

BEFORE THE IOWA BOARD OF MEDICINE

IN THE MATTER OF THE)	FILE NO. 02-07-575
STATEMENT OF CHARGES AGAINST:)	DIA NO. 08DPHMB023
)	
ASHAR AFZAL, M.D.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
RESPONDENT)	DECISION AND ORDER

Date June 18, 2009.

On October 23, 2008, the Iowa Board of Medicine (Board) filed a Statement of Charges against Ashar Afzal, M.D. (Respondent), charging him with two counts:

COUNT I: Engaging in unethical or unprofessional conduct in the practice of medicine, in violation of Iowa Code sections 147.55(3), 272C.10(3) and 653 IAC 23.1(4);

COUNT II: Willfully or repeatedly violating the laws and rules governing the practice of medicine in Iowa by inappropriately engaging in a pattern of sexual misconduct in the practice of medicine, in violation of Iowa Code sections 147.55(8), 272C.10(8) and 653 IAC 23.1(4) and 13.7(4).

The Statement of Matters Asserted alleged that Respondent engaged in a pattern of sexual misconduct in the practice of medicine, including inappropriately touching two female patients in a sexual manner. The hearing was held on May 6, 2009 before the following members of the Board: Rodney Zeitler, M.D., Vice-Chairperson; Yasyn Lee, M.D.; Jeffrey Snyder, M.D.; Allen Zagoren, D.O.; Tom Drew and Paul Thurlow, public members. Respondent was represented by attorney Connie Diekema. Assistant Attorneys General Theresa O'Connell Weeg and Jordan Esbrook represented the state. The hearing was closed to the public, pursuant to Iowa Code section 272C.6(1) and 653 IAC 25.18(12). The hearing was recorded by a certified court reporter. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing and was instructed to prepare a written decision, in accordance with their deliberations.

THE RECORD

The record includes the testimony of the witnesses, State Exhibits 1-39 and Respondent Exhibits A-0 and Q-S.

FINDINGS OF FACT

1. Respondent was issued Iowa medical license number 34325 on September 24, 2001. Respondent is a board-certified anesthesiologist and pain management specialist who practices with an anesthesiology group in Waterloo, Iowa. Respondent submitted a number of letters of support from his peers, co-workers, and patients. (Respondent testimony; State Exhibits 2, 6; Respondent Exhibits F, G, H, I, J, K, M, N)

Allegations of Patient #1

2. In August 2006, Patient #1, a 38 year-old female, was referred to Respondent for pain management. The referring physician had been treating Patient #1 for low back pain for approximately one year. Another physician had previously treated her for chronic regional pain syndrome. The patient's pain stemmed from an earlier work-related injury and a serious automobile accident approximately three years earlier. Patient #1's treatment included prescriptions for a number of different narcotic medications as well as physical therapy and lumbar epidural steroid injections. Just prior to her referral to Respondent, Patient #1 was diagnosed with cervical spondylosis and cervical degenerative disc disease. In October 2006, Patient #1 was in a second automobile accident and suffered a broken pelvis and broken ribs.

Respondent assumed care for Patient #1 and continued to prescribe narcotic medications to her, although he advised her at the first visit that he had concerns about her use of narcotic pain medications. Respondent's long-term goal for the patient, as reflected in the patient record, was to replace the patient's Oxycontin with non-narcotic medications if possible. Respondent also prescribed physical therapy and massage therapy and referred the patient to a pain management therapist. Respondent also gave the patient injections in her lower lumbar facet joints. Respondent would usually give the patient Versed to relax her and alleviate anxiety prior to the injections. The patient was required to have a designated driver on the days that she had these injections. (State Exhibits 19, 20; Respondent Exhibit A; Testimony of Respondent, Patient #1)

3. Patient #1 had an appointment with Respondent on February 12, 2007, at 4:00 p.m. Her three children, including her oldest daughter who was the designated driver, accompanied her to the appointment. They planned to go to the mall and out to dinner following the appointment. The patient's husband was out of town. Patient #1 was taken back to the examination room by a medical assistant and reported that she had been experiencing a sharp stabbing pain in her groin area. The medical assistant thought she entered both the patient's vitals and the report of groin pain into the patient's chart but the patient record did not include this information. The medical assistant recalled that Patient #1 was fully clothed when she left the examination room. The medical assistant was not present during Respondent's subsequent examination of the patient. (Testimony of Patient #1, McCullough; State Exhibits 18, 16; Respondent Exhibit L)

4. According to Patient #1, Respondent asked her to change into a gown after she told him about the groin pain. Patient #1 reported that Respondent initially examined her by pressing on her groin and thigh area over the top of the gown but then he put gloves on and put his fingers inside her vagina to apply pressure to her groin area. Respondent told the patient that he was going to consult another physician. Respondent left the room and when he returned, he told the patient that he wanted to examine her again. He put gloves on and then used a lubricant during the second examination.

Patient #1 described the second vaginal examination as inappropriately sexual, and she reported that Respondent became sexually aroused. When Respondent left the room a second time, Patient #1 got dressed and sat on a chair. She reported that when Respondent re-entered the examination room, he put his hand on her shoulder and asked if he could examine her again. She

refused and told him that he was not going to touch her again. (Testimony of Patient #1, McCullough; State Exhibits 11-13)

5. Respondent denies that he performed any vaginal examination on Patient #1. He testified that he has not performed a vaginal examination on any patient since his internship. Respondent testified that when Patient #1 reported her groin pain he told her to see her gynecologist. Respondent did not document this referral in his patient record. (Respondent testimony; State Exhibits 18, 22)

Respondent testified that lubricant is not stocked in the examination rooms. This was verified by pain clinic staff, and the pain clinic's supply records show that only one tube of lubricant had ever been ordered by the clinic. One unopened tube of lubricant was located on the crash cart. (Respondent, Rebecca West testimony; Respondent Exhibit B)

6. After Respondent examined Patient #1, a second medical assistant escorted the patient to the procedure room for her injection. The medical assistant did not recall anything unusual about the patient's demeanor at that time. Patient #1 was not given any Versed prior to this injection, although it had been given to her at previous visits. Respondent came in and gave Patient #1 the injection. (Testimony of Patient #1; State Exhibits 13, 16, 18; Respondent Exhibit H)

According to Patient #1, Respondent asked the medical assistant to go out and get a wet rag to clean the patient's back. Patient #1 reported that after the medical assistant left the room, Respondent rolled his chair over to her, told her that he knew he had been inappropriate with her and that he was very sorry, and asked her if they could keep it between the two of them. (Testimony of Patient #1, McCullough; State Exhibit 13)

The medical assistant did not recall that she left the room during the patient's procedure. (State Exhibit H) However, Respondent recalled that he asked the medical assistant to get a wet rag. Respondent also recalled that the injection had been painful for Patient #1 and testified that he only apologized to the patient for causing her pain. (Respondent testimony; State Exhibit 22)

Respondent's staff all reported that Patient #1 seemed fine when she left the office that day. She stopped at the reception desk and made her next appointment, and she conversed with Respondent's receptionist about her family. (Wedeking, Mullinex testimony; State Exhibit 16; Respondent Exhibits F, G, H, K, L)

After leaving the pain clinic, Patient #1 and her children went to the mall, purchased Valentine's Day gifts, and then went out to dinner. Patient #1 called her husband in Indianapolis that evening at about 9:00 p.m. and told him that Respondent had sexually assaulted her. The patient's husband testified that his wife was very upset, and he told her to hang up and call the police and her primary care provider. (Testimony of Patient #1 and her husband)

7. Patient #1 did not report the sexual assault to the police until February 14, 2007 at 3:19 p.m. The police conducted an investigation, but the county attorney determined that there was insufficient evidence to charge Respondent. (Testimony of Shawn Monroe; State Exhibit 15)

8. Attorney Jay Roberts had previously represented Patient #1 in a workman's compensation claim, and he agreed to represent her in a civil lawsuit against Respondent. After she retained Mr. Roberts, Patient #1 filed her complaint against Respondent with the Board on August 29, 2007. When Mr. Roberts realized that one of his friends, Barb Miller, was also Respondent's patient, he asked her if Respondent had treated her well. Ms. Miller told him that Respondent had never mistreated her but that one of her friends (Patient #2) had told her that he made sexual advances towards her. Mr. Roberts contacted Patient #2 and later informed the Board of her allegations. Mr. Roberts has filed civil lawsuits against Respondent on behalf of both patients. (Testimony of Patient #1, Roberts, Miller; State Exhibits 5, 12)

9. On October 9, 2007, Patient #1 voluntarily submitted to a polygraph examination that was arranged by her attorney. The polygraph examiner concluded that Patient #1 told the truth to the police and that Respondent performed a vaginal examination on her during her last visit to the pain clinic. (State Exhibit 14). On March 2, 2009, Respondent voluntarily submitted to a polygraph examination that was arranged through the attorney representing the pain clinic. The polygraph examiner concluded that Respondent was truthful when he denied putting his fingers inside the patient's vagina. (Respondent Exhibit E; Testimony of Richie)

Allegations of Patient #2

10. Patient #2 did not testify at hearing but her deposition was submitted into the record. (State Exhibits 25A, 25B) Respondent treated Patient #2, a 46 year old female, for pain in her right wrist and arm from February 28, 2006, through April 18, 2008. Respondent diagnosed Patient #2 with complex regional pain syndrome and treated her with various narcotic medications (Gabapentin, methadone, hydrocodone, Trazadone, Darvocet and Tramadol). The patient admitted that she had been prescribed a number of these medications before Respondent began treating her. The patient obtained additional medication (fentanyl patch) from another physician. Respondent referred Patient #2 for physical therapy, which she discontinued, and gave her infraclavicular nerve injections and Bier Blocks. Respondent gave Patient #2 Versed for sedation prior to the nerve injections and Bier Blocks.

Patient #2 alleged that Respondent had inappropriate sexual contact with her at two appointments, approximately six months apart. Patient #2 was uncertain of the date of the first incident but indicated that it was the day of her first Bier Block and that Barb Miller had driven her to the appointment. The medical records show that Patient #2 had her first Bier Block on July 27, 2006, but her husband drove her that day.

Patient #2 reported that when she awoke following the Bier Block, Respondent was lying on top of her, with one foot on the ground and one leg over her. He had his hands on her breasts and was telling her how much she excited him. She further alleged that he sat down on a chair, grabbed her hand, and placed it on his erect penis. She stated that she was still groggy from the Versed and no nurse was present in the room. She further alleged that Respondent wanted her to take his credit card and get a motel room for them, but she refused. Patient #2 further alleged that Respondent called her at home that night and asked her if she was going to meet him at the motel, but she again refused. Patient #2 claimed that she told Barb Miller about the incident a few days later, but Ms. Miller testified that Patient #2 first told her about the incidents in May

2008. Patient #2 continued treatment with Respondent after this incident because he was relieving her pain.

Patient #2 initially told the Board's investigator that at an appointment on February 14, 2007, Respondent entered the examination room, asked how she was feeling, and then kissed her hard, put his hand down her pants and touched her clitoris and vagina, and touched, licked and sucked her breasts. She did not have an injection on February 14, 2007. In her deposition on April 30, 2009, Patient #2 provided an inconsistent description of the February 14th appointment. She stated that Respondent entered the room, locked the door, and asked her to get up on the examination table. He checked her lungs with a stethoscope and after about three or four minutes, he undid his pants and asked her to touch his penis. She complied and then he molested her. (State Exhibits 25, 25A; Testimony of McCullough)

11. There are no locks on the doors of the examination rooms at the pain clinic. (Testimony of Respondent, West)

12. Patient #2 told the Board's investigator that she called Respondent on his cell phone approximately twenty times and that Respondent called her about twenty times. (State Exhibit 25) Respondent's cell phone records show that Respondent called Patient #2 five times and she called him sixteen times. Respondent testified that all of his calls were either follow ups to an appointment or prescription request or questions about his speeding tickets. Patient #2 worked at the courthouse. (State Exhibits 35, 35A, 38; Respondent Exhibit C; Testimony of Respondent)

13. Respondent's polygraph examiner concluded that Respondent was truthful when he denied ever lying on top of Patient #2 when she was on an exam table, when he denied that Patient #2 ever touched his penis, and when he denied ever asking Patient #2 to meet him at a motel. (Respondent Exhibit E; Testimony of Richie)

BMI Evaluation/Hallucinatory Effect of Versed

14. Respondent agreed to undergo and pay for a comprehensive professional boundaries evaluation with Dr. Gene Abel at Behavioral Medicine Institute of Atlanta (BMI), a Board-approved facility. At the conclusion of the evaluation, Dr. Abel was unable to determine the validity of the accusations against Respondent and deferred that factual determination to the Board. Dr. Abel stated that his understanding of the case was complicated due to the repeated use of Versed on Patient #2 because there were numerous opportunities for the Versed to have caused sexual hallucinations or misunderstandings. Dr. Abel included a review article from the journal "Anesthesia" entitled "Sexual hallucinations during and after sedation and anesthesia" with his evaluation. (State Exhibit 6)

15. Dr. Dana Simon, who is the co-director of the Mercy Hospital Pain Center, Des Moines, Iowa, testified in general terms concerning the use of Versed in pain clinics. Versed is used mostly for its sedative and hypnotic properties to help alleviate patient's anxiety prior to receiving a lumbar injection. Dr. Simon occasionally administers Versed prior to injecting a patient. The more common side effects of the drug include nausea, emesis, dizziness, and drowsiness. On rare occasions, patients have been reported to become disinhibited and have

made statements of a personal nature that they would not normally make. In addition, sexual hallucinations have been reported in the literature. These side effects are likely more common with higher dosages of Versed. When a patient hallucinates, they may perceive something that they believe is real although it is not. Because of the risk of such side effects, Dr. Simon always has another medical professional in the room with him when a patient has been administered Versed. (Testimony of Dr. Dana Simon; State Exhibit 7)

16. Respondent did not always have a nurse or other staff member present when he examined patients at the time the allegations were made. However, a nurse always stayed with the patient and checked the patient's vitals every five minutes for any procedure involving sedation or Versed. On Dr. Abel's recommendation, Respondent now has a chaperone present at all times when he examines or treats patients. The chaperones' document their presence in the patient record. (Testimony of Respondent; Hart)

CONCLUSIONS OF LAW

The Board is statutorily authorized to discipline a licensee for unethical conduct¹ [Count I] and for willful or repeated violations of Board rules² [Count II]. The Board's rules also provide that engaging in unethical or unprofessional conduct includes but is not limited to the committing by a licensee of an act contrary to honesty, justice or good morals, whether committed in the course of the licensee's practice or otherwise.³ The rules further provide that it is unprofessional and unethical conduct for a physician to engage in contact, touching, or comments of a sexual nature with a patient in the course of providing medical care or in any sexual conduct with a patient when that conduct occurs concurrent with the physician-patient relationship.⁴

After careful consideration of the testimony of all of the witnesses and review of the exhibits, the Board was unable to determine, by a preponderance of the evidence, that Respondent had sexual contact with, or made sexual advances to, either Patient #1 or Patient #2.

DECISION AND ORDER

IT IS THEREFORE ORDERED that the Statement of Charges filed against Respondent Ashar Afzal, M.D. on October 23, 2008, is hereby **DISMISSED**.


Yasyn Lee, M.D.
Iowa Board of Medicine

June 18, 2009
Date

¹ Iowa Code section 147.55(3), 272C.10(3)(2005, 2007).

² Iowa Code section 147.55(8), 272C.10(8)(2005, 2007).

³ 653 IAC 23.1(4).

⁴ 653 IAC 13.7(4).

cc: Theresa O'Connell Weeg, Assistant Attorney General
Connie Diekema, Respondent's Attorney

Judicial review of the board's action may be sought in accordance with the terms of the Iowa administrative procedure Act, from and after the date of this Decision and Order. 653 IAC 25.31.

BEFORE THE IOWA BOARD OF MEDICINE

IN THE MATTER OF THE STATEMENT OF CHARGES AGAINST

ASHAR AFZAL, M.D., RESPONDENT

File No. 02-07-575

STATEMENT OF CHARGES

COMES NOW the Iowa Board of Medicine on October 23, 2008, and files this Statement of Charges pursuant to Iowa Code section 17A.12(2)(2007). Respondent was issued Iowa medical license no. 34325 on September 24, 2001. Respondent's Iowa medical license is active and will next expire on February 1, 2009.

A. TIME, PLACE AND NATURE OF HEARING

1. Hearing. A disciplinary contested case hearing shall be held on December 1, 2008, before the Board. The hearing shall begin at 8:30 a.m. and shall be located in the conference room at the Board office at 400 SW 8th Street, Suite C, Des Moines, Iowa.

2. Answer. Within twenty (20) days of the date you are served this Statement of Charges you are required by 653 IAC 24.2(5)(d) to file an Answer. In that Answer, you should state whether you will require a continuance of the date and time of the hearing.

3. Presiding Officer. The Board shall serve as presiding officer, but the Board may request an Administrative Law Judge make initial rulings on prehearing matters, and be present to assist and advise the Board at hearing.

4. Hearing Procedures. The procedural rules governing the conduct of the hearing are found at 653 IAC 25. At hearing, you will be allowed the opportunity to respond to the charges against you, to produce evidence on your behalf, cross-examine witnesses, and examine any documents introduced at hearing. You may appear personally or be represented by counsel at your own expense. If you need to request an alternative time or date for hearing, you must review the requirements in 653 IAC 25.16. The hearing may be open to the public or closed to the public at the discretion of the Respondent.

5. Prosecution. The office of the Attorney General is responsible for representing the public interest (the State) in this proceeding. Pleadings shall be filed with the Board and copies should be provided to counsel for the State at the following address: Theresa O'Connell Weeg, Assistant Attorney General, Iowa Attorney General's Office, 2nd Floor, Hoover State Office Building, Des Moines, Iowa 50319.

6. Communications. You may not contact board members by phone, letter, facsimile, e-mail, or in person about this Notice of Hearing. Board members may only receive information about the case when all parties have notice and an opportunity to participate, such as at the hearing or in pleadings you file with the Board office and serve upon all parties in the case. You should direct any questions to Kent M. Nebel, J.D., the Board's Legal Director at 515-281-7088 or to Assistant Attorney General Theresa O'Connell Weeg at 515-281-6858.

B. LEGAL AUTHORITY AND JURISDICTION

7. Jurisdiction. The Board has jurisdiction in this matter pursuant to Iowa Code chapters 17A, 147, 148, and 272C.

8. Legal Authority: If any of the allegations against you are founded, the Board has authority to take disciplinary action against you under Iowa Code chapters 17A, 147, 148, and 272C and 653 IAC 25.

9. Default. If you fail to appear at the hearing, the Board may enter a default decision or proceed with the hearing and render a decision in your absence, in accordance with Iowa Code section 17A.12(3) and 653 IAC 25.20.

C. SECTIONS OF STATUTES AND RULES INVOLVED

COUNT I

10. Respondent is charged pursuant to Iowa Code sections 147.55(3) and 272C.10(3) and 653 IAC 23.1(4) with engaging in unethical or unprofessional conduct in the practice of medicine.

COUNT II

11. Respondent is charged pursuant to Iowa Code sections 147.55(8) and 272C.10(8), and 653 IAC 23.1(4) and 13.7(4) with willfully or repeatedly violating the laws and rules governing the practice of medicine in Iowa when he inappropriately engaged in a pattern of sexual misconduct in the practice of medicine.

STATEMENT OF THE MATTERS ASSERTED

12. Respondent is an Iowa-licensed anesthesiologist who practices anesthesiology and pain medicine in Waterloo, Iowa.

13. The Board alleges that Respondent engaged in a pattern of sexual misconduct in the practice of medicine, including, but not limited to the following:

- A. **Patient #1:** Respondent inappropriately touched a female patient in a sexual manner while performing an examination to determine the cause of the patient's groin pain. Respondent did not have a chaperone present during the examination and he failed to document the examination in the medical record.
- B. **Patient #2:** Respondent inappropriately touched a female patient in a sexual manner while she was sedated during a pain management procedure. Respondent made inappropriate sexual comments to the patient during this incident. Respondent kissed Patient #2 and touched her breasts and genitals in a sexual manner on a second occasion during an office visit.

E. SETTLEMENT

14. Settlement. This matter may be resolved by settlement agreement. The procedural rules governing the Board's settlement process are found at 653 Iowa Administrative Code 25. If you are interested in pursuing settlement of this matter, please contact Kent M. Nebel, J.D., Legal Director at 515-281-7088.

F. PROBABLE CAUSE FINDING

15. On this 23rd day of October 2008, the Iowa Board of Medicine found probable cause to file this Statement of Charges.


Yash Lee, M.D., Chairperson
Iowa Board of Medicine
400 SW 8th Street, Suite C
Des Moines, Iowa 50309-4686