

**BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS**

In the Matter of)
)
JOHN R. TOTH, M.D.) Docket No. 05-HA-79
Kansas License No. 04-18310)
)
_____)

EMERGENCY ORDER

NOW ON THIS Twenty-third Day of June 2005, this matter comes on for hearing upon the motion of Petitioner for an emergency order. Kelli J. Benintendi, Associate Counsel, appears for Petitioner. Respondent John R. Toth, M.D. appears in person and through Steve A. Schwarm of Polsinelli, Shalton, Welte and Suelhaus, P.C.

Having heard the testimony of the witnesses, and with the agency record before him, the Presiding Officer finds, concludes and orders as follows:

1. This is a motion for an order pursuant to K.S.A. 65-2838 and 77-536. The Presiding Officer concludes that under those statutes, the Board may issue an order to temporarily limit or suspend a license upon the finding of an imminent harm to the public health and safety. When issuing a temporary order, the Board must use the least restrictive means available to protect the public.

2. The petition and motion for an emergency order in the present case alleges that Respondent John R. Toth, M.D., a licensee of the Board, demonstrated professional incompetency by practicing below the standard of care to a degree constituting gross negligence when treating two separate patients. The motion is accompanied by five affidavits from physicians who had knowledge regarding at least a portion of Respondent's care of those two

patients. Based upon the affidavits and the arguments of counsel, the Board issued an *ex parte* Emergency Order suspending Respondent's license on June 11, 2005. That order was filed and personally served on June 15. The order included a notice that a hearing was scheduled for June 20. At Respondent's request, the matter was continued to June 23.

3. The Presiding Officer concludes initially that the Board may take disciplinary action against a licensee upon a finding of professional incompetency. Professional incompetency is defined by K.S.A. 65-2837(a)(1) as at least one instance of practice below the standard of care to a degree constituting gross negligence.

4. The Presiding Officer finds that Respondent has treated Patient #1 for approximately 11 years. He diagnosed the patient with Lyme disease. Respondent treated Patient #1 in his office using Bismuth. The drug was administered intravenously. Patient #1 was admitted to the hospital on April 19, 2005 with a diagnosis of acute renal failure. This patient was discharged on April 24, 2005, and remains on outpatient kidney dialysis. The cause of renal failure was the consequence of the Bismuth treatment.

5. There is evidence that the diagnosis for Lyme disease was not supported for Patient #1. The Presiding Officer finds that the diagnosis was not correct, but there is no finding at this time as to whether the diagnosis was within the standard of care.

6. Patient #2 received Bismuth treatments for Lyme disease on April 14, 2005. This patient presented to Respondent's office on April 18 for a second administration of Bismuth. Patient #2 went into cardiac arrest in the office as a result of the Bismuth. The patient was hospitalized with acute renal and respiratory failure and was unresponsive.

7. There appears to be no dispute that Bismuth is a toxic metallic element not having FDA approval for IV use. The record does not contain a great amount of detail regarding the side effects or toxicity of Bismuth except to indicate that IV Bismuth is a “poison”.

8. As support for the Bismuth treatment, Respondent apparently relied upon a paper from the Bradford Research Institute (BRI). That paper is part of the agency record, and is identified as Exhibit 5. The paper identified Bismacine-C and Bismacine-N (Bismuth) as two agents that were being evaluated with Lyme patients at the BRI/ Ingles Hospital in Tijuana, Mexico. There is no mention of any details of the method of research, criteria for establishing the diagnosis of Lyme disease, or criteria for quantifying side effects. There is no enumeration of dosages, risks or any details regarding testing results in the exhibit. The Presiding Officer finds that the Bradford Research Institute paper lacks scientific credibility upon which a physician may base a treatment plan.

9. The evidence establishes that Respondent’s treatment for the Lyme disease was below the standard of care. While the testimony did not include opinions of persons identified as expert witnesses, the testimony presented was exclusively from physicians who were knowledgeable in their specialties. The Presiding Officer is able to understand their testimony and find that Respondent’s treatments for Lyme disease in Patients #1 and #2 were below the standard of care. The Presiding Officer further finds that the intravenous administration of a toxic metal substance such as Bismuth that is not indicated for the disease and that is without adequate support in the scientific literature, is a reckless disregard for the known dangers of the drug. The fact that IV Bismuth is a poison suggests that special caution is required when treating patients with any renal impairment. The patient record reveals that at least one of the two patients had a history of hematuria. The recklessness of Respondent’s conduct establishes that

the Respondent failed to adhere to the applicable standard of care to a degree constituting gross negligence.

10. Respondent did not avail himself of the opportunity to rebut the evidence that IV Bismuth as an alternative remedy imposes an unreasonable danger to the patient. The unreasonableness of the danger is underscored by the uncontroverted testimony indicating a very high degree of effectiveness for conventional antibiotic treatment of Lyme disease with minimal further risk to life. Whether Respondent's treatments were, in his mind, experimental or simply a preference for alternative agents is not clear. The Presiding Officer finds that Respondent's judgment in treating the Lyme disease with IV Bismuth calls into question his criteria for selecting agents with which to treat, and further calls into question his ability to use independent professional judgment regarding the likely effectiveness and danger of other experimental or alternative agents.

11. The two instances of practice below the standard of care to a degree constituting gross negligence, with the aggravating circumstance that both patients experienced devastating injury, are ample authority to revoke Respondent's license. There is additional aggravating circumstance in that the Board censured Respondent in an order dated April 25, 2005 for failing to respond to pages in a timely manner.

12. Respondent's defense in the present case is that random records of patients receiving allopathic or "conventional" treatments have been reviewed by peers and that those conventional treatments were within the standard of care. At least one of the peers who reviewed records and testified regarding the conventional treatments agreed upon cross examination that the alternative treatments were below the standard of care. All of Respondent's treatments discussed in the record, whether conventional or alternative were performed under

Respondent's authority and presumed skill as a physician. The testimony did not fully develop the concept of what constitutes alternative medicine. The Presiding Officer is aware that the term "alternative" is often used to encompass alternative, complementary, or integrative practices, and the term appears to be used in that broad sense in this proceeding, and is considered in that broad sense in this order.

13. The Presiding Officer finds that the public is in imminent danger by Respondent's continued practice of experimental or alternative medicine.

14. The Presiding Officer finds and concludes that if any leniency is to be accorded Respondent to continue in any capacity as a licensed physician in Kansas, Respondent's practice must be in strict conformity to textbook Internal Medicine and Family Practice, and textbook diagnostic criteria and therapeutic agents. Respondent must divorce himself totally from "alternative, complementary, or integrative medicine".

15. As the least restrictive means of protecting the public at this stage of the proceeding, the Presiding Officer finds and concludes that the suspension of Respondent's license should be modified, and that his license should be restored with limitations until the hearing on the petition has concluded.

IT IS, THEREFORE ORDERED, that the suspension of the license of John R. Toth, M.D. is hereby modified, and the license of John R. Toth is hereby limited pending the completion of this proceeding, as follows:

A. Respondent shall not engage in any conduct that falls within the definition of the healing arts except as that conduct is within the practice of allopathic medicine and surgery.

B. Respondent shall not prescribe, order, or treat any patient with IV Bismuth;

C. Respondent shall not diagnose Lyme disease. Respondent shall not initiate treatment of Lyme disease except in consultation with and approval by a Kansas-licensed physician having a practice specialty in infectious disease;

D. Respondent shall not engage in any diagnosis or treatment that is not accepted in the medical community. For purposes of this order only, a diagnosis is accepted in the medical community if there is an ICD 9 classification accurately describing Respondent's diagnosis, and a treatment is accepted in the medical community if there is a CPT code accurately describing Respondent's treatment procedure. If Respondent engages in a treatment that is not found in the CPT procedure code, Respondent will bear the burden of establishing that the treatment is openly taught at the University of Kansas School of Medicine and is considered by that institution as not being experimental or alternative;

E. Respondent shall not prescribe, order, or administer any drug, whether or not designated as prescription-only, that has not been approved by the FDA. Any drug that Respondent prescribes, orders, or administers shall either conform to the drug label, or shall be fully supported by peer-reviewed scientific literature that is published in a journal generally accepted by the medical community; and

F. Respondent shall not compound drugs.

PLEASE TAKE that this is an emergency order. An emergency order is effective when issued. Service of an emergency order constitutes notice of agency action for purposes of the Kansas act for judicial review of agency action. As provided by that act, a person whose license is affected by an emergency order may seek review in the district court. A copy of a petition for review must be served upon the Executive Director, State Board of Healing Arts, 235 S. Topeka Blvd., Topeka, KS 66603.

Dated this 27th Day of June 2005.

**KANSAS STATE BOARD OF
HEALING ARTS**

**_____/s/ Lawrence T. Buening, Jr. _____
Roger D. Warren, M.D.
Presiding Officer**

Certificate of Service

I certify that a true copy of the foregoing Emergency Order was served this 27th day of June 2005 by United States mail, first-class postage prepaid, and addressed to:

Steve A. Schwarm
Polsinelli, Shalton, Welte, Suelhaus, P.C.
555 Kansas Avenue, Suite 301
Topeka, KS 66603

John R. Toth, M.D.
2115 S.W. 10th Street
Topeka, KS 66604

And by hand-delivery to the office of:

Kelli J. Benintendi
Associate Counsel
235 S. Topeka Blvd.
Topeka, Kansas

_____/s/ Lawrence T. Buening, Jr. _____