

Court of Appeals No. 39301-8-II  
Thurston County Superior Court 08-2-02116-2

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DALE E. ALSAGER, D.O., individually and with  
respect to his licensure as an Osteopathic Physi-  
cian and Surgeon, Credential No. OP00001485,

APPELLANT,

v.

WASHINGTON STATE BOARD OF OSTEOPATHIC MEDICINE AND  
SURGERY, a State Board and Agency as established by  
law under RCW 18.57.003; WASHINGTON STATE DEPART-  
MENT OF HEALTH, an administrative agency of the  
State of Washington; ADJUDICATIVE SERVICE UNIT, a  
unit of the Washington State Department of Health,  
and JOHN F. KUNTZ, Health Law Judge, Presiding  
Officer, Adjudicative Service Unit, Department  
of Health,

RESPONDENTS.

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BRIEF OF APPELLANT

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

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## I. INTRODUCTION

Dale E. Alsager, D.O., respectfully appeals and seeks review of the (1) Order Affirming Board's Final Order entered by the trial court dated May 1, 2009; and as the judicial review of an administrative agency decision, (2) the Corrected Findings of Fact, Conclusions of Law and Final Order entered by the Board of Osteopathic Medicine and Surgery dated August 15, 2008; and (3) Ex Parte Order Of Summary Restriction entered by the Board of Osteopathic Medicine and Surgery on August 8, 2006.

Alsager was sanctioned by the Board based on its Conclusion of Law that "the Department [of Health] proved with clear and convincing evidence that [Alsager] committed unprofessional conduct as defined in RCW 18.130.180(4)" in that he was adjudged by it guilty of "incompetence, negligence or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed." CAR Bates Nos. 4979 - 4980. However and most noteworthy, the Board separately held as a Conclusion of Law that "the Department failed

to prove with clear and convincing evidence that [Alsager] committed unprofessional conduct as defined in RCW 18.130.180(7)" and thus he was not adjudged guilty of a "violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice." CAR Bates No. 4980.<sup>1</sup>

The four prongs of Alsager's appeal are: (1) the Board punished him not for incompetence but for what it deemed to constitute negligence based on *ad hoc* standards of care announced and applied by a 3-

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<sup>1</sup> The Board clearly did not intend to limit this Conclusion of Law to merely the disposition of Paragraph 1.23 of the Statement of Charges, as such was previously removed from consideration at the hearing by its omission from Prehearing Order No. 8 which set the issues and agenda for the hearing. Bates No. 4695; WAC 246-11-390(5)(a). This was clarified and the Presiding Judge ruled in a prehearing colloquy that "I am not striking the allegation at 1.23, but I will strike the citation to 18.130.180, sub (7). If you believe, Ms. O'Neal, that you have evidence that you can bring 1.23 in through subsection (4), the Uniform Disciplinary Act, certainly you'll have an opportunity to do that, but as to that particular statutory subsection, sub (7) of the UDA, I'll take that out. I'll grant that motion." CAR Bates No. 10103. Had the Board intended to memorialize this prehearing ruling, it could have and would have simply held that such Charge had been dismissed on motion by Alsager; it did not do so and this Conclusion of Law is as broad and all-inclusive as its language indicates. CAR Bates Nos. 10099 - 10103; CAR Bates No. 4959 - 4960.

member panel in an adjudicative proceeding in lieu of the mandatory APA rulemaking process; (2) the panel sidestepped its duty as the factfinder and failed to determine the cause in fact of the death of Patient "A" relying instead on a conclusive presumption substantially prejudicing Alsager's right to a fair adjudication of disputed facts under the "highly probable" standard; (3) certain findings are not supported by substantial evidence; and (4) sanctions imposed in the Final Order exceed statutory authority and are excessive.

## II. ASSIGNMENTS OF ERROR

In his Petition for Judicial Review, Alsager clearly identified and assigned error to and challenged with specificity the findings and conclusions by the Board as set forth in its Final Order and in its Ex Parte Order. CP at 3 - 77. Each of the identified challenged findings and conclusions in Alsager's Petition for Judicial Review is included herein by reference and assigned error for judicial review by this Court. RAP 10.3(a)(4). Each of these errors is further identified hereinbelow.

**A. TRIAL COURT ERRORS**

1. The trial court erred by issuing its Order Affirming Board's Final Order dated May 1, 2009. CP at 84 - 85.

**B. BOARD OF OSTEOPATHIC MEDICINE ERRORS**

2. The Board of Osteopathic Medicine and Surgery erred by issuing the (a) Corrected Findings of Fact, Conclusions of Law and Final Order dated August 15, 2008; and (b) Ex Parte Order Of Summary Restriction dated August 8, 2006.

3. Alsager assigns error to each of the following aspects and elements of the **EX PARTE ORDER** in their entirety (as in more detail described in the Petition for Judicial Review, CP at 5 - 6):

**Findings of Fact:** Paragraphs 1.2; 1.3; and 1.4.

**Conclusions of Law:** Paragraphs 2.1; 2.2; and 2.3.

**Order:** Entire Paragraph comprising Order.

4. Alsager assigns error to each of the following aspects and elements of the **FINAL ORDER** in their entirety (as in more detail described in the Petition for Judicial Review):

**Introductory Paragraph** (CP at 7).

**Issues** (CP at 7).

**Summary of Proceedings** (CP at 7).

**Findings of Fact:** Paragraphs 1.2; 1.3; 1.4; 1.5; 1.6; 1.7; 1.8; 1.9; 1.10; 1.11; 1.12; 1.13; 1.14; 1.15; 1.16; 1.17; 1.18; 1.19; 1.20; 1.21; 1.22; 1.23; 1.24; 1.25; 1.26; 1.27; 1.28; 1.29; 1.30; 1.31; 1.32; 1.33; 1.34; 1.35; 1.36; 1.37; 1.38; 1.39; 1.40; 1.41; 1.42; 1.43; 1.44; 1.45; 1.46; 1.47; 1.48; 1.49; 1.50; 1.51; 1.52; and 1.53. CP at 8 - 39.

**Conclusions of Law:** Paragraphs 2.1; 2.2; 2.3; 2.4; and 2.6. CP at 39 - 40.

**Order:** Entire Paragraph comprising Order, including Paragraphs 3.1; 3.2; 3.3; 3.4; 3.5; and 3.6. CP at 41.

**C. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

The issues presented to this Court for judicial review are as follows:

1. Whether the Findings of Fact are supported by substantial competent evidence that prove the allegations to be highly probable under the clear, cogent and convincing standard in quasi-criminal professional license revocation proceedings? (Assignments of Error Nos. 1 - 4, inclusive.)

2. Whether the Board's Summary Order and Corrected Final Order must be reversed and vacated because Alsager was found guilty of unprofessional conduct in a quasi-criminal professional license disciplinary action based only on *ad hoc* standards of care adopted and applied by the Board's panel outside of the mandatory APA rulemaking procedure in violation of law? (Assignments of Error Nos. 1 - 4, inclusive.)

3. Whether the Board panel unlawfully abdicated its constitutional responsibility and duty as factfinder to factually determine the cause of death of Patient A and to determine on such actual basis whether Alsager's treatment and care of Patient A violated the known standards of care? (Assignments of Error Nos. 1 - 4, inclusive.)

4. Whether sanctions imposed by the Board are outside the Statement of Charges and are unconstitutionally excessive? (Assignments of Error Nos. 1 - 4, inclusive.)

### III. STATEMENT OF THE CASE

#### A. FACTUAL BACKGROUND

Dr. Dale E. Alsager, D.O., Ph.D., is an osteopathic physician and surgeon licensed in the State of Washington by the Board since 1995 with his office now located in the Maple Valley area of unincorporated King County.<sup>2</sup> Unlike the Depart-

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<sup>2</sup> The overview of Dr. Alsager's education, work experience and expertise are based on his Curriculum Vitae (CV) admitted as Exhibit R-10. CAR Bates Nos. 5004 - 5030. In addition, Dr. Alsager's testimony is produced at CAR Bates Nos. 10467 - 10495 (Hearing Transcript at pp. 378 - 406). In answer to a (continued...)

ment's expert, Dr. Jon Hillyer, M.D., Alsager is educated and trained in osteopathic medicine and certified in family practice which emphasizes rural environment and care of the entire family.<sup>3</sup> Alsager specializes in musculoskeletal pain management, CAR Bates No. 5005, which includes the use of OMT (Osteopathic Manipulative Therapy) as well as opioids as may be necessary and as to which each patient is fully warned of the hazards prior to any use. CAR Bates Nos. 10635 - 10636. Alsager has specialized training, experience, skills and certification in radiological techniques, including x-ray and CT/MRI and Dexa scan processes, and in medical procedures, including minor surgery and joint/muscle trigger point injections. CAR Bates Nos. 5006, 5011 - 5014, 10478 - 10479. Alsager's

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<sup>2</sup>(...continued)

query regarding his claim to have "a pain clinic and you're specialized in pain management," Alsager testified that "musculoskeletal conditions are part of my specialty, that includes pain management." Bates No. 10924.

<sup>3</sup> CAR Bates No. 10477. And as a result of this specialized education and training, referrals to outside specialists or consultants are not as commonplace as with other practices as a DO family practitioner is "expected to treat many more things at a primary level because we're trained to operate in rural environments." CAR Bates No. 10477.

specialized education, training and experience in "the use of opioids and non-pharmaceutical methods for pain control" includes multiple courses, internship at drug and alcohol detox centers, and certification in Suboxone Subutex. CAR Bates Nos. 5006, 10479 - 10481. Prior to starting his own private practice, Alsager worked at a pain management clinic at Saint Luke's Medical Center in Bellevue, WA, at which opioids were used together with other techniques, such as osteopathic manipulation, for the control and management of pain. CAR Bates Nos. 10482 - 10483. Through this extensive background of training and experience, Alsager knows how to recognize patients having legitimate injuries or conditions vis à vis those with drug addictions or dependencies, CAR Bates Nos. 10480 - 10482; and it is with this specialized knowledge, training and expertise that Alsager confidently testified that "none of the patients before this Board are addicts [or] meet the criteria for an addict[; however, they do] exhibit signs and symptoms of physiological dependence on drugs that

they have in their system for the purpose of maximizing function." CAR Bates No. 10482. Alsager also made extensive use of his specialized knowledge, skills and certification in the use of massage therapy as a treatment modality in pain management. CAR Bates Nos. 5011, 10483 - 10484. Alsager has specialized training, skills and certification in diagnosis and treatment of nutritional deficiencies, including the use of vitamin B12 and other micronutrients and the affect thereon of opioids and benzodiazapines. CAR Bates Nos. 5012, 10484 - 10485. Alsager has specialized knowledge, training, skills and experience in the early diagnosis of rheumatoid arthritis (RA) with MRI so that effective treatment may be given the patient to prevent damage,<sup>4</sup> and is a member of ISEMIR

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<sup>4</sup> CAR Bates Nos. 10485 - 10486. Contrary to the Department's expert and the Board's findings related to the use of combination of factors to diagnose RA when at least four are present (CAR Bates No. 4964 - 4965; 5057 - 5058), the use of MRI as is Alsager's practice for the early diagnosis and treatment of RA is gaining widespread acceptance as effective new criteria. See "Rheumatoid Arthritis: MRI's Role in Diagnosis and Management," The MRI Mentor, Vol. 3, No. 3 (February 27, 2009) (the Conclusion of this article - published subsequent to the hearing and unavailable - is that "Immunological features occur in rheumatoid arthritis years (continued...)

(International Society of Extremity MRI in Rheumatology). CAR Bates No. 10486. Alsager has specialized knowledge, training and skills in using osteopathic manipulation techniques to mitigate pain levels in the stomach and abdominal region, including those patients diagnosed with and treated for colitis.<sup>5</sup> Alsager extensively uses the McManis Table, as to which he is specially certified, as a treatment therapy for his patients "to reduce their pain and more importantly reduce the reliance on opioid medications." CAR Bates Nos. 10487 - 10489. Alsager uses all of the diagnostic equipment in his office, including x-ray and CT/MRI, to obtain imaging and objective evidence of patient injuries and

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<sup>4</sup>(...continued)

before clinically apparent disease and may result in stigmata appreciable by MRI in asymptomatic people [and therefore] MRI may afford early RA diagnosis even when serology proves negative, which is important because early disease modification therapy better protects long-term joint function."). And contrary to Board findings, the SSA confirmed Alsager's diagnosis of rheumatoid/psoriatic arthritis for Patient "F" by written Order dated April 27, 2009.

<sup>5</sup> CAR Bates No. 10487. Of special note is the fact that the unique coding of such osteopathic techniques in the Electronic Medical Records (EMR) are missed by non-osteopathic physicians, such as the Department's expert, and thus Alsager receives no credit for the use of such alternative treatment therapies for his patients. CAR Bates No. 10487.

pain complaints to support specific treatment plans. CAR Bates No. 10635 - 10636. Objective findings regarding pain and functional plans for each patient are recorded in the EMRs each visit. E.g., CAR Bates Nos 5185 - 5189; 8221 - 8224 (and thousands more). The EMR system tracks medication prescriptions to ensure proper use and to preclude improper refills. CAR Bates Nos. 10394 - 10395, 10707 - 10708, 10823, 10915 - 10916. Finally, Alsager has specialized knowledge, skills, education, training, and experience in the use and effect of opioid medications in the treatment and management of pain, including the use of fentanyl for chronic and acute pain control.<sup>6</sup> Contrary to the Board panel's findings, Alsager clearly qualifies and is a pain management specialist. CAR Bates No. 4960. On the other hand, however, although as a Conclusion of Law the Board panel asserts that it "used

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<sup>6</sup> CAR Bates Nos. 10491 - 10494; 10655 (opioids vs opiates). Alsager is affiliated with the Washington Academy of Pain Management. CAR Bates No. 10494. Alsager is published in the medical literature, including an article titled "OxyContin CR Use Associated With B12 - B2 Deficiency" published in the Pain Clinic journal. CAR Bates Nos. 10494 - 10495.

its experience, competency, and specialized knowledge to evaluate the evidence," CAR Bates No. 4979, there is total silence in the record identifying with any particularity whether and which Board panel members have any pain management special knowledge, skills, experience, training or education.<sup>7</sup>

The foregoing background recital is not only noteworthy but is most crucial as nowhere in the Final Order did the Board find Alsager incompetent,<sup>8</sup> as all of its findings<sup>9</sup> were based on purported deficiencies in *ad hoc* standards of care. CAR Bates Nos. 4961 - 4966 (as to purported *ad hoc*

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<sup>7</sup> In fact, during the hearing the Board panel chairman, Dr. Shelton, even went so far as to specifically inquire of the Department's witness, Dr. Hillyer, for names of pain specialists for patient referrals. CAR Bates No. 10248. It is thus axiomatic that the Court can not presume the members of the Board hearing panel have any pain management expertise upon which to base its findings as to standards of care outside those adopted by the full Board after notice and comment from all members of the profession.

<sup>8</sup> Incompetency means "lack of ability, legal qualification, or fitness to discharge the required duty." Black's Law Dictionary, at p. 688 (5<sup>th</sup> ed. 1979). See also Oxford English Dictionary, at p. 166 (1<sup>st</sup> ed. 1971).

<sup>9</sup> In extensive detail, Alsager assigned error to the Board's Findings of Fact, Conclusions of Law and Final Order in the Petition For Judicial Review filed with the Superior Court and included in the Clerk's Papers for this Appellate Court. CP at 3 - 77. In order to honor limited page requirements, all of those errors are incorporated herein by reference *in toto*.

standards in general).<sup>10</sup>

A Board 3-member panel conducted the adjudicative hearing<sup>11</sup> on the Department's Statement of Charges against Alsager stemming from his treatment of seven patients, identified for purposes of this matter only as Patients "A" through "G". In sum, the Board found that "the treatment provided to the above-identified patients reveals that [Alsager's] treatment practices fall below the standard of care for the practice of osteopathic medicine in the state of Washington in several areas." CAR Bates No. 4961. However, the Board also concluded as a matter of law that Alsager did not violate "any state or federal statute or administrative rule regulating the [osteopathic] profession . . . , including any statute or rule defining or

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<sup>10</sup> Specific findings as to each patient made by the Board drawing upon its *ad hoc* pronouncement of "standards of care" are at the following portions of the record (Patient/CAR Bates Nos.), and all assigned error by Alsager: "A"/4966-4970; "B"/4970-4972; "C"/4972-4973; "D"/4973-4974; "E"/4974-4976; "F"/4976-4978; "G"/4978-4979. And none of these "standards of care" were found and concluded as a matter of law to have violated any Board adopted standards of care, including its own Guidelines For Management of Pain. CAR Bates No. 4980.

<sup>11</sup> Panels must consists of three or more members of the disciplinary authority. RCW 18.130.050(18).

establishing standards of patient care or professional conduct or practice." CAR Bates No. 4980. Such rules include the Board's own "Guidelines For Management of Pain" published in 2002<sup>12</sup> having the express purpose and "intent that providers will have confidence that these guidelines are the standard by which opioid usage is evaluated."<sup>13</sup> Thus, it may be stated with certainty that Alsager was adjudged guilty by the Board of violating only those *ad hoc* standards of care newly defined by a panel in this adjudicative proceeding. All standards known, accepted and published to the osteopathic community through the APA were clearly met in all respects in Alsager's diagnosis, treatment and care of these seven patients.

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<sup>12</sup> See also Board Rules promulgated as WAC 246-853-510 through WAC 246-853-540 (specifically regarding use of controlled substances for pain control and the adoption of the 2002 Guidelines as recognized national standards in the field of pain management).

<sup>13</sup> The Department's attorney confirmed that the referenced 2002 Board Guidelines are the most current. CAR Bates Nos. 10465 - 10466. Alsager testified extensively that his practice and treatment of each of the seven patients conformed to these adopted Guidelines. See Patient/CAR Bates Nos.: "A"/10709-10712; "B"/10637-10643; "C"/10754-10757; "D"/10791-10793; "E"/10828-10830; "F"/10870-10873; "G"/10894-10896.

That Alsager conducted his practice and met all recognized standards of care with respect to the treatment of these seven patients is underscored by the testimony of Dr. Wayne E. Anderson, D.O.<sup>14</sup> Dr. Anderson was offered and recognized by the Board without objection as an expert in (1) issues regarding the Duragesic Patch and the fentanyl system, (2) standard of care, and (3) neurological seizure disorders, including SUDEP.<sup>15</sup> With respect to Alsager's acts, conduct, diagnoses, and treatment of each of the seven patients, Dr. Anderson testified that Alsager's care was neither defective nor deficient and met the standard of care for osteopathic physicians, including the Board's own Guidelines, with respect to each of

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<sup>14</sup> Dr. Anderson's CV is presented as CAR Bates Nos. 4987 - 5003.

<sup>15</sup> CAR Bates No. 10265. Dr. Anderson is a licensed osteopathic physician (California) and board certified as a neurologist and pain management physician. CAR Bates No. 10252. Dr. Anderson is published in and gives seminars on the fentanyl Duragesic Patch and pain management. CAR Bates Nos. 10253 - 10254. Dr. Anderson is on the pain committee for the American Academy of Neurology and also a local standard of care committee composed of both DO and MD physicians and is familiar with the Board's adopted Guidelines for Management of Pain. CAR Bates No. 10253; CAR Bates No. 10265.

these individual patients.<sup>16</sup> With special respect to the death of Patient "A", Dr. Anderson unequivocally testified that his death was in fact attributed to SUDEP (Sudden Unexpected Death of Epilepsy<sup>17</sup> Patients) and that pain management medications, including especially the fentanyl Duragesic Patch,<sup>18</sup> were not the cause of death. CAR Bates Nos. 10265 - 10294. Dr. Anderson's judgment and opinion delivered with reasonable medical certainty that the cause of death of Patient "A" was SUDEP and not drug medications<sup>19</sup> was supported

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<sup>16</sup> CAR Bates Nos. 10294 - 10295. E.g., the detailed Electronic Medical Records (EMR; i.e., patient charts) describing in detail each and every visit made to the clinic by Patient "A" are presented as CAR Bates Nos. 5070 - 5157.

<sup>17</sup> The treating neurologist of Patient "A", Dr. Song, diagnosed "A" as having "epilepsy with GTC seizures". CAR Bates No. 221. Dr. Song's neurological reports for Patient "A" are presented as CAR Bates Nos. 219 - 231.

<sup>18</sup> The Chronic Pain Management Contract for and signed by Patient "A" is set forth at CAR Bates No. 5159. Such Contract creates a functional plan for each patient. The Informed Consent and Release from Liability for Medical Procedures for and signed by Patient "A" on May 5, 2005 is presented as Bates No. 5160. The contractual Agreement to Pay for Medical Services for and signed by Patient "A" is at CAR Bates No. 5161.

<sup>19</sup> CAR Bates Nos. 10286 - 10287; CAR Bates No. 10292. The EMR printout of patient prescription history presents a duplicate record when a particular prescription has been inactivated. To the untrained eye, this could erroneously be seen as over-  
(continued...)

initially by family members<sup>20</sup> and firmly by former King County Medical Examiner and expert in forensic pathology Dr. Donald Reay, M.D.,<sup>21</sup> but was contrary to the cause of death assigned by the current Medical Examiner on the death certificate<sup>22</sup> as drug related that was blindly accepted by the Board without debate and to the absolute exclusion of all substantial, competent, clear, cogent and convincing evidence to the contrary.

The King County Medical Examiner's Office has established the cause of death for Patient A. This is the official cause of death recorded on the death certificate. For that reason, the Board has no need to choose between the alternative causes of death for

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<sup>19</sup>(...continued)  
prescribing. CAR Bates Nos. 10394 - 10395.

<sup>20</sup> See CAR Bates No. 5069 (in written notes contemporaneously entered into Alsager's EMR for Patient "A", on September 14, 2005 it is entered therein that in a phone conversation "Father [Patient "B"] thinks he might have had another seizure"); at least until the decision to file a lawsuit against Alsager was made. CAR Bates Nos. 5043 - 5046.

<sup>21</sup> CAR Bates No. 10522. Dr. Reay's CV is presented as CAR Bates Nos. 5031 - 5042. The qualification and acceptance of Dr. Reay as an expert in forensic pathology is set forth in CAR Bates Nos. 10520 - 10522.

<sup>22</sup> The death certificate issued for Patient "A" is CAR Bates No. 5163. The Autopsy Report is presented at CAR Bates Nos. 5164 - 5171. Specially note that the autopsy was not performed and blood samples drawn for analysis until 31 hours after time of death.

Patient A (acute intoxication due to the combined effects of the drugs or death from seizure).

CAR Bates No. 4969. The Board "view[ed] its responsibility to determine whether the care [Alsager] provided to Patient A was incompetence or negligence of the type that results in injury to Patient A or creates an unreasonable risk that Patient A may be harmed. In other words, did [Alsager's] treatment of Patient A fall below the standard of care for an osteopathic physician in the state of Washington."<sup>23</sup> The Board then erroneously found that "[Alsager's] care of Patient A fell below the standard of care for an osteopathic physician in the state of Washington."<sup>24</sup>

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<sup>23</sup> CAR Bates No. 4969.

<sup>24</sup> CAR Bates No. 4969. There are several simply flat errors in the evidence overlooked by the Board leading to its erroneous findings regarding Patient "A". CAR Bates Nos. 10302 - 10305. For example, the Board found that "there is no indication that [Alsager] prescribed a 75 microgram patch prior to prescribing the 100 microgram patch to Patient A." CAR Bates No. 4968. But Alsager testified that "Patient A was treated in 2002 with a 75 microgram fentanyl patch; in addition to Roxicodone tablets, 15 milligrams each, . . . for breakthrough pain, with a maximum of 6 a day, the equivalent of 90 milligrams of oxycodone per day" and still reported inadequate pain control for his back and stomach. CAR Bates No. 10668; see also CAR Bates Nos. 10674 - 10675. Another  
(continued...)

This is the recurring and sole theme of the Board's Final Order; to wit, Alsager's **standard of care** for Patients "A" through "G" fell below the purported standard of care for an osteopathic physician in the State of Washington notwithstanding the Conclusion of Law concurrently made by the Board that Alsager violated no standard of care set forth and adopted in statute or administrative rule, including the Board's own adopted 2002 Guidelines for Management of Pain which Alsager clearly demonstrated were met for all seven patients and as to which the Board clearly concurred with such substantial evidence as a matter of fact and of law.

Clearly and as a legal distinction, the Board grounded its Final Order concluding that Alsager committed unprofessional conduct solely and

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<sup>24</sup>(...continued)

factual error in the Board's findings is its erroneous statement that "Patient A was treated for his seizure condition by neurologist James Song, M.D., and was prescribed Dilantin. This information was forwarded to [Alsager]." CAR Bates No. 4968. However, Alsager testified that "although I was Patient A's treating doctor . . . I was not aware of these notes, the content, until perhaps a couple of months ago, when I had an opportunity to see these notes through the exhibits here." CAR Bates Nos. 10661 - 10662.

exclusively on the purported basis that Alsager was negligent in his treatment of these seven patients, and not on either incompetence or malpractice as separate, independent grounds under RCW 18.130.180 (4). And as assigned error in Alsager's Petition for Judicial Review (CP at 3 - 77)<sup>25</sup> and herein, each of the purported standards of care asserted to have been violated were in fact created *ad hoc* by the Board panel in this adjudicative proceeding and not by the entire Board pursuant to APA rulemaking as required by law.<sup>26</sup>

Not considered by the Department's witnesses in the hearing in support of their testimony was

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<sup>25</sup> All parts of the Board's Final Order were assigned error except for Paragraphs 1.1 and 2.5; and all parts of the Board's Ex Parte Order were assigned error except for Paragraph 1.1. See Petition for Judicial Review, at pp. 3 - 39, in which all findings, conclusions and orders entered by the Board are contested, challenged and appealed, except for the foregoing, on the grounds and for the reasons set forth therein, including, *inter alia*, the error of law that each of the purported "standards of care" which Alsager purportedly violated were first announced by a mere panel of the Board *ad hoc* in the adjudicative proceeding and are thus unlawful and invalid as not having been properly promulgated under the APA.

<sup>26</sup> As the Board concluded as a matter of law that the "Department failed to prove with clear and convincing evidence that [Alsager] committed unprofessional conduct as defined in RCW 18.130.180(7)." CAR Bates No. 4980.

the extensive personal knowledge as to the background of each of the seven patients used and relied on by Alsager in his diagnoses, treatment and care, including use of alternative modalities, for each of these patients.<sup>27</sup> This great well of personal information relating to each individual patient was heavily factored in arriving at an individual treatment and care pain management program. Alsager's testimony detailed with great specificity and to great lengths his personal knowledge of each patient and how such was considered and factored into the pain management

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<sup>27</sup> Admitted by the Department's principal witness Dr. Hillyer in answer to the question "what did you review in order to do the opinion and analysis that you did for us in this case" was the fact that "I can't say I went through every page of these records, but I scanned these records. Once I learned how Dr. Alsager's electronic medical record worked, I was able to wean out kind of the start and finish of the record and find in the record what I was looking for in terms of telling me whether or not, the pain management care. And I tried to focus initially just on pain management things, like opiate prescriptions, like compliance, like procedures in terms of pain management. I tried to focus on those and gleaned those out to see if there was anything in the record that was worth pursuing further." CAR Bates Nos. 10149 - 10150. Likewise, the Department's witness Dr. Lacy never spoke with Alsager regarding his personal knowledge, diagnoses, treatment and care of Patient "A" prior to issuing the death certificate. CAR Bates No. 10129.

program selected for implementation,<sup>28</sup> including the financial aspects of each patient which of necessity must be carefully considered by doctor and patient<sup>29</sup> in determining an effective, available and affordable means of achieving the pain control objectives for each patient.<sup>30</sup>

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<sup>28</sup> The detailed testimony by Alsager with respect to each of the seven patients is contained in the administrative record as follows (Patient/CAR Bates Nos.): "A"/10649-10674; "B"/10564-10588; "C"/10718-10722; "D"/10764-10766; "E"/10793-10797; "F"/10830-10853; "G"/10874-10880.

<sup>29</sup> As Dr. Anderson testified regarding patient care in light of absence of medical insurance and independent wealth, "so, what do you do if you don't have . . . [the financial means]? I don't know. You don't have psychological referral. You don't have PMNR. You don't have a neurology consult. You don't have an orthopedic surgery. You don't have a lot of these things because you can't get them. . . . [B]ut let's be honest. If you have a really complex patient who can afford nothing, you're not going to have every option available to you. And, so, you have to figure out what to do with the tools available to you." CAR Bates No. 10297.

<sup>30</sup> Besides the very difficult problems stemming from lack of financial resources, referrals and consults are held not to be standard practice in a family practice specialty, such as Alsager's, as Dr. Anderson testified "in family practice, the whole point of family practice is to be a family practitioner. If you needed seven or eight consultations on every patient that came in, there's really no need to have family practice as a specialty. We could just abolish it. . . . And we know that's not the case." CAR Bates No. 10298. The Board patently failed to adequately consider the dilemma faced by Alsager as a family practitioner in a rural environment composed of patients of limited means in the *ad hoc* pronouncement of purported standards of care that very frankly are impossible to meet under all the circumstances, short of simply abandoning these individuals. This is precisely why  
(continued...)

Finally and not just seemingly disregarded by the Board panel but obviously and patently so<sup>31</sup> is Alsager's comprehensive and detailed answer to each and every one of the myriad charges against him set forth in the Department's Statement of Charges and on which the Board conducted its adjudicative proceeding.<sup>32</sup>

### **B. PROCEDURAL BACKGROUND**

Following the Board's entry of the Final Order (Corrected), Alsager filed a Petition for Judicial Review in Thurston County Superior Court. CP at 3

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<sup>30</sup>(...continued)

APA rulemaking, with notice and opportunity to comment, is not only mandatory under the law but essential to the development of real and meaningful standards of care applicable to the entire osteopathic physician community.

<sup>31</sup> That the Board's lack of attention to detail at and during the adjudicative hearing is evident and most astonishing is derived from the absolute fact that, contrary to the Board's "Summary of Proceedings" set forth in its Corrected Final Order, neither Mary Wilson nor David Buscher, M.D., were at the hearing and had no testimony presented thereat. CAR Bates No. 4957. See also CAR Bates No. 10320 (Mary Wilson would not be called to testify).

<sup>32</sup> Alsager's thorough answer and detailed denial to each of the 78 allegations in the Statement of Charges (see CAR Bates Nos. 4 - 10) is presented as to each of the seven patients as follows (Patient/CAR Bates Nos.): "A"/10674-10709, 10712-10718; "B"/10588-10637, 10644-10648; "C"/10722-10754, 10757-10758; "D"/10767-10791; "E"/10797-10828; "F"/10853-10870; "G"/10880-10894, 10896-10898.

- 77. Following a hearing, the Superior Court entered its Order simply affirming the Board's Final Order. CP at 84 - 85. Alsager timely filed a Notice of Appeal seeking review in this Court. CP at 86 - 120.

#### IV. STANDARD OF REVIEW

The Court of Appeals finds itself in the exact position as was the trial court in considering Alsager's Petition for Judicial Review of the Final Order entered by the Board. The Court reviews the agency Order under the Administrative Procedures Act (APA). RCW 34.05.570(3); Clausing v. State Board of Osteopathic Medicine & Surgery, 90 Wn. App. 863, 870, 955 P.2d 394 (1998). A professional license disciplinary proceeding is a quasi-criminal action, Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 474, 663 P.2d 457 (1983);<sup>33</sup> and as observed by the Washington Supreme Court "[a professional license revocation proceeding's] con-

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<sup>33</sup> Citing In re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968) (attorney disbarment); In re Kindschi, 52 Wn.2d 8, 319 P.2d 824 (1958) (physician discipline). See Clausing, 90 Wn. App. at 874. Quasi-criminal actions impose penalties; i.e., punishment for wrongful conduct.

sequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose." In re Revocation of License of Kindschi, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958).<sup>34</sup>

The Court reviews the findings and conclusions of the agency and must grant relief if the agency's order:

[V]iolates the constitution, exceeds statutory authority, is the result of faulty procedure, involves an error in interpreting or applying the law, is not supported by substantial evidence, omits issues requiring resolution, involves improper rulings on disqualification issues, is inconsistent with an agency rule, or is arbitrary or capricious.

RCW 34.05.570(3)(a) - (i); Clausing, 90 Wn. App. at 870. The standard of proof applied is that the conclusions of law must be based on findings of fact that are in turn based on evidence that is clear, cogent and convincing. Ongom v. Department of Health, 159 Wn.2d 132, 142-43, 148 P.3d 1029 (2006). Where the evidentiary standard is clear, cogent and convincing, the Court must determine

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<sup>34</sup> "Johnston and Kindschi are unquestionably the law of this jurisdiction." Nguyen v. Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 528, 29 P.3d 689 (2001).

that the competent evidence is substantial enough to allow it to conclude that the ultimate facts in issue have been shown to be "highly probable." In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).<sup>35</sup> Although the Board is the trier of fact in the proceeding,<sup>36</sup> the application of law to the facts is an issue of law that the Court reviews *de novo*.<sup>37</sup> And finally, although the Court accords substantial weight to the Board's interpretation of law as may specially fall within its area of expertise, the agency is not the final arbiter of the law and the Court may substitute its judgment for that of the Board. Haley v. Medical Disciplinary Board, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

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<sup>35</sup> Substantial evidence is "a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

<sup>36</sup> Deatherage v. State Examining Board of Psychology, 85 Wn. App. 434, 445, 932 P.2d 1267 (1997); Chicago, Milwaukee, St. Paul and Pacific R.R. Co. v. Washington State Human Rights Commission, 87 Wn.2d 802, 806-807, 557 P.2d 307 (1976).

<sup>37</sup> Tapper v. Employment Security Department, 122 Wn.2d 397, 402, 858 P.2d 494 (1993) (the Board's contested conclusions of law are reviewed *de novo* under the error of law standard, Bond v. Department of Social & Health Services, 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002)).

## V. ARGUMENT AND DISCUSSION

The Board panel is the trier of fact in the adjudicative proceeding and as such is charged as a matter of law with the responsibility and duty to determine the cause in fact of the death of Patient "A" and whether Alsager's treatment and care of Patient "A" violated known and applicable standards of care so as to result in the injury to Patient "A" or which would have created an unreasonable risk that Patient "A" would be harmed thereby constituting unprofessional conduct. RCW 18.130.180(4). Furthermore and crucial to the Board's Final Order is that as a matter of law, and as clearly confirmed by the Legislature, the standard of care in pain management is not properly the subject of *ad hoc* decision-making in individual adjudicative proceedings but must be formally promulgated as Rules pursuant to and in accordance with the APA rulemaking procedures, including notice and opportunity to comment prior to adoption. Finally, sanctions imposed by the Board against Alsager do not derive from the Statement of Charges upon which Alsager

was tried in the adjudicative proceeding and are unconstitutionally excessive.

- A. THE CORRECTED FINAL ORDER MUST BE REVERSED AND VACATED AS THE BOARD PANEL ABDICATED ITS DUTY AND RESPONSIBILITY AS TRIER OF FACT TO DETERMINE THE CAUSE IN FACT OF THE DEATH OF PATIENT "A" THEREBY PREJUDICIALLY BYPASSING AN ESSENTIAL ELEMENT OF UNPROFESSIONAL CONDUCT IN CONTRAVENTION OF ALSAGER'S CONSTITUTIONAL RIGHT TO BE ADJUDICATED FREE FROM CONCLUSIVE PRESUMPTIONS

As the trier of fact in the adjudicative proceeding against Alsager, the Board panel was required as a matter of law to determine the vigorously disputed issue regarding the cause in fact of the death of Patient "A", especially in light of the further factual determination as to whether or not Alsager violated any proper standard of care resulting in such injury or creating an unreasonable risk of harm to Patient "A".

The cause of death is a question of fact for the jury to decide from all the facts and circumstances.

Washington v. Engstrom, 79 Wn.2d 469, 476, 487 P.2d 205 (1971). See also Washington v. Childs, 8 Wn. App. 388, 391, 506 P.2d 869 (1973); RCW 4.44.090.

The Board panel totally bypassed its legal

responsibility and duty as the trier of fact and simply deferred to the cause of death of Patient "A" described as acute intoxication due to the combined effects of certain drugs, including fentanyl, as attributed by King County Associate Medical Examiner Dr. Lacy in the death certificate. CAR Bates No. 4969; CAR Bates No. 5163.<sup>38</sup> It may only be surmised that the Board based its patent abdication on an erroneous and unconstitutional interpretation and application of RCW 70.58.180, which purports to create a conclusive presumption as to the "legally accepted cause of death."<sup>39</sup>

A conclusive or irrebuttable presumption requires the fact finder to find an ultimate fact upon proof of certain predicate facts regardless of whether there is other evidence to disprove the ultimate facts.

31A C.J.S., Evidence, § 131(b) at p. 270 (1996).

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<sup>38</sup> And having bypassed this foundational question of fact, the Board merely proceeded with making its decision as to unprofessional conduct on partial evidence and the erroneous presumption that Alsager's treatment of and pain management program for Patient "A" resulted in his death or created an unreasonable risk of harm to him, notwithstanding the clear, cogent and convincing substantial evidence that the death of Patient "A" was attributed to SUDEP with reasonable medical certainty and not at all on the pain management program undertaken by Alsager and Patient "A".

<sup>39</sup> This statute was enacted as Laws of 1953, Ch. 188, § 5.

The obvious and substantial danger arising from conclusive presumptions is the deprivation of constitutional rights so basic to a fair adjudication that the use thereof can never be treated as harmless error, as it has been held that conclusive presumptions virtually always contribute to the trier of facts' ultimate decision.<sup>40</sup> Harmless error analysis is rendered moot as under Washington law:

The constitution prohibits a statute from creating a conclusive presumption.

Adams v. Hinkle, 51 Wn.2d 763, 786, 322 P.2d 844 (1958).

The evidence summarily bypassed and overlooked by the Board is clear, cogent and substantial in light of the highly probable test that Alsager's treatment of and pain management program for Patient "A" met all proper standards of care and caused him no injury and created no unreasonable risk of harm<sup>41</sup> and most assuredly did not contribute

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<sup>40</sup> Connecticut v. Johnson, 460 U.S. 73, 85-86, 74 L. Ed. 2d 823, 103 S. Ct. 969 (1983) (plurality decision).

<sup>41</sup> Both the Department's expert, Dr. Hillyer, and Alsager's expert, Dr. Anderson, were in complete agreement that the  
(continued...)

in fact to his death, as the cause of death of Patient "A" was attributed with reasonable medical certainty to SUDEP.<sup>42</sup>

The Board panel committed a clear error of law and engaged in unconstitutional conduct by abdicating its duty and responsibility as trier of fact in the adjudicative proceeding and violated Alsager's constitutional right to a fair hearing and adjudication in a quasi-criminal action as to

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<sup>41</sup>(...continued)

fentanyl Duragesic Patch could not as a matter of fact contribute any real amount of drug into the body of Patient "A" in only a maximum of 6 hours after the Patch was applied. CAR Bates Nos. 10286 - 10287. Dr. Hillyer's written testimony, and concurred in by Dr. Anderson, is that "onset of the fentanyl patch is delayed by about 1 day." CAR Bates No. 5052. Dr. Hillyer had ample opportunity to change his written testimony regarding the substantial lag time for onset of fentanyl in the system from the Duragesic Patch and affirmed all such statements without redaction. CAR Bates Nos. 10243 - 10245. Fentanyl concentration increases in the body post mortem and here the autopsy was not performed and blood samples taken until 31 hours after death thus giving rise to unreliable high values. CAR Bates Nos. 10293 - 10294. Also compare CAR Bates Nos. 10171 - 10172 with CAR Bates Nos. 10303 - 10304; 10707 - 10708 (relating to calculated alleged increase in medication dose prior to the death of Patient "A" by Dr. Hillyer and the fallacy of such assertions). Alsager's calculations are presented at CAR Bates Nos. 10675 - 10679. A basic and false premise employed by King County Associate Medical Examiner Dr. Lacy was that SUDEP is viewed by him as a "diagnosis of exclusion" where no other factors may exist, especially where drugs are found in the decedent's body. CAR Bates No. 10127. But see CAR Bates Nos. 10523 - 10524 (Dr. Reay's discussion and conclusions re "exclusion").

<sup>42</sup> CAR Bates Nos. 10287 - 10295.

whether or not he was guilty of unprofessional conduct. Accordingly, reversal and vacation at a minimum of those Board findings and conclusions relating to Patient "A" must be granted.<sup>43</sup>

**B. THE BOARD AS A WHOLE IS REQUIRED BY LAW TO PROMULGATE AS RULES THE STANDARDS OF CARE BY WHICH UNPROFESSIONAL CONDUCT IS TO BE ADJUDGED AND IT WAS ERROR OF LAW AND IN EXCESS OF STATUTORY AUTHORITY FOR THE BOARD PANEL TO CREATE STANDARDS OF CARE AD HOC TO BE APPLIED AGAINST ALSAGER IN THE ADJUDICATIVE PROCEEDING**

The Board<sup>44</sup> as a whole is vested with the legislative power and duty to adopt standards of care applicable to all osteopathic physicians in the State of Washington. As the disciplinary auth-

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<sup>43</sup> However, as it cannot be concluded with certainty that the Board's bald application of this conclusive presumption did not taint its entire decision-making process in the adjudicative proceeding, the Court should reverse and vacate the entire Corrected Final Order and Ex Parte Summary Order (as it, too, must be presumed to be based at least in part on the application of this same statutory conclusive presumption), and remand this matter to the Board to conduct adjudicative proceedings consistent with the law relating to conclusive presumptions and this Court's decision.

<sup>44</sup> "'Board' means the Washington state board of osteopathic medicine and surgery." RCW 18.57.001(1). The Board consists of seven individuals appointed by the Governor. RCW 18.57.003. The panel which heard and decided the Alsager adjudication is composed of only three members of the Board, clearly not even a majority necessary to take any official action. RCW 18.57.003.

ority for osteopathic physicians,<sup>45</sup> the Board has the following express authority as delegated by the Legislature fully considered as being within its ability and capability to accomplish:<sup>46</sup> “. . . (14) to adopt standards of professional conduct or practice.” RCW 18.130.050.<sup>47</sup> Exercising its delegated legislative powers, under and in accordance with the APA, the Board adopted standards of practice for osteopathic physicians to conform with regarding the treatment and management of pain. See WAC 246-853-510 through WAC 246-853-540. Of particular interest and importance here is the fact that the Board “adopted [the 2002 Guidelines for Management of Pain] in order to acquaint osteo-

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<sup>45</sup> See RCW 18.57.011; RCW 18.130.040(2)(b)(vii); RCW 18.130.020(6). Rulemaking authority is under RCW 18.57.005(2) (Board has the power and duty to makes such rules and regulations necessary or proper to carry out its purpose under the law).

<sup>46</sup> This Legislative determination regarding standards of care is what distinguishes our case from Haley, 117 Wn.2d at 742.

<sup>47</sup> The Legislature expressly defined “standards of practice” to mean “the care, skill, and learning associated with the practice of a profession.” RCW 18.130.020. Expressly observed and clearly stated in its rules is that “the board of osteopathic medicine and surgery recognizes that effective pain management is an essential component of quality medical care and that **no single approach to the treatment of pain is exclusively correct.**” WAC 246-853-510(1) (emphasis added).

pathic physicians with recognized national standards in the field of pain treatment."<sup>48</sup> WAC 246-853-520(1) (emphasis added).<sup>49</sup> It is the stated Purpose of the Guidelines that "it is the intent that providers will have confidence that these guidelines are the standard by which opioid usage is evaluated." Guidelines, at p. 1 (emphasis added). It should also be noted that "these guidelines specifically address the patient evaluation and treatment plan, informed consent, periodic reviews, use of consultation, and the necessity for maintaining accurate and complete medical records." WAC 246-853-520(2). Finally, the Board announced that "these guidelines may be revised from time to time to reflect changes in the practice of pain management." WAC 246-853-520(3). It is axiomatic that any changes to the pain management guidelines

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<sup>48</sup> This subpart is prefaced by and answers the introductory query: "What specific guidance should an osteopathic physician follow?" WAC 246-853-520.

<sup>49</sup> The Board's 2002 Guidelines for Management of Pain is published at the following Department Internet website: <http://www.doh.wa.gov/hsqa/professions/Osteopath/Documents/GuidelinesForPainManagement.pdf>

announcing additional new standards of practice/ care applicable to all practitioners under the Board's jurisdiction must be done in conformance with the requirements of the APA; namely, notice and opportunity to comment given to all licensees and interested persons.<sup>50</sup> This is especially true where noncompliance with such standards is unprofessional conduct subjecting the licensee to the penalty of sanctions, including license revocation or suspension. RCW 18.130.180(7). And as a penal action under Washington law, professional license disciplinary actions must only be taken where there has been prior adequate notice of the forbidden or required conduct.<sup>51</sup> Consider the following:

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<sup>50</sup> Unless revisions are likewise formally adopted in compliance with APA rulemaking procedures, such would be invalid and unenforceable as a matter of law. Barry & Barry, Inc. v. Department of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972) (adherence to APA rulemaking procedures fundamental to the constitutional validity of legislative delegations to administrative agencies); Hunter v. University of Washington, 101 Wn. App. 283, 2 P.3d 1022 (2000) (eligibility requirements for tuition waivers were "rules" under the APA and were invalid because such were not adopted according to proper rulemaking procedures).

<sup>51</sup> Under Washington law, negligence of a health care provider, including osteopathic physicians, is grounded on a failure to follow the accepted standard of care which is "that degree of (continued...)"

Given the critical consequences including "the loss of professional standing, professional reputation, and of livelihood . . .", Spevack v. Klein, 385 U.S. 511, 516, 87 S. Ct. 625, 628 (1967), attending the suspension or revocation of a [professional] license and permit, there can be no doubt that the imposition of sanctions under [the disciplinary code] must satisfy the requirements of notice and clear description of what is prohibited conduct imposed on all penal statutes by the Fourteenth Amendment.

Pennsylvania State Board of Pharmacy v. Cohen, 292 A.2d 277, 282 (Pa. 1972). In Cohen the Pennsylvania Supreme Court noted that the State Legislature had granted to the Board rulemaking powers "to promulgate rules and regulations governing the standards of practice,"<sup>52</sup> and proceeded to reverse an Order of the Pharmacy Board sanctioning a pharmacist for the violation of *ad hoc* standards created in an adjudicative proceeding purportedly constituting additional grounds for finding grossly

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<sup>51</sup> (...continued)  
care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040(1). This is the same definition given by the Legislature to the term "standards of practice" in RCW 18.130.020 and as to which it empowered the Board with rulemaking authority.

<sup>52</sup> Cohen, 292 A.2d at 281.

unprofessional conduct concurring with the argument of the pharmacist, and identical to that posited by Alsager here, that:

[A] finding that [licensee] did not violate any of [the statutorily listed types of proscribed conduct] or any other provision in the . . . Act including rules adopted thereunder or any other law of [the State] compels the conclusion that the Board exceeded its statutory authority in suspending appellant's license for one year and revoking indefinitely his permit.

Cohen, 292 A.2d at 280. And in Megdal v. Oregon State Board of Dental Examiners, 605 P.2d 273 (Or. 1980), the Oregon Supreme Court reasoned in a manner similar to the Pennsylvania Supreme Court in Cohen that an express grant of rulemaking authority to define standards legally obligates the regulating Board to issue prior rules as standards before finding the behavior in a disciplinary adjudication to be unprofessional conduct.

[W]hen a licensing statute contains both a broad standard of *unprofessional conduct* that is not fully defined in the statute itself and also authority to make rules for the conduct of the regulated occupation, the legislative purpose is to provide for the further specification of the standard by rules, unless a different understanding is shown.

Megdal, 605 P.2d at 283.<sup>53</sup> The cogent underpinnings of the Cohen and Megdal Courts may be summarized as follows:

Regulatory systems which operate without rules are inherently irrational and arbitrary. The purpose of such a system is presumably to bring primary conduct into conformance with agreed upon societal norms. Yet a system operating without rules cannot possibly achieve this goal, since the people being regulated are not informed of what the societal norms are.

Megdal, 605 P.2d at 277 n.7 (quoting Note, *Due*

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<sup>53</sup> And similar to the statutory framework in both Cohen and Megdal, the Washington Legislature has expressly provided that "the following conduct, acts, or conditions constitute unprofessional conduct for any license holder under the jurisdiction of this chapter . . .". RCW 18.130.180. Under Washington law there are enumerated 25 specific types of conduct, acts and conditions constituting unprofessional conduct, including that conduct or act in "violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice." RCW 18.130.180(7). A finding of negligence as the Board did in the Alsager adjudication is grounded on failure to follow a standard of care for the profession, and such standard of care is by definition embodied in the standards of practice as to which the Legislature expressly authorized the Board to adopt as rules. RCW 18.130.050(14). The Board adopted its standards of practice for pain management in WAC 246-853-510 through WAC 246-853-540, specifically including the 2002 Guidelines for Management of Pain as the recognized national standards in the field of pain treatment. The Board concluded as a matter of law that Alsager did not violate any of its adopted standards of care, finding and concluding only that Alsager purportedly violated those *ad hoc* standards of care it created during the adjudicative proceeding. As in Cohen and Megdal, such *ad hoc* creation of standards outside the rulemaking process is invalid and is in excess of the Board's statutory authority.

*Process Limitations on Occupational Licensing*, 59 Va L Rev 1097, 1104-1105 (1973)).

Where an agency has been delegated rulemaking authority by the Legislature to establish standards of practice applicable to the entire professional body of practitioners subject to its disciplinary powers, and where such standards of practice have in fact been properly promulgated by such agency under and in accordance with the APA and upon which the practitioners have been assured their right to rely, as a matter of law it is invalid and in excess of statutory authority for such agency to embark upon *ad hoc* creation of additional new standards of practice in an adjudicative proceeding that is a quasi-criminal action and penal in nature.<sup>54</sup> As so cogently and succinctly explained:

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<sup>54</sup> One of the obvious and inherent problems attendant the *ad hoc* creation of standards of practice is the lack of consistency and uniformity in the asserted standard. The Alsager decision contains classic examples of this patent unfairness and arbitrariness where, e.g., the Board found the "standard of practice" for Patient "E" was referral out to a rheumatologist **for a second opinion** regarding the RA diagnosis, CAR Bates No. 4975 (emphasis added), whereas it found that the standard following RA diagnosis for Patient "F" was referral out to a rheumatologist "for confirmation **and co-management** of the patient". CAR Bates No. 4977 (emphasis (continued...))

The theory of administrative rule-making is, of course, that in certain fields and in certain respects the public interest is better served by delegating a large part of detailed lawmaking to the expert administrator, controlled by policies, objects and standards laid down by the legislature, rather than by having all the details spelled out through the traditional legislative process. Administrative rule-making remains in essence, however, the enactment of legislation of general application prospective in nature. The object is not legislation ad hoc or after the fact, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards administrative control lacks the essential quality of fairly predictable decisions. Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong in hindsight conception of what the public interest requires in the particular situation. . . . As has already been pointed out, it is the antithesis of legislation to

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<sup>54</sup>(...continued)

added). The Board is now adding additional layers to its *ad hoc* standards of practice to the point where no reasonable practitioner can ever second guess the Board in what is and what is not unprofessional conduct. The APA rulemaking process would result in a uniform standard of practice as to which all affected practitioners had notice and opportunity to comment in its adoption -- a very sound and fair due process upon which to base sanctions in subsequent disciplinary proceedings where negligence is the gravamen of the charges.

make law from case to case and after the fact. Where an administrative agent is given full rule-making power, he must in all fairness, bottom an alleged violation on general legislation before he may rule in a particular case. The general mandate, either statutory or administrative must precede the specific violation.

Boller Beverages, Inc. v. Davis, 183 A.2d 64, 71, 73 (N.J. 1962). The touchstone of due process is what distinguishes a professional license disciplinary action from a mere tort case where negligence is the gravamen of the complaint and a standard of care is at issue. This distinction and the sound rationale for giving fair notice as to applicable standards the violation of which would constitute unprofessional conduct and result in sanctions against the licensee stem from the fundamental fact that a professional license is a valuable property right that is entitled to constitutional protection including, *inter alia*, due process.<sup>55</sup>

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<sup>55</sup> Washington courts have long held that professional licenses are a very valuable property right accorded an individual by the State and subject to constitutional protections. Nguyen, 144 Wn.2d at 522-23. And the process that is due is to, as found doable and expressly authorized by the Legislature, promulgate standards of practice/care for the professionals subject to Board control and discipline in accordance with and pursuant to the requirements of the APA prior to enforcement, (continued...)

The Board's Final Order must be reversed and vacated as a matter of law as the panel acted in excess of its statutory authority and violated Alsager's due process rights by creating *ad hoc* standards of practice/care in a quasi-criminal disciplinary proceeding and then enforcing such new standards to impose substantial and severe sanctions on Alsager and his professional license as an osteopathic physician.<sup>56</sup>

**C. SANCTIONS IMPOSED AGAINST ALSAGER ARE IN EXCESS OF STATUTORY AUTHORITY AND ARE UNCONSTITUTIONAL AS A MATTER OF LAW**

The Board imposed sanctions on Alsager on matters outside the Statement of Charges in this quasi-criminal action. Paragraph 3.2 of the Corrected Final Order directs Alsager during the period his license is restricted to (1) have any and all diagnostic MRI scan, CT scan, or Dexa scan

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<sup>55</sup>(...continued)

especially where nationally recognized standards have already been adopted and relied upon. RCW 18.130.050. As illustrated, the promulgation of uniform standards under the APA promote current technology and practice and prevent the *ad hoc* creation of and enforcement of inconsistent standards as well as outdated technology and practice.

<sup>56</sup> RCW 34.05.570(3)(b), -(3)(c), -(3)(d), -(3)(h), and -(3)(i).

taken by him over-read by a qualified radiologist;  
(2) schedule an inspection of his office to confirm that his facility has the appropriate shielding for his equipment used in x-rays, MRI scan, CT scan and Dexa scan. CAR Bates No. 4981. The failure to comply with these terms and conditions could result in Alsager's license being revoked or suspended. CAR Bates Nos. 4981 - 4982 (Paragraph 3.6). As noted on the record by Health Law Judge, John F. Kuntz, in comments directed to the Board panel:

I would just take this opportunity to state that Dr. Alsager's responsible to answer to the allegations contained in the statement of charges.

CAR Bates No. 10931. The Statement of Charges contains no charges against Alsager alleging improper reading of MRI - CT - or Dexa scans, or improper shielding of equipment. CAR Bates Nos. 4 - 10. Imposing these sanctions is thus invalid and must be stricken by the Court as in excess of the Board's statutory authority.<sup>57</sup>

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<sup>57</sup> RCW 18.130.160. Whereas the Board imposed restrictions on Alsager's license regarding the prescribing of Schedule II and III controlled substances, he was not placed on probation  
(continued...)

In addition to the restrictions on Alsager's prescribing authority and the sanctions imposed as described above, the Board also assessed a monetary fine against Alsager in the total amount of \$20,000. CAR Bates No. 4981. The statutory authority for the Board's imposition of a monetary fine is set forth as follows:

Payment of a fine for each violation of this chapter, not to exceed five thousand dollars per violation.

RCW 18.130.160(8). The Board concluded as a matter of law that Alsager violated only a single provision of Chapter 18.130 RCW; to wit, RCW 18.130.180(4). CAR Bates Nos. 4979 - 4980. However, the rule of lenity applies in this quasi-criminal action<sup>58</sup> in such manner as to make a sanctionable

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<sup>57</sup>(...continued)

which would then subject his practice to conditions under RCW 18.130.160(7). Sanction guidelines adopted by the Department provide no guidance to the Board and thus give rise to arbitrary, capricious and abusive action.

<sup>58</sup> The rule of lenity applies to both criminal and quasi-criminal actions. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Under this principle, penalties are to be strictly construed and all ambiguities must be resolved in favor of lenity to the defendant to avoid imputing to the Legislature an enactment that lacks necessary precision. In  
(continued...)

violation of Chapter 18.130 RCW singular in nature regardless of how many individual patients may be in issue.<sup>59</sup> Accordingly, the total amount of any fine is limited as a matter of law to only \$ 5,000. The actual fine assessed by the Board against Alsager in the total amount of \$ 20,000.00 is greater than the maximum and is in excess of statutory authority. The Court at a minimum must reduce the total amount of monetary fine, if any, to no more than \$ 5,000.

Moreover, the monetary fine imposed by the Board against Alsager is unconstitutionally excessive. Wash. Const. art. I, § 14. Sanctions imposed

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<sup>58</sup>(...continued)  
re Personal Restraint of Stenson, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004); United States v. Enmons, 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

<sup>59</sup> Cf. State v. Sutherby, 165 Wn.2d 870, 878-79, 204 P.3d 916 (2009) (determination of the proper unit of prosecution is an issue of law that is reviewed *de novo*, and the rule of lenity applies to avoid "turning a single transaction into multiple offenses"). See also United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 73 S. Ct. 227, 97 L. Ed. 260 (1952) (general course of conduct rather than the separate items in such course constitute the punishable offense under Fair Labor and Standards Act). Such construction and application of lenity is necessary to avoid an issue of double jeopardy. U.S. Const. Amend V; Wash. Const. art. I, § 9.

in this quasi-criminal action are penal in nature<sup>60</sup> and constitute a punishment as to which the constitutional protection against excessive fines applies.<sup>61</sup> Whether a fine is excessive rests on whether the amount of the monetary penalty is grossly disproportionate to the gravity of the offense committed. United States v. Bajakajian, 524 U.S. 321, 324, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314 (1998). Here, simply by commencing this action against Alsager and by Ex Parte Order summarily restricted his prescription authority as to Schedule II and III controlled substances, the Board cut Alsager's professional practice by over 70 percent.<sup>62</sup> And to assess on top of all this a

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<sup>60</sup> Johnston, 99 Wn.2d at 474; In re Kindschi, 52 Wn.2d at 10-11; In re Revocation of the License to Practice Dentistry of Flynn, 52 Wn.2d 589, 596, 328 P.2d 150 (1958).

<sup>61</sup> Washington v. Clark, 124 Wn.2d 90, 102-03, 875 P.2d 613 (1994), overruled on other grounds, State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (sanction in a quasi-criminal action is punishment under Washington law and is entitled to constitutional protection against excessive fines).

<sup>62</sup> CAR Bates No. 10926. And in order to lift this restriction, the Board imposed on Alsager the most substantial requirement to in essence abandon his patient practice and complete a year of residency at some institution Alsager has found impossible to find locally -- at his own expense and  
(continued...)

monetary fine of \$ 20,000 for what was found to be purported negligence in light of *ad hoc* standards is as a matter of law grossly disproportional as applied and unconstitutional.

**D. FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AS SUCH ARE NOT SHOWN TO BE HIGHLY PROBABLE**

Supplemental to the challenges made above, the following Board findings are specific examples in the record shown not to be supported by substantial evidence under the clear, cogent and convincing standard:<sup>63</sup>

1. **Para. 1.2;** Alsager "is not a pain management specialist". CAR Bates No. 4960.<sup>64</sup>

2. **Para. 1.5;** "[a] general review of the treatment provided to the above-identified patients reveals that [Alsager's] treatment practices fall below the standard of care for the practice of osteo-

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<sup>62</sup>(...continued)  
basically without any income.

<sup>63</sup> Gogerty v. Department of Institutions, 71 Wn.2d 1, 8-9, 426 P.2d 476 (1967) (meager vs overwhelming evidence).

<sup>64</sup> Direct substantial competent evidence to the contrary is at CAR Bates Nos. 5005 - 5006; 5011 - 5014; 10478 - 10489; 10491 - 10495; 10635 - 10636.

pathic medicine in the state of Washington in several areas." CAR Bates No. 4961. See also supra, at p. 13 n.10.<sup>65</sup>

3. **Para. 1.19;** "[t]here were no objective findings which would support starting the patient with such a high dosage of medication . . . [and] did not create a functional plan for the treatment of Patient A." CAR Bates No. 4966.<sup>66</sup>

4. **Para. 1.21;** Alsager "began the prescription of medications at the same levels prescribed in the 2001-2002 period, without any sufficient explanation or objective medical findings to support that treatment approach." CAR Bates No. 4967.<sup>67</sup>

5. **Para. 1.22;** "Patient A was treated for his seizure condition by neurologist James Song, M.D., and was prescribed Dilantin. This information was

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<sup>65</sup> Direct substantial competent evidence to the contrary is at CAR Bates Nos. 4980; 10294 - 10295; 10637 - 10643; 10709 - 10712; 10754 - 10757; 10791 - 10793; 10828 - 10830; 10870 - 10873; 10894 - 10896. See also supra, at p. 14 n.13.

<sup>66</sup> Direct substantial competent evidence to the contrary is at CAR Bates Nos. 10652 - 10656; 5123 - 5125; 5185 - 5189; 5159.

<sup>67</sup> Direct substantial competent evidence to the contrary is at CAR Bates Nos. 10671 - 10675.

forwarded to [Alsager]." CAR Bates No. 4968.<sup>68</sup>

6. **Para. 1.23;** "[t]he 100 microgram Fentanyl patch is the highest dose for such a duragesic. There is no indication that [Alsager] prescribed a 75 microgram patch prior to prescribing the 100 microgram patch to Patient A." CAR Bates No. 4968.<sup>69</sup>

7. **Para. 1.25;** "[t]he King County Medical Examiner's Office has established the [official] cause of death for Patient A." CAR Bates No. 4969.<sup>70</sup>

8. **Para. 1.48;** "[t]here are no objective findings and no x-ray evidence to support that diagnosis[;] the patient's rheumatoid factor lab results were in the normal range." CAR Bates No. 4977.<sup>71</sup>

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<sup>68</sup> Direct substantial competent evidence to the contrary is at CAR Bates Nos. 10661 - 10662.

<sup>69</sup> Direct substantial competent evidence to the contrary is at CAR Bates Nos. 10665; 10668; 10674 - 10675; 10278 - 10282.

<sup>70</sup> And the Board found that it had "no need to choose between the alternative causes of death". As previously discussed herein, such finding is based on an unconstitutional conclusive presumption and is contrary to the Board's constitutional duty as the finder of fact to determine the cause of death. See supra, at pp. 28 - 32. Direct substantial competent evidence to the contrary is at CAR Bates Nos. 5052; 10286 - 10295; 10303 - 10304; 10522; 10675 - 10679; 10707 - 10708.

<sup>71</sup> Direct substantial competent evidence to the contrary is at CAR Bates Nos. 10833 - 10834; 10853.

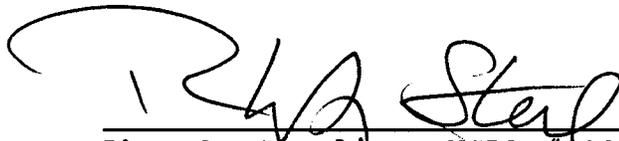
**VI. CONCLUSIONS**

Based on the foregoing, the Board's Corrected Final Order must be reversed and vacated by the Court. RCW 34.05.570(3)(a) - 3(e), (3)(h) - 3(i). Because the Board ultimately found and concluded that Alsager was guilty only of violating *ad hoc* standards of practice newly created by a 3-member panel in the adjudicative proceeding and not in accordance with the requirements of the APA, this Court should remand this matter to the Board with instructions to dismiss the Statement of Charges against Alsager.<sup>72</sup>

DATED this 10<sup>th</sup> day of July, 2009.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



\_\_\_\_\_  
Rhys A. Sterling, WSBA #13846  
Attorney for Appellant Dr. Alsager

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<sup>72</sup> Should outright dismissal not be ordered, this Court should at a minimum remand this matter to the Board with instructions to fulfill its responsibility and duty under the APA and as the fact-finder regarding the cause of Patient "A"'s death and to eliminate/reduce any sanctions to be consistent with the Board's authority regarding conditions and monetary fines.

Court of Appeals No. 39301-8-II  
Thurston County Superior Court 08-2-02116-2

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DALE E. ALSAGER, D.O., individually and with  
respect to his licensure as an Osteopathic Physi-  
cian and Surgeon, Credential No. OP00001485

APPELLANT,

v.

WASHINGTON STATE BOARD OF OSTEOPATHIC MEDICINE AND  
SURGERY, a State Board and Agency as established by  
law under RCW 18.57.003; WASHINGTON STATE DEPART-  
MENT OF HEALTH, an administrative agency of the  
State of Washington; ADJUDICATIVE SERVICE UNIT, a  
unit of the Washington State Department of Health,  
and JOHN F. KUNTZ, Health Law Judge, Presiding  
Officer, Adjudicative Service Unit, Department  
of Health,

RESPONDENTS.

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DECLARATION OF SERVICE BY MAIL

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RHYS A. STERLING, P.E., J.D.  
By: Rhys A. Sterling, #13846  
Attorney for Appellant Alsager

P.O. Box 218  
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COURT OF APPEALS  
DIVISION II  
09 JUL 13 AM 9:10  
STATE OF WASHINGTON  
BY DEPUTY

STATE OF WASHINGTON )  
 ) ss. DECLARATION OF RHYS  
 ) A. STERLING  
COUNTY OF KING )

RHYS A. STERLING hereby says and states under penalty of perjury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the attorney of record representing Appellant Dale E. Alsager, D.O. in the action captioned Alsager v. Board of Osteopathic Medicine and Surgery, et al., Court of Appeals, Division II No. 39301-8-II.

3. By postage prepaid first class mail on July 10, 2009 I served on the counsel of record for Respondents a copy of the BRIEF OF APPELLANT and the DECLARATION OF SERVICE BY MAIL filed in this matter, by placing in the United States mail the same addressed to:

DECLARATION OF SERVICE  
BY MAIL  
-- PAGE 1 OF 2

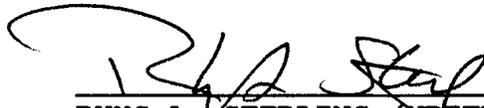
Callie A. Castillo and Cassandra Buyserie  
Assistant Attorneys General  
Gov't Compliance and Enforcement Div'n  
P.O. Box 40100  
Olympia, Washington 98504-0100

4. By postage prepaid first class mail on July 10, 2009 I filed with the Court of Appeals, Division II, the original and one (1) copy of the BRIEF OF APPELLANT and the original of this DECLARATION OF SERVICE BY MAIL by placing in the United States mail the same addressed to:

Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, Washington 98402  
Attn: David C. Ponzoha  
Clerk/Administrator

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

July 10, 2009  
DATE

  
RHYS A. STERLING (WRITTEN)  
WSBA # 13846

Hobart, WA  
PLACE OF SIGNATURE

  
RHYS A. STERLING (PRINTED)

DECLARATION OF SERVICE  
BY MAIL  
-- PAGE 2 OF 2