

**NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS
DISCIPLINARY MATTERS PENDING CONCLUSION
OPEN MINUTES -
February 8, 2006**

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, February 8, 2006 at the Richard J. Hughes Justice Complex, 25 Market Street, 4th Floor, Conference Center, Trenton, New Jersey for Disciplinary Matters Pending Conclusion, open to the public. The meeting was called to order by Ms. Karen Criss, Chairperson for Open Disciplinary Matters.

PRESENT

Board Members Cheema, Ciechanowski, Clemency Kohler, Criscito, Criss, DeGregorio, Jordan,, Lambert, Lomazow, Mendelowitz, Nussbaum, Paul, Reichman, Scott, Stanley, Strand, Walsh and Wheeler.

EXCUSED

Haddad, Salas-Lopez, and Weiss

ABSENT

ALSO PRESENT

Senior Deputy Attorney General Dick, Deputy Attorney Generals Ehrenkrantz, Flanzman, Gelber, Kenny, Levine, Warhaftig and Executive Director Roeder, Medical Director Gluck and Medical Education Director Blanks.

RATIFICATION OF BOARD MINUTES

**THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE
THE JANUARY 11, 2006 OPEN DISCIPLINARY BOARD
MINUTES AS SUBMITTED.**

HEARINGS, PLEAS, RETURN DATES, APPEARANCES

11:00 a.m.

ZAHL, Kenneth M.D. (License #MA 56413)
(Counseling Deputy: Flanzman, Steven N.)
JACKSON, John Zen Esq., for Respondent
KENNY, Paul R., D.A.G. for Complainant

Dr. Cheema and Ms. Clemency Kohler recused from discussion and vote in this matter and left the hearing.

This matter was placed before the New Jersey State Board of Medical Examiners on Respondent's Notice of Motion to Clarify and/or Modify Order of May 5, 2003 and Consent Order of May 7, 2004 and other relief; Memorandum of Law in Support of Motion to Clarify and/or modify order of May 5, 2003 and Consent Order of May 7, 2004 and other relief; and Certification in Support of Motion to Clarify and/or Modify Order of May 5, 2003 and Consent Order of May 7, 2004 and other relief.

Additionally, attached was the Attorney General's Letter Brief in Opposition to Dr. Zahl's Motion to Modify the Monitoring Orders and in Support of the Attorney General's application to table all consideration of Dr. Zahl's motion pending Board decision on the Attorney General's Order to Show Cause and Verified Complaint.

At the time of printing, the administrative office had not received Respondent's response. Upon receipt, it would be sent under separate cover.

Attached was Respondent's February 2, 2006 response received by the Administrative office to the Attorney General's Letter Brief in Opposition to Dr. Zahl's Motion to Modify the Monitoring Orders and in Support of the Attorney General's application to table all consideration of Dr. Zahl's motion pending Board decision on the Attorney General's Order to Show Cause and Verified Complaint.

The Board, upon motion made and seconded, voted to move into Executive Session for the advice of counsel. All parties, except counseling staff and members of the Administrative Office, left the room.

The Board returned to Open Session.

A hearing before Ms. Criss, as the Hearing Officer, took place concerning some preliminary issues outside the full Board meeting. Ms. Criss returned to the meeting and announced that she had decided that a limiting instruction was necessary to the Board relating to the sequestering of the witnesses.

The full Board entered the hearing room to begin the proceeding and Chairman Criss announced that the Board would hear an application of the Attorney General for the temporary suspension of the license of Dr. Kenneth Zahl. She asked that the record reflect that she had already asked the attorneys to place their appearances on the record prior to a preliminary motion. However, since the full Board was now in the room, she asked that the attorneys place their appearances back on the record.

Paul R. Kenny, Deputy Attorney General, appearing for the Attorney General Zulima V. Farber. Jeri Warhaftig, Deputy Attorney General, also appearing on behalf of the Attorney General. John Zen Jackson with the law firm of Kalison, McBride, Jackson & Murphy appearing on behalf of Dr. Kenneth Zahl, who was also present.

Chairman Criss asked for the participants to speak loudly and succinctly for the court reporter and for those present. The Chair indicated that a preliminary motion was made by Mr. Jackson seeking that a limiting instruction be given to the Board. That motion was denied but, she reminded the Board that this matter needed to be decided on the basis of the facts presented before the Board at the hearing. Also, the Chair indicated that the motion to sequester the witnesses, with the exception of Dr. Zahl, had been granted.

Board member, Dr. Reichman noted for the record that the Medical Society of New Jersey had filed an amicus brief in this case and he served as the Speaker of the House and as the Speaker of the House of Delegates of the Medical Society and also as a member of the Board of Trustees. He assured both parties that he did not participate in the discussion or the decision of the Medical Society to participate in this matter, nor did he participate in any vote, as to whether the Medical Society should file an amicus brief. Dr. Reichman, for the record, did not believe that his positions with the Medical Society prejudiced him or placed him in a position to prejudge the matter. Neither side voiced any objections to Dr. Reichman's participation in the hearing.

Mr. Jackson raised an issue as to the impropriety of Dr. Lomazow's comments made with other physicians regarding what he understood to have been the conduct of Dr. Zahl, and had also had business dealings with practices that competed with, or were in adverse positions, to that of Dr. Zahl's. Mr. Jackson believed that under the applicable code of ethics embodied in the Administrative Code, especially in light of the pronouncements from now Governor Corzine, there should at least be an attempt to obtain an ethics opinion in accordance with the Administrative Code on the propriety of Dr. Lomazow's participation. Mr. Jackson indicated that he understood, through D.A.G. Flanzman, that Dr. Lomazow would continue to participate.

Dr. Lomazow for the record did not recall any conversation with Dr. Moss, and that if any statements were made, it would have been based on information gained from the public record based on the decision made by the ALJ in the decision rendered by the Board. Additionally, Dr. Lomazow performed consultations with Union Back Institute and had ultimate faith that he was perfectly capable of judging this case on the basis of the information supplied at the hearing and by that information only.

Mr. Jackson indicated that the other application involved, on behalf of Dr. Zahl, was that he did not have subpoena power. Counsel requested that a subpoena be issued by the Board, which did have subpoena power, to the Pennsylvania State Police for the records of a Complaint that had been made by Miss Elaine Caruso-Long regarding police brutality.

D.A.G. Kenny expressed his surprise at Mr. Jackson's request to the Board and believed that this application should have been raised with the Board President, Dr. Sindy Paul and the counseling deputy, Steven Flanzman. He requested that the Board ignore the testimony offered by Mr. Jackson on this issue. Mr. Jackson argued that his point was an appropriate one and that it was supported by a New Jersey Supreme Court case, *State vs. Guenther*, decided in August of 2004.

Chairman Criss, after a discussion off the record, denied the motion regarding the requested subpoena to the State of Pennsylvania for these records, as there was no indication that it would be necessary at this time. Mr. Jackson asked if he could renew his application, if necessary, at another point, should the foundation be laid. His request was acknowledged by the Chair.

The Chair requested that the Attorney General proceed with opening arguments as there were no further motions.

D.A.G. Kenny noted in his opening statement that in April of 2003, the State Board of Medical Examiners issued an Order revoking the license of Dr. Kenneth Zahl finding him to be a fundamentally corrupt licensee and concluded that Dr. Zahl failed to understand his moral repugnancy for his deception and misrepresentation. Dr. Zahl's acts included billing for more than 100 overlapping anesthesia procedures in violation of Medicare regulations. The violations further included the creation of false and misleading patient records which included the insertion of the names of physicians who were not present during the procedures, the inclusion of fraudulent retention of duplicate insurance statements, and included knowingly and repeated lying to his disability carrier in order to gain more than \$118,000 in benefits. Counsel reminded the Board that the Board's decisions were affirmed by the Appellate Court and further, that the Supreme Court of New Jersey, had declined to hear anything more with regard to those findings.

The Board was further reminded by D.A.G. Kenny that presently in February 2006, Dr. Zahl was back before the Board on the Attorney General's application for the Temporary Suspension of his license. D.A.G. Kenny asserted that the State was poised to show that Dr. Zahl had engaged in strikingly similar kinds of behaviors in violating the Board's Order.

The State continued with the history of the matter and indicated that after the Revocation Order in 2003, Dr. Zahl sought review by the Appellate Division and was granted a stay while the proceedings moved forward. Pursuant to the direction of the Appellate Division's Order, the Board required a monitoring and compliance program. Thereafter, an Order of Monitoring was issued in May 2003 for both a practice and billing monitor, which was subsequently modified by a Consent Order entered later in May 2003. Specifically, the two Orders required a practice monitor to observe and log all medical procedures and services provided by Dr. Zahl. Additionally, Dr. Zahl was required to have the billing monitor review of the records in determining the appropriateness of the billing and to report to the Board Dr. Zahl's compliance with these requirements.

The Appellate Division, in June 2005, affirmed the facts and conclusions of law, except for the Order of Revocation, opining that perhaps it was too harsh and sent the matter back to the Board for

reconsideration. The Attorney General respectively disagreed with the Appellate Division's opinion and petitioned the State Supreme Court in October 2005 and was advised that the case would be heard. Dr. Zahl, at the same time, requested that the entire case be reviewed, which the Supreme Court refused. The Attorney General stated that after more than three years upon the entry of the Board's Order of Revocation, the Attorney General contended that Dr. Zahl violated the Board's Orders by:

- 1.) The unmonitored procedures and unmonitored billings in over 100 patient pain management procedures;
- 2.) Dr. Zahl's attempt to justify the violations of the Orders by falsified records to mislead that someone else was the one that provided the service; and, among other things,
- 3.) Dr. Zahl's presentation of false and misleading statements to the Attorney General about the nature of scope of his practice.

While he believed that Dr. Zahl would argue that the Order permitted another healthcare practitioner in his office to provide the service and that the requirement of a practice monitor and/or billing monitor did not apply to that healthcare practitioner, D.A.G. Kenny argued that this interpretation was contrary to both the spirit and the letter of the Consent Order because Dr. Zahl would benefit from the funds generated by another healthcare practitioner. The Attorney General also reminded the Board of Dr. Zahl's \$197,000 owed in attorney fees, and the fact that there had not been any attempts to make a payment, in spite of the demands by the Attorney General's office, nor had an application been made to extend the payment and/or put Dr. Zahl on a payment plan, also evidences a total disregard for the Orders of the Board.

The State continued to argue that the Board was not looking at the entire practice of Dr. Zahl, however, they were concerned with two aspects, namely, the billing and the provision of pain management services. This was to be watched by the monitors, however, no reports had been received from the Board office since March 2005. D.A.G. Kenny added that he would provide evidence that would demonstrate that the delay in issuing the reports was due to his obstruction to making the information available.

Finally, D.A.G. Kenny referenced the May 2004 Consent Order, where there existed an issue between the Attorney General and Dr. Zahl which was raised by the Practice Monitor who was dismissed as a result of negotiations over the May 2004 Order. The issue was regarding the propriety of Dr. Zahl's billings for fluoroscopies and that these were radiological studies that the Board would see in Volume II and III. The Attorney General added that the Board would hear a lot of blame shifting and they would hear testimony from personnel from Dr. Zahl's office that would take the blame for Dr. Zahl about inaccuracies in the records. The State's contention after all of the evidence submitted was that Dr. Zahl was a dangerous physician and that he should be temporarily suspended from the practice of medicine and surgery in the State of New Jersey.

In his opening statement, Mr. Jackson began with a parable told to him by his grandmother about a wise man and a young boy who was a smart aleck who thought that he could make a fool out of this wise man. The young boy asked the wise man if the bird in his hand was alive or dead? The plan was that if the wise man said it was alive, he would squeeze it and crush it to death. Or on the other hand, if he said it was dead, he'd let it go and it would fly away, showing that the wise man did not know what he was talking about. When asked by the young boy, is it alive or is it dead? The wise man listened and thought, and then replied, "it's up to you." The decision was in his hand. Mr. Jackson informed the Board it was also "up to them" as to whether or not to crush Dr. Zahl.

Counsel pointed out that the Attorney General had attempted to present to it a crescendo of

misconduct, misdeeds, falsehoods and lies. Mr. Jackson informed the Board that what they needed to consider in reaching its decision, was not the past, but the evidence presented to the Board at this hearing. There would be evidence and testimony presented that Dr. Zahl was not a clear and imminent danger, but in fact, he would present statements from patients that would testify to the opposite. Counsel noted that it was only after Dr. Zahl filed a motion for reconsideration, or clarification of the Order, that the Attorney General filed its motion to attempt to once again put Dr. Zahl out of practice. Additionally, the allegation of the falsification of records to indicate that Dr. Yulo had not provided the services entitled Dr. Zahl to the benefit of the doubt.

Mr. Jackson stressed to the Board that it was not fair, just, or appropriate to say that because Dr. Zahl was found to have done something wrong before, that Dr. Zahl must have done something wrong now. The Board needed to look at the evidence and to find a palpable demonstration that Dr. Zahl was a clear and imminent danger to the public's health, safety or welfare. Mr. Jackson asserted that there would be no evidence of a clear and imminent danger to the public health or safety and indeed, the Board would have before them statements from patients on how Dr. Zahl had helped and saved their lives because of their chronic pain problems that they have.

Mr. Jackson asked that the Board look carefully at the Orders as they related to the conduct by Dr. Zahl and to ask the question if Dr. Zahl had willfully violated those Orders. Mr. Jackson noted that there was no physician in the State of New Jersey who wasn't going to have instances in which there were mistakes or inconsistencies. Counsel urged the Board to weigh the evidence in the matter carefully and asked the Board to listen to every word of testimony about a URS billing monitor coming in and asking for access to the original medical records and being denied. There came a point in time when Dr. Zahl in conjunction with Elaine Caruso-Long, who had been brought in a practice manager said, "Why are we going crazy copying papers, why can't URS come to the office and be given open access," as required by the Order and, thus Mr. Jackson, informed the Board that he would prove that it was Ms. Caruso-Long who questioned how the URS monitors were doing their job and not Dr. Zahl.

The Attorney General's application, Mr. Jackson noted, was also based on Dr. Zahl not paying his \$188,000 and noted that, in fact, it was true. Respondent made a request of special counsel, Douglas Harper, Esq., inquiring as to the Attorney General's position as to a payment and were told that it had to be paid in a lump sum, in a letter received sometime in late December 2005. Counsel further noted that the issue had been brought up to DAG Kenny and Respondent had filed a motion asking permission to pay the monies over time. The issue, unfortunately, was never resolved.

Mr. Jackson asserted that the evidence would show that Dr. Zahl was a fundamentally dedicated physician who was subjected to tremendous stress and had made mistakes in terms of record-keeping and perhaps in the way in which he dealt with some people, thus making some enemies, who subsequently turned on Dr. Zahl and ultimately placing Dr. Zahl in front of the Board. In any event, he was positive that after hearing all the evidence, the Board would not find that the Attorney General had proven its case to support the Temporary Suspension of Dr. Zahl's license to practice medicine and surgery in the State of New Jersey.

Prior to calling his first witnesses, D.A.G. Kenny offered into evidence and asked the Board to keep in mind that on an application for temporary suspension, the statute permits certifications to be generally admissible in these proceedings, and in fact, this Board had decided temporary suspension applications solely based on Certifications.

He offered the following:

S-1 Volume I containing the documents which outline the history of the matter and Dr. Zahl's response to the Attorney General's Demand for Statement Under Oath.

S-2 Volume II - Patient records of Dr. Zahl's patients (#0001 - 0346)

S-3 Volume III - Patient records of Dr. Zahl's patients Volume of records (#0347 - 0678)

S-3A Procedures (unmonitored) performed in March 2005 (#679 - 723)

S-4 Volume IV - Certifications of Individuals

Peggy Barron (URS)

Elaine Caruso-Long

Paul Kenny, DAG

Dr. John Yulo

Kathy Ostrowski (unmonitored procedures)

Mr. Jackson objected to the admission of Ms. Caruso-Long's certification as she would be called as a witness and, therefore, the hearsay aspect would be cured because she could be cross-examined on her certification. Mr. Jackson made a similar argument relating to the certification of Dr. Yulo and reminded the Board that they should consider the testimony, and not the certification as the evidence before them. Counsel further objected to the admission of Peggy Barren, current owner of URS, because he would not have the ability to cross examine her.

The Chair, Ms. Criss, admitted these items into evidence and reminded counsel that hearsay evidence may be admitted during administrative hearings and that the Board would accord the appropriate weight to each during its deliberations.

D.A.G. Kenny offered S-4 into evidence and noted that the remainder of his items that had been pre-marked probably would best go into evidence in the context as when the witnesses were called to testify.

DR. YULO TESTIMONY

D.A.G. Kenny called his first witness. Dr. John Yulo, a physiatrist, was sworn in and testified that he resided in Philadelphia, PA. In going over his curriculum vitae (S-5 which was accepted into evidence), he noted that he went to medical school in the Philippines and was trained in pain medicine, electrodiagnostic medicine, physical medicine, and rehabilitation. The witness testified that he completed one year of internship at New York Hospital in Flushing, Queens. Dr. Yulo was accepted to the Thomas Jefferson University hospital as a resident for three years. He also informed the Board that he took the Boards administered by the American Board of Medical Specialty (the "ABMS") and became certified after taking his written and oral boards a year after by the American Board of Physical Medicine and Rehabilitation and became a diplomate of the Board. Dr. Yulo was licensed in New York (currently inactive), New Jersey, Pennsylvania, and New Mexico. Dr. Yulo testified that he had never been the subject of any Board disciplines or complaints against him.

While working for Dr. Zahl, Dr. Yulo testified that he was paid per diem as an independent contractor and was compensated \$1,500 per day. He was to see some patients and, when necessary, order tests and/or medications; test for nerve and muscle; review patient records and perform some EMGs. In applying for the position, Dr. Yulo recalled that he saw the advertisement in the paper and had a telephone interview and subsequently, interviewed in the office when Dr. Zahl made him an offer to come in on Thursdays.

Dr. Yulo recalled that he worked in Zahl's office and acknowledged that he knew Ms. Caruso-Long and saw her a couple of times. He specifically recalled that she asked him to sign a form so that she could submit the bills to medicare to get paid for the EMGs. He saw Ms. Caruso-Long a second time, however, but could not recall the details. He did know the CRNA and believed there may have been a few times that she helped him with an EMG even though he generally did not sedate the patient. His informed the Board that his typical day on Thursday would entail a full schedule of exams for that day and testified that the fluroscopy unit was in the office. When Dr. Yulo was in the EMG room, most of the time Dr. Zahl was in the procedure room to go over patients that he had already performed the EMGs on and had to localize where the nerve level was involved.

The witness testified that Ms. Shontell Graham was the x-ray technician and operated the flouroscopy machine to review the spine and recalled that his name was seen on some charts in the fluroscopic image. He further explained that he believed that whenever you walked into the procedure, you had to document anyone that was in the room and this would account for his name being on records for which he did not have direct patient care or provide the services. Dr. Yulo continually testified that he did not perform any of the flourscopic procedures. Dr. Yulo further testified that a gentleman, named "Michael," although he did not know his last name, recalled or thought that he did the billing in the office.

Dr. Yulo understood that being the primary physician would mean that he was the one physician that was fully responsible for the procedure or services provided. Dr. Yulo reviewed the records and testified that he was not the primary attending physician for these patients. He testified that he did not direct the care or procedures, but only performed the EMGs as directed by Dr. Zahl.

Also, when Dr. Yulo was asked about Operative Reports that appeared to be signed by him, Dr. Yulo testified, after his review, that he could not verify that he had signed them. He did note that he did not authorize Dr. Zahl to sign his name, nor did Dr. Zahl ever give him any of the reports to review.

When Dr. Yulo was shown some documents that purported to have his signature, Dr. Yulo denied that it was his signature. He further denied that he performed the procedure on the patient that was indicated on the record. He categorically denied that he was present for many of the procedures that indicated that he was the primary physician and, in fact noted, that he was not qualified to perform most of the procedures that were indicated. When questioned about needle localizations, he recalled that he may have performed some in the lower back area, but only at the request of Dr. Zahl. When questioned about a particular procedure relating to a cervical injection, he denied that he would have ever been the primary physician in a cervical epidural injection. He may have observed the procedure, however, he categorically denied that he would have been the primary or attending physician. According to Dr. Yulo, he would not have performed these procedures because he had not had the adequate training to perform it. In some of the procedures, Dr. Yulo even went so far as to testify that if more than one physician was involved as indicated in the record, it would have been a deviation from the standard of care as it would have put the patient at more risk.

Dr. Yulo testified that a Radio Frequency Machine (the "RFM") was used and did not recall that he ever performed any procedures with the RFM because he was not familiar with it at that time. Dr. Yulo also noted that he was trained on the EMG machine, not the RFM and if used by one that is not properly trained, it could cause more damage to the patient. Dr. Yulo observed Dr. Zahl perform the RFM tests and there may have been times, for the lower back area only, where Dr. Zahl would operate the machine and perform the procedure.

When asked by D.A.G. Kenny to explain a Discogram, Dr. Yulo testified that this procedure was a more invasive test where the physician injects a needle into the disc with dye. Dr. Yulo denied that he was the primary or attending physician on any Discogram test and at best, he may have observed the procedure. Although his name may appear as the primary or attending physician on these tests, he categorically denied that he could have performed the tests.

Dr. Yulo acknowledged that in June 2005, most of the procedures that he was listed as the primary and/or attending physician could not have been true because he was not qualified to do perform these types of procedures and he would have put the patient at risk had he performed them . He cited that this would have included procedures such as the "Injection Procedure of Contrast Dye for Discograms at L-2/3 and L-3/4" and then a "Lumbar Discography at L-2/3, and L-3 and Interpretation" and "Intradiscal Injection of Anesthetic and Steroids at both levels." When shown all the records, Dr. Yulo could not verify that he signed any of the records and for all of them, indicated that he would not have been the attending or primary physician for these procedures.

Dr. Yulo testified that he never worked at the Bergen Ambulatory Facility and when shown a copy of the Operative Report, he denied that although his name was on the record, that he ever worked at the facility listed on the document. The witness further testified that he would be qualified to perform this type of injection, although he did not recall that he ever performed one. He was sure, however, that he never performed one at the Bergen Ambulatory Facility.

Dr. Yulo learned that Dr. Zahl did not need his services any longer in September of 2005 by the practice manager. She explained that due to a slow down in the number of patients, his services were no longer needed. Dr. Zahl contacted him by leaving a message on his answering machine after the Attorney General contacted him, sometime late in December 2005. The witness further explained that the message was recorded and then later transcribed by the Attorney General's office. Dr. Yulo identified the micro-cassette. Mr. Jackson did not object to the entry of the tape into evidence (S-7) and a transcript of the tape (S-6). Both were entered into evidence. In the taped message, Dr. Zahl requested that Dr. Yulo meet with him to go over some charts and obtain some original signatures on some charts. Dr. Zahl also contacted the receptionist at his current work practice about the same thing. He also received a telephone call from Michael, which the witness believed was the person responsible for the billing. D.A.G. Kenny represented to the Board that the Attorney General had a certified true copy of the words on that tape that had been marked as S-6 for identification. D.A.G. Kenny asked that the tape be played for the Board members to follow along with the transcript offered into evidence as S-7.

During the break, Z-1 (Certification of Mr. Jackson) was offered into evidence and the Attorney General did not object. The Board accepted it into evidence.

On cross-examination, Mr. Jackson clarified that Dr. Yulo was first approached by the Attorney General by telephone sometime in December 2005. He recalled that the Attorney General explained to him that DAG Kenny and DAG Warhaftig that they wanted to speak with him about his employment with Dr. Zahl. After he met with them, he agreed to come to be a witness and subsequently, received a subpoena to appear at today's hearing. When shown a copy of his certification, Dr. Yulo noted that it showed an October 23, 2004 date that he interviewed with Dr. Zahl when in fact it was September 23, 2004.

Concerning the presence of a monitor, the witness recalled that he did see one while Dr. Zahl was performing a procedure most of the time that he observed him. He recalled, and clarified, that he thought it was a medical student who was taking notes while Dr. Zahl was doing the procedure. He believed that Michael told him and Dr. Yulo followed up by asking why. Dr. Yulo came to understand that there were problems in the past, especially with billing. The witness recalled that he had discussed with Dr. Zahl prior to his hiring his qualifications and training. Dr. Yulo, to the best of his recollection, informed Dr. Zahl of what procedures he had done, was able to do and was not able to do prior to his hiring by Dr. Zahl. While he may have observed Dr. Zahl doing some of these types of procedures, he did not believe that he received the proper training. Dr. Yulo acknowledged, when pressed, that he was exposed to various types of procedures by Dr. Zahl.

Dr. Yulo acknowledged that even when he performed the procedure, he did not prepare the patient record. He assumed that Dr. Zahl was going to prepare the record and according to the witness, he did not believe that Dr. Zahl ever showed him any of the records that Dr. Zahl may have prepared. The witness, however, could not recall, or estimate, the number of times that this may have happened.

Dr. Yulo testified that October through December 2005 he was not qualified to perform the procedures by himself. Dr. Yulo clarified that when he said "cannot do it alone" he meant that Dr. Zahl would put the needle in and then Dr. Yulo would place his hand on top of Dr. Zahl's and together they would insert the needle so that Dr. Yulo could "feel" the location.

Dr. Yulo testified that he did not recall seeing Dr. Zahl perform any of the EMGs, although he did not know what he did when Dr. Yulo was not there. Dr. Yulo was not familiar with the expression "See one, Do One, Teach One, Be One."

Specially relating to Radio Frequency procedures, Dr. Yulo did observe Dr. Zahl perform the procedures with a monitor in the room, although, Dr. Yulo did not recall ever discussing any of the results and/or reports with each other. He acknowledged that a technician could turn on the machine, but only upon the orders of the physician.

During direct, Dr. Yulo testified that he was being paid on a per diem fee and that Dr. Zahl would issue the charges/billing for the services that Dr. Yulo provided. He also recalled that he had signed a document that the practice manager had asked him to sign, which he believed that it had something to do with Medicare. When shown the document "Assignment of Benefits," he further acknowledged that he assigned to Dr. Zahl the right to bill for the services that he provided that could appropriately be billed to Medicare. He also understood that some of the patients may have had private insurance and that Dr. Zahl would be billing for the services that were being provided by Dr. Yulo.

Turning his attention to the document which was on the Bergen Facility letterhead, Dr. Yulo again stressed that he had not provided any services at that facility. When he further focused on the anesthesia record, he noted that it was provided by Ambulatory Anesthesia of New Jersey. He also acknowledged that the procedure note (i.e., medical record) did not indicate that it was performed at the Bergen Facility, but rather at the Union office of Dr. Zahl where Dr. Yulo did perform services for Dr. Zahl.

The witness denied that Dr. Zahl sent him for a training course, although, during this time, Dr. Yulo on his own, attended some basic training in fluoroscopy. He had not been credentialed prior to this.

Dr. Yulo testified that the EMGs were performed by Dr. Yulo and he considered himself as the primary physician for that test and he was responsible for the test and the results. After he would see the patient and examine the patient, he would make the recommendation of where the EMG needed to be performed, sometimes consulting with Dr. Zahl. While Dr. Yulo did not perform the billing, he was aware that the billing was done based on the number of nerves or limbs that were performed. Dr. Yulo did not keep a record of the number of nerves/motors or limbs that he did. When the EMG study was complete, he would type in a computer (laptop) what he had done, printing out the report right there and then signing it and placing it into the patient record.

Dr. Yulo also clarified that he signed the Assignment of Benefits for the Medicare billing. He believed that he did not sign the authorization until after being there about three months. Also, on the signature on the operative reports, he noted that there was a marked difference between the two. On the operative reports, he believes that it was a stamp that was made from his medical license. He did not give anyone authority to make a stamp with his signature.

The witness believed that the first time that he had met Dr. Zahl was during the week. He was sure of this because they had lunch together and talked about the jobs that he would be doing. Dr. Yulo only recalled seeing Dr. Cottler's patients in follow up.

Dr. Yulo testified that some patients were treated medically and he would have dictated his care. Also, he may have seen the record the following week, but he did not believe that he signed off on all the visits. He again stressed that he did not bill and so he did not assign any CPT codes to any work that he performed, although he is aware of the CPT code system.

In the eleven months that he worked for Dr. Zahl, according to Dr. Yulo, he would have seen the same patients from time to time. He did recall noticing that his signature was on the documents, but he thought this was because anyone that was around treating the patient should have his name on the record and he did not read the reports in detail.

Dr. Yulo estimated that he may have performed 10 or 15 lumbar injections when Dr. Zahl was on the premise. He would have documented it on the template that was part of the procedure in the office. Dr. Yulo believed that Dr. Zahl created the operative report from a template.

The witness was questioned by many members of the Board and was excused.

MS. CARUSO-LONG TESTIMONY

The State called their next witness, Elaine Caruso-Long and was sworn in. Ms. Caruso-Long noted that she was a practice manager, billing manager, and billing expert. Ms. Caruso-Long was a certified coder, received her training from technical schools and had been working with bills for 27 years. She came to know Dr. Zahl when she was asked to be an expert witness in an administrative hearing. Ms. Caruso-Long never testified, although, she did write an expert report, which was never used. Again, in 2003, she wrote an expert report from the proceedings before the Board of Medical Examiners and added that she was opposed to the actions of the Attorney General. She also served as an expert in a proceeding that dealt with the break up of his practice as an expert who had audited his books.

The witness testified that she was employed initially as a consultant in March, 2005 and then became his office manager in July 2005. As a consultant, the witness testified that she began on a medicare billing project to deal with a number of outstanding bills. She also worked on a number of other projects. Even after she became office manager, Dr. Zahl's wife remained the practice manager, who explained her job responsibilities which included the overall oversight of the office in staying compliant with the URS monitor (i.e., send the records, pay the bills in particular). United Review Services (URS) was the service that was monitoring Dr. Zahl's practice according to the Board's Orders. Additionally, she was responsible that no matter what Dr. Zahl requested her to do, the witness had to comply with the terms of the Order. His wife, the witness continued, also directed Ms. Caruso-Long that if Dr. Zahl told her to do something else, she had to bring it to Mrs. Zahl's attention immediately. Mr. John Jackson, attorney for Dr. Zahl, also explained the same thing to her.

Ms. Caruso-Long also oversaw the employees, which included hiring and firing, providing evaluations, and giving raises and called in the payroll. Dr. Yulo and Dr. Liebowitz were two physicians that worked in Dr. Zahl's office and testified that she never met Dr. Liebowitz. She was informed that his salary would be determined based on his amount of training. Ms. Shontell Graham wore many hats and testified that she was paid \$78,000 when the witness first starting working and when she left, she received a raise and her salary was approximately \$82,000. As the office manager, Ms. Caruso-Long was familiar with her job functions. Ms. Caruso-Long was also a patient of the practice and received injections and testified that as far as she knows, she had a patient record and after she left the employment, she requested a copy of her patient record.

The witness informed the Board of Ms. Graham's functions which included preparation of the table, obtaining the consent form, and they had a code between them. Ms. Graham would then manipulate the machine and placed out the needles that were to be used. Ms. Graham would set up the tray along with Vicky Grant. Ms. Caruso-Long testified that, as the office manager, she received a salary of \$85,000 a year, and a company vehicle.

The witness remembered sending a letter to the Board of Medical Examiners (attached to S-4). She described the contents to include notification of the Board that her name was sent and that she was the one that was overseeing with billing practices of the Board. Because, according to the witness, this was not true, she felt an obligation to inform the Board because he was not in compliance with the Board's orders. The witness knew this because she had received copies of the Orders and Mr. Jackson explained in plain English to her, the requirements of the Orders. According to the witness, Dr. Zahl did not allow her to send the records to URS as dictated by the Orders. She also was aware that the monitor was asked to leave on several occasions. She estimated that on at least four occasions

she was instructed not to send the records. In fact, the day before her last day at work, she recalled that Dr. Zahl grabbed the list of documents needed by URS which it forwarded over to her. Another time, Dr. Zahl instructed her to send a list to URS informing them they Dr. Zahl will not be sending any more records. When she informed his wife, they (Ms. Caruso-Long and his wife) telephoned Mr. Jackson, but Ms. Caruso-Long left the practice prior to the meeting.

The witness testified that Mrs. Zahl begged her to stay with the practice and even offered her additional money. The witness explained that she told Mrs. Zahl that she would only stay on with three conditions. One was to write to the Board informing the Board she was not responsible; two was to allow her to do the billing and; third, to allow her to submit the records to URS. After a while, Mrs. Zahl, after contacting Mr. Jackson, indicated that she had one month to perform the tasks. The next day, Dr. Zahl had her under the microscope and was questioning everything that she did and this was the day that he grabbed the documents out of the fax machine. Dr. Zahl again grilled her over what she was doing and informed her that no matter what she agreed to with his wife, he was going to do it his way.

Ms. Caruso-Long recalled that she informed Dr. Yulo that his services were not needed because Dr. Zahl told her that he did not trust him anymore. He may have mentioned something about Dr. Yulo had hurt a patient, but she could not be definite about that. She further recalled that Dr. Yulo was to do the EMGs and in some ways to act as the NP (helping out with medication) so that Dr. Zahl could do the interventional pain management procedures. At best, Dr. Yulo was there to assist and be trained. She recalled this because Dr. Zahl told her that and told her that he did not trust Dr. Yulo and further testified that Ms. Caruso-Long should look for a replacement for Dr. Yulo.

Ms. Caruso-Long also was aware that Dr. Zahl's interpretation of the Orders was different than Mr. Jackson's because he told her and his wife.

The arrangement with Dr. Liebowitz, as recalled by the witness, included that Dr. Liebowitz would be involved in some procedures, albeit limited. She understood that he was working because a fellow biller telephoned her with that information. The witness testified that, as far as she knew, Dr. Liebowitz worked in the Union office. She was concerned about this because she had not credentialed him and his information was not in the computer. Michael Fabricatore told her that Dr. Zahl directed her to just bill the Liebowitz procedures that should be billed under Dr. Zahl's name. Ms. Caruso-Long strongly objected to this process and confronted Dr. Zahl with her objections.

Upon leaving her employment, Dr. Liebowitz telephoned the witness to see if Dr. Zahl had come up with some procedure about billing because he was uncomfortable with him billing this under Dr. Liebowitz' name when he was not the primary provider. Ms. Caruso-Long also noted that she was aware that they were going to share the money because they were worried about the tax implications.

During her tenure as office manager, Dr. Zahl and Michael Fabricatore did the billing. On Saturdays, Robin Kornegay worked with Dr. Zahl getting the bills out the door.

In reviewing the schedules, she noted that they were made up by the receptionists when the patient would call in for the "regular" appointments. Surgical procedures were made up by Dr. Zahl himself and there were specific instructions given by Dr. Zahl that they should not be shown to the monitor. Looking at another example, Ms. Caruso-Long testified that the Operative Reports were created by Dr. Zahl through his own laptop. After he created it, according to the witness, he attached it to the patient chart or give to someone in the billing department. The Anesthesia Report was always on the report prior to the Operative Report being completed for the file.

Turning her attention to an e-mail to John Jackson, Ms. Caruso-Long testified that she was asked to create a list of those accomplishments that were in place to improve the office. The e-mail listed, all claims are coded by the physician, that all CPT codes are identified by the physician, there was a check and balance system in place to check as to what was performed and what was being billed,

however, she noted that this stopped shortly after she wrote the e-mail.

The witness also reviewed another e-mail from Dr. Zahl which was his addition to her email of accomplishments. She noted that this included a statement that all CPT codes are double checked by another employee prior to mailing. According to the witness, this was true if she was present when the billing was going out. Another statement noted that physician and staff member reviewed operative reports. This may have been done, but only after it was with the billing record and it was not a separate process. All new billing was sent to the monitor prior to the submission of claims and Dr. Zahl changed it after.

Dr. Zahl, as recounted by the witness, wanted his patients to write to their assembly persons letting them know how over zealous the Board was being with the investigation against him. Ms. Caruso-Long also wrote a letter that was severely critical of the Board. When she realized that Dr. Zahl had been leading her down the primrose path, she felt obligated to let the Board know what he was doing. She first began to wonder what was going on when Dr. Zahl requested that she obtain the assignment of benefits from Dr. Yulo. Then when she learned that he was billing for Dr. Liebowitz she began to look into this and realized the breadth of his fraud.

The witness explained that she informed Mr. Jackson that she would like to meet with them to discuss any issues, because she had decided to resign. She informed Mr. Jackson that she could not take it anymore and that she believed that because she had no longer been willing to do it the "Zahl" way, she was no longer welcome in the practice. In her resignation, she explained the same thing to Dr. Zahl and contacted the Board, as well, and believed that she had to do this because it is the right thing.

The witness explained that she contacted an attorney because she feared that she could get into trouble for what Dr. Zahl may have done in her name. She also was advised that she may have a CEPA claim. Prior to her resignation, Dr. Zahl made it clear that she needed to shut her mouth or that she may not have a job.

Finally, she informed the Board that she did not question his ability as a clinician and in fact, thanked him for what he had done to help her with her own personal condition. She did, however, believe that in spite of that, she had to come forward because of the fraud that he was committing.

Board member, Dr. Strand left the meeting.

Before Mr. Jackson's cross-examination, the chair indicated that Board member, Douglas Wheeler had a statement to make. Mr. Wheeler indicated that in his previous life, he was a Chief of Staff at the Department of Banking and Insurance. Mr. Wheeler vaguely remembered seeing either Ms. Caruso-Long's letter or a forward from a legislator. Mr. Wheeler believed that it would not cloud his judgement in terms of his participation in the hearing and his ability to render a fair decision in the matter. Mr. Jackson had no objection.

On cross examination, Ms. Caruso-Long indicated that it was a fair assertion to say that she and Mr. Jackson were allies in the effort to keep Dr. Zahl in practice and the straight line. She further agreed that she and Mr. Jackson recognized that at some point, there were some questions that were going to have to be brought to the Medical Board. Mr. Caruso-Long testified that Dr. Zahl was on her back regarding the records that were being mailed and sent to the URS office by she and the office staff and that she was part of a plan specifically developed to give URS unfettered access to the records in Dr. Zahl's office.

Mr. Caruso-Long was shown Z-1 as KZ90, an email dated October 18, 2005 indicating the subject line "URS Issue of Restructure." The witness testified that in her first paragraph her email read, "I propose the following that all pertinent files will be made readily available for this person to review

onsite.” followed with “All questions can be answered on site.

The day before she resigned, she noted that she was working on the restructuring of some of the ways in which URS was billing for their review. She pointed out that there were times when the same person was billing overlapping times for different functions. Ms. Caruso-Long also noted that she objected to some of the block time that was being billed when some other work could be performed at the same time during that time.

Prior to knowing about the Liebowitz proposed method of billing, she did not suspect that there was any fraud being committed. She did note, however, that she was aware of Dr. Zahl’s failure to abide but the terms of the Order.

When she reviewed her certification, she noted that she was not permitted to review any of the outgoing claims or billing because Dr. Zahl did it all by himself. Although when confronted further, she did acknowledge that she did review the bills concerning Dr. Liebowitz and that is what made her look further into Dr. Zahl’s billing practice.

Ms. Caruso-Long reviewed one of the schedule forms and she admitted that she wrote the information o the form. The initials "NB" meant not billed because staff had missed the billing of the service. She compared the sheet to the computer’s day sheets that schedules the patients. In checking whether the service was billed, she testified that she did not review the patient chart or patient sheet.

On some PIP matters, the witness recalled that she was asked to gather some of the missing material from the files that were needed. She further recalled that she had located most of the records and sent them. She had not seen any list that would indicate which procedures were done by Dr. Yulo and which were performed by Dr. Zahl.

On the billing form, Ms. Caruso-Long confirmed that it was her experience that the billing physician was always to be the attending or the physician that was providing the service. She further explained that the Medicare project dealt with items that had already been billed. She also mentioned that most of her work centered around old receivables and not the current billing.

As part of her responsibilities, she did anticipate that she would restructure the billing department, however, Dr. Zahl never permitted her to implement anything. She also reiterated that Mrs. Zahl wanted her to make sure that she complied with all of the Board’s orders.

The witness testified that she became eligible for SSDI in March 2004 and when she was working for Dr. Zahl as both the consultant and as the office manger she reported that income to the government. She was on the back to work program.

When Ms. Caruso-Long was questioned about an incident with the Pennsylvania state police when DAG Kenny objected as to its relevance. Mr. Jackson believed that the case law supported his questioning in this regard as it goes to the credibility of the witness. The objection was sustained as it was determined that it was beyond the scope of this proceeding and not relevant.

Ms. Caruso-Long acknowledged that she did make an attempt to have the URS representatives come to the office because she wanted to facilitate the process of compliance with the Orders in particular because this is what his wife wanted. She noted that when she did come up with other parameters of the review is when Dr. Zahl began to reproach her.

Prior to working for Dr. Zahl, she had served both as a consultant and an expert on his behalf. At that time, she did not believe that Dr. Zahl was improperly billing. She also opined at that time that his billing charges were on the lower side.

The witness was questioned by several of the Board members and was then excused.

The hearing ended at 10:15 P.M. and the meeting was adjourned the hearing until February 22, 2006 at 9:00 a.m. at the Justice Complex in room D-1.

Karen Criss R.N., C.N.M.
Vice-President
Chairperson for Open
Disciplinary Matters
RCS/wr February '06

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