFICE OF GENERAL COUNSEL
P.O. Box 2649
Harrisburg, PA 17105-2649

For Respondent:

Harvey Walter Brookman
12 Moon Circle
Yardley, PA 19067

Date of mailing:

June 30, 2006

Notice

The attached Adjudication and Order represents the final agency decisions in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court in accordance with the Pennsylvania Rules of Appellate Procedure. If you take an appeal to the Commonwealth Court, you must serve the Board with a copy of your Petition for Review. The agency contact for receiving service of such appeals is:

Board Counsel
P.O. Box 2649
Harrisburg, PA 17105-2649

The name of the individual Board Counsel is identified on the Order page of the Adjudication and Order.