

**IN AND BEFORE THE OKLAHOMA STATE BOARD
OF MEDICAL LICENSURE AND SUPERVISION** **FILED**
STATE OF OKLAHOMA

NOV 26 2003

STATE OF OKLAHOMA)
EX REL. THE OKLAHOMA BOARD)
OF MEDICAL LICENSURE)
AND SUPERVISION,)

OKLAHOMA STATE BOARD OF
MEDICAL LICENSURE & SUPERVISION

Plaintiff,)

v.)

Case No. 02-05-2517

ALFRED ESTIN AVERY, M.D.,)
LICENSE NO. 22650)

Defendant.)

FINAL ORDER OF REVOCATION

This cause came on for hearing before the Oklahoma State Board of Medical Licensure and Supervision (the "Board") on November 20, 2003, at the office of the Board, 5104 N. Francis, Suite C, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Board.

Elizabeth A. Scott, Assistant Attorney General, appeared for the plaintiff and defendant appeared not.

The Board *en banc* after hearing arguments of counsel, reviewing the exhibits admitted and the sworn testimony of witnesses, and being fully advised in the premises, found that there is clear and convincing evidence to support the following Findings of Fact, Conclusions of Law and Orders:

Findings of Fact

1. The Board is a duly authorized agency of the State of Oklahoma empowered to license and oversee the activities of physicians and surgeons in the State of Oklahoma pursuant to 59 Okla. Stat. §480 *et seq.*
2. The Board has jurisdiction over this matter, and notice has been given in all respects in accordance with law and the rules of the Board.
3. Defendant, Alfred Estin Avery, holds Oklahoma license no. 22650.

4. On or about August 17, 1999, Defendant's privileges were suspended at the Fishermen's Hospital in Marathon, Florida based upon continuous medical record delinquencies and the fact that required patient visits and daily progress notes not being completed. Defendant's privileges were subsequently reinstated.

5. On or about September 15, 1999, a patient at the Fishermen's Hospital asked hospital staff for pain medication. Staff determined that 100 mg. Demerol had been signed out for Defendant to administer to the patient, but the patient claimed he never received the Demerol. At that time hospital staff also determined that on September 14, 1999, Defendant had checked out Demerol for a procedure, but the procedure was never done.

6. On or about September 17, 1999, Defendant treated a patient in the emergency room at Fishermen's Hospital. Demerol was signed out to the patient on the narcotic record, but not documented as having been given to the patient in the patient chart.

7. On or about September 21, 1999, Defendant's privileges were suspended at Fishermen's Hospital based upon delinquent medical records. On or about September 29, 1999, Defendant's privileges at Fishermen's Hospital were reinstated with certain conditions and restrictions.

8. On or about October 11, 1999, Defendant's privileges at Fishermen's Hospital were suspended based upon delinquent medical records. Defendant's privileges were subsequently reinstated.

9. On or about February 14, 2000, Defendant's privileges at Fishermen's Hospital were suspended based upon delinquent medical records. Defendant's privileges were subsequently reinstated on February 17, 2000.

10. In early March 2000, Fishermen's Hospital reported Defendant to the Florida Physicians Recovery Network based upon possible diversion of narcotics.

11. On or about March 21, 2000, Defendant was evaluated by Jeffrey D. Kamlet, M.D. pursuant to the request of the Physicians Recovery Network in Florida based upon complaints regarding his behavior. Co-workers noted him as appearing confused and glassy-eyed, that he performed procedures on weekends and off hours when staffing was low, that he disappeared from the department for 20-30 minutes at times, and that there were several instances where Demerol could not be accounted for. During the evaluation, Defendant admitted self-injecting Demerol on two (2) occasions and occasional use of Oxycontin. Dr. Kamlet then concluded that Defendant suffered from substance abuse. At that time, Dr. Kamlet offered to perform forensic hair testing in his office. Defendant refused to submit to such a test. Dr. Kamlet recommended that Defendant enter into a monitoring agreement with the Florida Physicians Recovery Network and enter into outpatient therapy.

12. On or about April 12, 2000, Defendant's privileges at Fishermen's Hospital were suspended based upon delinquent medical records. Defendant's privileges were subsequently reinstated on April 26, 2000.

13. On or about May 4, 2000, Defendant signed a five-year contract with the Florida Physicians Recovery Network whereby he agreed to be monitored for substance abuse, attend AA meetings, and obtain outpatient therapy. In November 2000, he completed outpatient therapy.

14. On or about November 17, 2000, Defendant's privileges at Fishermen's Hospital were suspended. Defendant's privileges were subsequently reinstated.

15. On or about June 18, 2001, Defendant's privileges at the Fishermen's Hospital were suspended based upon delinquent medical records. Defendant's privileges were subsequently reinstated.

16. On or about July 23, 2001, Defendant's privileges at the Fishermen's Hospital were suspended based upon delinquent medical records. Defendant's privileges were subsequently reinstated.

17. In mid to late 2001, Defendant began missing required meetings with the Florida Physicians Recovery Network and subsequently cut off all contact with the Physicians Recovery Network.

18. On or about September 4, 2001, Defendant's privileges at the Fishermen's Hospital were suspended based upon delinquent medical records.

19. On or about September 14, 2001, Defendant applied for an Oklahoma medical license. On his Application for Licensure, Defendant was asked the following question: "Have you ever been denied, or had removed or suspended, hospital or staff privileges?" In response to this question, the Defendant answered "NO". Defendant had previously been suspended by Fishermen's Hospital on numerous occasions.

20. On his Application for Licensure signed September 14, 2001, Defendant was asked the following question: "Have you ever been the subject of disciplinary action by a hospital?" In response to this question, Defendant answered "NO". Defendant had previously been suspended by Fishermen's Hospital on numerous occasions.

21. On or about December 18, 2001, Defendant was granted a temporary license to practice medicine in the State of Oklahoma by the Board Secretary. A full license was subsequently granted by the Board on March 24, 2002.

22. On or about January 2, 2002, Defendant began working for Hillcrest Medical Center in Tulsa, Oklahoma.

23. In September 2002, concerns were raised at Hillcrest Medical Center regarding possible diversion of Demerol, Fentanyl and Versed by Defendant. An audit of patient charts and hospital pharmacy records revealed that (a) eleven 50 mg. vials of Demerol had been checked out by Defendant but not documented as administered to a patient, (b) twelve 100 mcg. Fentanyl amps had been checked out by Defendant's nurse for administration by him, but were not documented as administered to a patient, and (c) there were four instances of Versed administration without documentation of wasting the excess.

24. In early September 2002, an employee at the clinic where Defendant was working accused him of diverting drugs. The administrator of the clinic asked Defendant to submit to a drug test, to which Defendant refused.

25. On or about September 19, 2002, Hillcrest Medical Center revoked Defendant's staff membership and clinical privileges. This action was based upon a finding that (a) Defendant was untruthful on his application to Hillcrest for medical staff membership relating to his substance abuse history, treatment and current usage, (b) Defendant gave untruthful answers to the Credentials Committee as a part of the subject investigation, and (c) Defendant's conduct as it related to substance abuse was detrimental to patient safety.

26. Defendant is guilty of unprofessional conduct in that he:

A. Habitually uses habit-forming drugs in violation 59 O.S. 407 §509(5) and OAC 435:10-7-4(3).

B. Engaged in dishonorable or immoral conduct which is likely to deceive, defraud or harm the public in violation of 59 O.S. §509(9) and OAC 435:10-7-4(11).

C. Violated any provision of the medical practice act or the rules and regulations of the Board or of an action, stipulation, or agreement of the Board in violation of 59 O.S. §509(14) and OAC 435:10-7-4(39),

D. Is unable to practice medicine with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals or any other type of material or as a result of any mental or physician condition in violation of 59 O.S. §509(16) and OAC 435:10-7-4(40).

E. Purchased or prescribed a regulated substance in Schedules I through V for the physician's personal use in violation of OAC 435:10-7-4(5).

F. Prescribed, sold, administered, distributed, ordered or gave a drug legally classified as a controlled substance or recognized as

an addictive dangerous drug to a family member or to himself or herself in violation of OAC 435:10-7-4(26).

G. Failed to keep complete and accurate records of purchase and disposal of controlled drugs or of narcotic drugs in violation of 59 O.S. §509(11).

H. Engaged in fraud or misrepresentation in applying for or procuring a medical license or in connection with applying for or procuring periodic reregistration of a medical license in violation of OAC 435:10-7-4(8).

I. Committed an act which is a violation of the criminal laws of any state when such act is connected with the physician's practice of medicine in violation of 59 O.S. §509(10) and 63 O.S. §2-402.

J. Used a false, fraudulent or deceptive statement in a document connected with the practice of medicine and surgery in violation of OAC 435:10-7-4(19).

K. Violated a state or federal law or regulation relating to controlled substances in violation of OAC 435:10-7-4(27), 63 O.S. §2-402, 63 O.S. §2-407 and OAC 475:30-1-3.

Conclusions of Law

1. The Board has jurisdiction and authority over the Defendant and subject matter herein pursuant to the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act (the "Act") and its applicable regulations. The Board is authorized to enforce the Act as necessary to protect the public health, safety and welfare.

2. Defendant is guilty of unprofessional conduct in that he:

A. Habitually uses habit-forming drugs in violation 59 O.S. 407 §509(5) and OAC 435:10-7-4(3).

B. Engaged in dishonorable or immoral conduct which is likely to deceive, defraud or harm the public in violation of 59 O.S. §509(9) and OAC 435:10-7-4(11).

C. Violated any provision of the medical practice act or the rules and regulations of the Board or of an action, stipulation, or

agreement of the Board in violation of 59 O.S. §509(14) and OAC 435:10-7-4(39),

D. Is unable to practice medicine with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals or any other type of material or as a result of any mental or physician condition in violation of 59 O.S. §509(16) and OAC 435:10-7-4(40).

E. Purchased or prescribed a regulated substance in Schedules I through V for the physician's personal use in violation of OAC 435:10-7-4(5).

F. Prescribed, sold, administered, distributed, ordered or gave a drug legally classified as a controlled substance or recognized as an addictive dangerous drug to a family member or to himself or herself in violation of OAC 435:10-7-4(26).

G. Failed to keep complete and accurate records of purchase and disposal of controlled drugs or of narcotic drugs in violation of 59 O.S. §509(11).

H. Engaged in fraud or misrepresentation in applying for or procuring a medical license or in connection with applying for or procuring periodic reregistration of a medical license in violation of OAC 435:10-7-4(8).

I. Committed an act which is a violation of the criminal laws of any state when such act is connected with the physician's practice of medicine in violation of 59 O.S. §509(10) and 63 O.S. §2-402.

J. Used a false, fraudulent or deceptive statement in a document connected with the practice of medicine and surgery in violation of OAC 435:10-7-4(19).

K. Violated a state or federal law or regulation relating to controlled substances in violation of OAC 435:10-7-4(27), 63 O.S. §2-402, 63 O.S. §2-407 and OAC 475:30-1-3.

3. The Board further found that the Defendant's license should be revoked based upon any or all of the violations of the unprofessional conduct provisions of 59 O.S. §509 (5),

(9), (10), (11), (14) and (16), OAC Title 435:10-7-4 (3), (5), (8), (11), (19), (26), (27), (39) and (40), 63 O.S. §§2-402, 2-407, and OAC 475:30-1-3.


Order

IT IS THEREFORE ORDERED by the Oklahoma State Board of Medical Licensure and Supervision as follows:

1. The license of Defendant, Alfred Estin Avery, M.D., Oklahoma license no. 22650, is hereby **REVOKED** as of the date of this hearing, November 20, 2003.


2. Promptly upon receipt of an invoice, Defendant shall pay all costs of this action authorized by law, including without limitation, legal fees and costs, investigation costs, staff time, salary and travel expenses, witness fees and attorney's fees.

Dated this 26 day of November, 2003.


Gerald C. Zumwalt, M.D., Secretary
Oklahoma State Board of Medical
Licensure and Supervision

CERTIFICATE OF SERVICE

I certify that on the 26 day of November, 2003, I mailed, via first class mail, postage prepaid, a true and correct copy of this Order to Charles Fox, Martin & Associates, P.C., 565 Wright Building, 115 West 3rd Street, Tulsa, OK 74103 and to Alfred Estin Avery, M.D., 2951 N. Slope Trail, Billings, MT 59102-0800.


Janet Swindle