

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL )  
REGULATION, BOARD OF OSTEOPATHIC )  
MEDICAL EXAMINERS, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 84-2844  
 )  
WILFRED W. MITTELSTADT, D.O., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held before the Division of Administrative Hearings and its duly designated Hearing Officer, Ella Jane P. Davis on February 4, 5, and 6, 1986, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Stephanie A. Daniel, Esquire  
130 North Monroe Street  
Tallahassee, Florida 32301

For Respondent: Gregory D. Seeley Esquire  
500 Baker Building  
1940 East Sixth Street  
Cleveland, Ohio 44114

BACKGROUND

The initial administrative complaint in this cause was filed July 16, 1984. After failure of Petitioner to comply with several orders to clarify the charging document in this cause; the undersigned by order of January 16, 1986 severed Counts VII and VIII of the Amended Complaint filed in this proceeding August 9, 1985, and this cause proceeded to formal hearing only upon Counts I through VI. Despite the January 16, 1986 order incorporating typographical or other errors of the most recent Motion to Amend, the parties both by a pre-hearing stipulation and upon the record at formal hearings agreed that adequate charging and notice had been had and that the formal hearing would go forward upon allegations of violations of Sections 459.015(1)(h), (l), (n), (o), (t), and (u) Florida Statutes. Accordingly, the issues to be determined are:

ISSUES

Respondent is charged, pursuant to Count I with a violation of Section 459.015(1)(h) in that he allegedly failed to perform any statutory or legal obligation placed upon a licensed physician by his alleged violation of Section 459.0154 Florida Statutes, which statute sets forth requirements of physicians who treat with the substance dimethyl sulfoxide ("D.M.S.O."), pursuant to Count

II, with a violation of Section 459.015(1)(o) in that he allegedly exercised influence on a patient in such a manner as to exploit the patient for financial gain, pursuant to Count III, with a violation of Section 459.015(1)(t) in that he allegedly committed gross or repeated malpractice or failed to practice medicine with that level of care; skill and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances, pursuant to Count IV, with a violation of Section 459.015(1)(u) in that he allegedly performed a procedure or prescribed a therapy which, by the prevailing standards of medical practice in the community would constitute experimentation on human subjects; pursuant to Count V, with a violation of Section 459.015(1)(n), in that he allegedly failed to keep written medical records justifying the course of treatment of a patient, including but not limited to patient histories, examination results and test results; and pursuant to Count VI, with a violation of Section 459.015(1)(l); in that he allegedly made deceptive untrue or fraudulent representations in the practice of osteopathic medicine or employed a trick or scheme in the practice of osteopathic medicine when such trick or scheme fails to conform to the generally prevailing standards of treatment.

Counts VII and VIII, were severed, to remain pending in the instant action until such time as Petitioner should file a voluntary dismissal thereof or a notice that same were ready for hearing. Petitioner had every opportunity to resolve this state of the pleadings and did not do so.

#### PROCEDURAL AND EVIDENTIARY MATTERS

At formal hearing, Respondent and Gregory D. Seeley, Esquire, were examined pursuant to Rules 22I-6.05 and 28-5.1055 F.A.C. and Gregory D. Seeley, an Ohio attorney, was determined to be a qualified representative of Respondent for purposes of this cause only. Respondent thereafter attempted to file a formal written answer, which request was denied pursuant to Rules 22I- 6.04 (5) and 25-5.203 F.A.C.

Petitioner presented the live testimony of Frank R. Laine, Lloyd D. Gladding, D.O., Jeffrey Erlich, M.D., William Pawley, Respondent Wilfred Middlestadt, D.O., Mark Montgomery, Ph.D., and the deposition testimony of Wilbur Blechman, M.D. Petitioner offered 12 exhibits, all of which were admitted in evidence. Deposition of Dr. Blechman is Petitioner's Exhibit 4 and Petitioner's Requests for Admission with extensive Answers thereto are Petitioner's Composite Exhibit 1, within the twelve. A request of Petitioner for judicial notice was denied.

Respondent testified on his own behalf. Respondent also was permitted to late-file the depositions of Garry Gordon, M.D., and Stanley Jacobs, M.D. Inasmuch as the transcripts of those depositions were timely filed, they are admitted in evidence as Respondent's Exhibits 4 and 5 respectively. Respondent offered 3 exhibits in evidence; all were excluded. Exhibits not admitted or at least proffered were not retained as part of the record. A number of requests for judicial notice by Respondent were also denied.

In the course of formal hearing, Respondent also made several motions for mistrial and/or recusal of the undersigned due to admission in evidence of what Respondent characterized as "prejudicial material." None of these motions was meritorious and all were denied, but a discussion of these rulings is also incorporated within this recommended order.

By agreement at hearing and without subsequent objection, copies of those matters actually judicially noticed by the undersigned were attached by the parties to their respective post-hearing proposals.

The parties' pre-hearing stipulation (H.O. Exhibit 2 as interlineated) also included stipulations as to many facts and has been extensively utilized in preparation of this recommended order.

At the close of Petitioner's case in chief Respondent moved to dismiss the pending charges as unproved. This motion was taken under advisement for resolution within this recommended order. The motion was renewed within Respondent's post-hearing proposals with written argument. The Motion to Dismiss within Respondent's post-hearing proposals also renews all previous motions to dismiss, incorporating by reference what may be read as previous arguments concerning procedural and pleading irregularities as to Counts VII and VIII. These issues are also disposed of within this recommended order.

Transcript of formal hearing was provided by Petitioner, who filed its proposed findings of fact and conclusions of law beyond the 10 day limitation. Respondent's proposed findings of fact and conclusions of law were timely filed. The late-filing of Petitioner's proposals without objection by Respondent are deemed a waiver of the 30 days for entry of this recommended order pursuant to Rule 22I-6.31 F.A.C., but all proposals have been considered and Petitioner's proposed findings of fact and Respondent's proposed findings of fact are ruled on in the appendix hereto.

#### FINDINGS OF FACT

1. At all times material, Respondent was licensed as an osteopathic physician in the State of Florida having been issued license number 05 0001510. He has practiced approximately 40 years.

2. On April 4, 1983 Frank R. Laine went to Bio-Equilibrium Testing located in Ft. Lauderdale, Florida. Laine complained of pain in his hands, feet, knees, and shoulders. On five different visits, Laine saw a Diane La Berge. At all times material hereto, Diane La Berge was not licensed to practice either medicine or osteopathic medicine in the State of Florida but held herself out as a homeopathic physician and Director of Bio-Equilibrium Testing. She conducted a series of "tests" and made "evaluations" regarding Laine's condition. Among the tests performed was a metal analysis based on a cutting of Laine's hair sent to Biochemical Concepts, a testing laboratory. Based on her evaluation of the results of the hair analysis for metal La Berge diagnosed Laine as suffering from "heavy or acute copper poisoning". As treatment therefore La Berge recommended chelation therapy, acupuncture, and numerous "supplements", presumably vitamins. Laine understood, based on his conversations with La Berge, that chelation therapy would "cure" his condition. Laine attempted, on a couple of occasions, to obtain chelation therapy from a physician recommended by La Berge; however, there was never anyone at that physician's office. Therefore, Laine went to Respondent's office after being referred by Dr. Harvey Frank, Laine's personal chiropractor. There is absolutely no proof of any connection or relationship of any kind between La Berge or Bio-Equilibrium Testing and Respondent.

3. About two months prior to his seeking out Bio- Equilibrium, Laine, a boat captain, had sanded the hull of a boat coated with a copper-based paint.

He performed this type of work approximately once a year, always outdoors with adequate ventilation. Laine informed Respondent that he had been scraping the hull of a copper boat and brought a copy of the hair analysis to their initial office consultation on May 16, 1983.

4. Laine initially presented himself to Respondent seeking chelation therapy on May 16, 1983. He complained of constant pain in his hands, feet, knees, and shoulders. Respondent obtained a medical history based in part on responses to a Cornell Medical Index Health Questionnaire (CMI), a health questionnaire on Respondent's stationery, and another history form, which contained a description of symptoms, family history, and personal history. Some of these responses were filled in, not by Laine, but by his wife. Respondent also got a brief verbal history from Laine but did no extensive one-on-one questioning of Laine or verification of prior physicians and diagnoses listed by Laine and/or his wife. He did no questioning concerning all of the responses or even significant relevant responses. The significant relevant responses include a "yes" response to the question: "Are you crippled with severe rheumatism (arthritis)?" Laine's symptoms were consistent with a diagnosis of rheumatoid arthritis but Respondent only recorded "inflamed joints onset following scraping copper bottom of boat." There is no recorded physical examination of Laine by Respondent at this initial office visit or at any time thereafter.

5. On May 16, 1983, Respondent diagnosed Laine as having "Copper poisoning as told by hair analysis," wrote this in his records, and administered intravenous chelation with 5cc. dimethyl sulfoxide (D.M.S.O.), intramuscular injections of zinc; and an intravenous injection of Phillipott's formula and sulfur cyl. Apparently, an oral dose of zinc was also prescribed. Respondent also obtained a urine specimen for analysis by tests which would be helpful in determining kidney function.

6. Although there is clear evidence that Laine specifically requested chelation therapy of Respondent, there is no evidence that he ever requested administration of D.M.S.O. or any other substance specifically.

7. Chelation therapy in general involves the use of certain chemicals called chelation agents to bind, immobilize, and in some instances to increase the excretion of a target molecule, in most cases heavy metals, so that the free amount in the blood is decreased more rapidly than the body would do absent the chelation therapy. Vitamin C and D.M.S.O. are not generally recognized as effective chelation agents. Both Vitamin C and D.M.S.O. have only weak binding properties.

8. Phillipott's formula is an I.V. for allergies and a nutritional supplement containing Vitamin C and other vitamins and minerals. Among those testifying, only Dr. Gordon and Respondent, members of the American Academy of Medical Preventics, even recognized its name, absent a list of ingredients.

9. Sulfur cyl is a salicylate useful in the treatment of inflamed joints and arthritis.

10. D.M.S.O. is an organic solvent with the potential to dissolve the vascular system.

11. At no time did Respondent obtain a written release from Laine, releasing Respondent from any liability for the administration of D.M.S.O. intravenously through chelation therapy.

12. At a May 17, 1983 office visit, Respondent administered intravenous chelation with 5cc. D.M.S.O. and an intravenous injection of sulfur cyl to Laine. No further testing was done by Respondent on that day. On this date Laine indicated that he was subjectively feeling better.

13. On May 19, 1983, Respondent administered intravenous chelation with D.M.S.O. and an intravenous injection of Phillipott's formula and sulfur cyl to Laine. D.M.S.O. was also prescribed topically for skin and shoulders as needed.

14. Respondent also ordered copper levels to be obtained from blood and urine specimens. Laine provided a 24 hour urine specimen which Respondent had tested. The specimen analyzed at 74.8 micrograms per liter. The normal copper values for the laboratory in question were .00-60.00 micrograms per liter. The greater weight of the direct credible expert testimony is that Laine's test showed a mild elevation not diagnostically significant for acute copper poisoning, however some rheumatoid arthritis sufferers show elevated copper levels. Respondent received the results of this urine test on May 22, 1983.

15. On May 23, 1983 Respondent administered chelation with D.M.S.O. and intravenous injection of sulfur cyl to Laine. D.M.S.O. 99.9 was prescribed topically for shoulders. No further testing was performed on that date.

16. On May 24, 1983, Laine was administered intravenous chelation with D.M.S.O. and an intravenous injection of sulfur cyl by Respondent. A blood sample was drawn for testing.

17. On May 25, 1983, Respondent administered an intravenous injection of sulfur cyl to Laine. At this visit, Respondent used a plethysmograph to study Laine's entire body. Plethysmography is used to measure pulse pressure, usually in the venous system, for determining impeded blood flow in the veins and was apparently done because of a response on Laine's medical history involving angina and prior myocardial infarctions and because of a protocol or teaching of the American Academy of Medical Preventics.

18. The blood sample drawn on May 24, 1983 was tested. The tests performed included serum copper levels, a SMAC profile, and r.a. latex titer results. The results showed a serum copper level of 135 micrograms per deciliter (normal values 70-155) and an r.a. latex titer of 1/1280. The greater weight of the direct credible expert testimony is that these results are not indicative of significant copper poisoning but were one significant indicator of rheumatoid arthritis. The results were reported to Respondent on May 26, 1983.

19. On May 26, 1983, Respondent administered intravenous chelation with D.M.S.O. with sulfur cyl and calcium disodium edetate (E.D.T.A.) added. Chelin was also prescribed, apparently orally. Blood urea nitrogen (BUN) levels were also obtained that day.

20. E.D.T.A. is most often used in the treatment of mild to severe lead poisoning. Although E.D.T.A. will chelate other heavy metals, including copper, it is not the treatment of choice by the majority of medical and osteopathic physicians for treatment of either copper poisoning or rheumatoid arthritis. D-penicillamine is preferred over E.D.T.A. because it is more effective and because E.D.T.A. has significant side effects, including primarily kidney failure. E.D.T.A. also has a problem permeating cell membranes.

21. On May 27, 1983, Respondent administered intravenous chelation with D.M.S.O. and sulfur cyl to Laine.

22. In Respondent's discussions with Laine between May 16 and May 27, 1983, Respondent suggested that a reduction of Laine's copper level would improve his symptoms. Respondent did not fully inform Laine of any of the potential side effects of E.D.T.A. chelation therapy or intravenous D.M.S.O. Respondent told Laine that his treatment was not completely accepted in the general medical community but he believed in it and it would be acceptable. This falls far short of fully informing Laine as to alternative methods of treatment and their potential for cure of his condition.

23. In total, Respondent billed Laine \$1,350.00 for office visits, various tests, examinations, and treatments. At each visit, Respondent provided Laine with bills and health insurance claim forms. These do not reflect a diagnosis until May 26 and then only the single diagnosis of "toxic metal poisoning". The bills were never paid by Laine whose wife complained to the Department of Professional Regulation concerning Respondent's treatment of Laine when Laine's insurance declined to pay for Respondent's treatment of him.

24. Despite Respondent's oral testimony to the contrary, the patient records do not reflect that Respondent diagnosed Laine as having rheumatoid arthritis or cardiovascular disease, they show only copper poisoning of various degrees as reflected in the above findings of fact.

25. Respondent maintains that the many tests were necessary and conservative for the purpose of confirming or rejecting his initial diagnosis of copper poisoning, to determine the presence of rheumatoid arthritis, and to guard against potential kidney failure before E.D.T.A. chelation was attempted. Since Respondent never performed any "hands on" physical examination and did no one-on-one questioning of Laine concerning the medical history forms, the tests may appear excessive, particularly in light of the probability that E.D.T.A. was used on Laine before Respondent received the final test results, but the characterization of Dr. Blechman is accepted that the type and spectrum of tests including plethysmography actually ordered by Respondent do not demonstrate significant fault.

26. Respondent's office staff regularly took readings of Laine's bloodpressure and pulsed and measured his height and weights but the patient records do not reflect any "hands on" physical examination by Respondent of Laine on any of the eight office visits.

27. The greater weight of the expert testimony is that a minimal physical examination for a new patient with unverified complaints should entail a complete hands-on physical which palpates the head, eyes, ears, nose, throat, neck, chest, abdomen, and the extremities and joints, listening to the heart and lungs and examining the skin, plus a rectal examination. If only joint diseased arthritis, or rheumatoid arthritis were suspected or being investigated for treatment, a minimal physical examination should emphasize evaluating all joints (including peripheral joints) by palpation, determining the range of motion of affected joints, listening to the heart and lungs, taking blood pressure, and evaluating length and duration of symptoms. According to physicians board-certified or with a majority of their practices in rheumatology or internal medicine, it is particularly important in joint disease cases for the physician to feel the joint to determine which element thereof is swollen and to see if it is warm to the touch i.e. inflamed.

28. Respondent admits his initial physical examination of Laine was merely observation of Laine's movements and his general ambulatory motion with his

clothes on, examination of tophi in his ears, and listening to his heart and lungs. Respondent is vague about whether he observed Laine's hands. Respondent's type of initial physical examination, if it can be called that, and lack of follow-up examinations fall short of the level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician as acceptable under similar conditions and circumstances.

29. On May 27, 1983 Laine also went to see Jeffrey Erlich, M.D. He was in pain and getting no relief from Respondent. On that date Dr. Erlich took a history from Laine, performed a complete "hands on" physical examination, reviewed laboratory data provided him by Laine from Respondent and tentatively diagnosed Laine as having rheumatoid arthritis. Laine's condition was such that, at formal hearing, Dr. Erlich characterized Laine as "the second sickest rheumatoid arthritis patient" he had seen. Because of the severity of Laine's condition Dr. Erlich began Laine on oral predisone which is the conservative treatment of choice among the majority of medical physicians and osteopathic physicians for the treatment of rheumatoid arthritis. Laine was subsequently hospitalized for what may have been side effects of the predisone itself or aggravation of a pre-existing ulcer by the predisone. From this hospitalization, Respondent desires that the inference be drawn that Dr. Erlich was less close to prevailing standards of treatment than was Respondent because Erlich's prescription for predisone constituted an error of Erlich based on failed physical examination and history-taking, which error Respondent knowingly avoided by electing chelation therapy over the predisone treatment. Respondent's argument is not persuasive, and that leap of the imagination cannot be made upon the credible competent substantial evidence in the record. Faulty judgment calls of Dr. Erlich, even if any existed, are non-issues advanced by Respondent to draw attention from relevant and material issues. Further, while in the hospital, Laine was seen by a rheumatologist and a gastroenterologist who essentially confirmed Erlich's diagnosis of rheumatoid arthritis. Laine has since been administered several types of treatment for rheumatoid arthritis, including but not limited to D-Penicillamine, by both Erlich and the rheumatologist without much success, but Laine continues to tolerate predisone and to receive some pain relief therefrom.

30. In light of the foregoing, it is found that Laine had rheumatoid arthritis which Respondent failed to diagnose principally because of Respondent's persistent reliance on the previous hair analysis and his failure to use "hands-on" physical examination contrary to the prevailing level of care, skill and treatment which is recognized by a reasonably prudent similar osteopathic physician as acceptable under similar conditions and circumstances.

31. Respondent's reliance on hair analysis performed by a non-physician was misplaced and did not conform to the practice of medicine with that level of care, skill and treatment which is recognized by a reasonably prudent osteopathic physician under similar facts and circumstances. Not only is the greater weight of all credible expert evidence that hair analysis has little or no clinical value in diagnosing elevated copper levels or anything else because hair analysis indicates not only endogenous (internal or ingested) but also exogenous (external) sources of copper, but Respondent's own testimony further reveals that he merely assumed that the hair sample had been properly taken from the nape of Laine's neck and properly washed prior to testing. In making this finding of fact, the undersigned has not overlooked the testimony of Respondent's expert, Dr. Garry Gordon, who considers hair analysis to be a

valuable diagnostic tool when laboratories meet all protocols. However, even Dr. Gordon admits that hair analysis is only relied on by a "distinct clear cut minority" nationwide; it is not required by the American Academy of Preventics; and the particular hair analysis of Laine in this case would probably show his most recent exogenous exposure to the copper boat hull.

32. Respondent is a member of the American Academy of Medical Preventics and considers himself a holistic practitioner and an expert in the use of chelation therapy for prevention and cure of disease. /1 He administers chelation therapy to an average of 32 persons per week for one ailment or another.

33. The American Academy of Medical Preventics is a group with a nationwide membership of 500-1000; of whom perhaps 100 are certified physicians. A protocol of this group requires extensive testing to verify the presence of various diseases, commends the least invasive approaches to testing and treatment, and favors chelation therapy for a number of ailments as well as hair analysis as a testing device.

34. According to Respondents the D.M.S.O. was administered for the purpose of aiding the cell permeability of the vitamin C and later to aid the cell permeability of the E.D.T.A., E.D.T.A. was administered one time for the purpose of treating rheumatoid arthritis; the Phillipott's formula (primarily vitamin C) was for chelation of copper allergies and improving nutrition; and sulfur cyl was for inflammed joints. This treatment conforms to the American Academy of Preventics' protocol.

35. It is stipulated by the parties that Respondent did not use D.M.S.O. as a treatment or cure for copper poisoning or as a treatment or cure for rheumatoid arthritis. (Pre-Hearing Stipulation paragraphs 33 and 34; H.O. Exhibit 2).

36. Expert testimony was permitted to be elicited from Lloyd D. Gladding, D.O., Jeffrey Erlich M.D., Mark Montgomery, Ph.D., Wilbur Blechman, M.D., Garry Gordon, M.D., and Stanley Jacobs, M.D. Respondent objected to any testimony by Petitioner's witnesses, Dr. Gladding, D.O. (the only Florida licensed osteopathic physician other than Respondent to testify), Jeffrey Erlich, M.D., Mark Montgomery, Ph.D. in toxicology and instructor of both medical and osteopathic physicians, and Wilbur Blechman, M.D. because they were not "similar health care providers" in that none were physicians specializing in holistic and preventive medicine upon grounds that only reasonably prudent similar physicians may properly evaluate Respondent's performance. Dr. Blechman's testimony by deposition was further objected to by Respondent upon the ground that a medical physician may not testify to the statutory standard required of a "reasonably prudent similar osteopathic physician as acceptable under similar conditions and circumstances" as specified in Section 459.015(1)(t) F.S. This position was not consistent with Respondent's relying heavily on the testimony of Dr. Jacob, also a medical physician (M.D.) or Dr. Gordon, trained as an osteopath but accredited through a merger of schools as an M.D.

37. Upon authority of Wright v. Schulte 441 So.2d 660 (Fla. 2d DCA 1983) 2/ upon the definition of "physician" contained in Section 459.0514(1) embracing both medical physicians and osteopathic physicians, upon the statutory language contained in Section 459.015(1)(t), specifying "The board shall give great weight to the provisions of Section 768.45 when enforcing this paragraph," and upon each witness' specialized education, training, and experience as evident from the records the undersigned overruled Respondent's objections and

qualified the witnesses as experts pursuant to their respective qualifications. This ruling is also in accord with the history of Chapter 21R F.A.C., of which judicial notice has been taken, and which shows holistic and preventive medicine has never been recognized as a sub-speciality by the Board of Osteopathic Medical Examiners. This evidentiary ruling is here reaffirmed and reiterated as clarification of the weight and credibility of the experts' opinions accepted, relied upon, or rejected in this recommended order.

38. The Food and Drug Administration (F.D.A.) is the federal agency charged with the enforcement of the federal Food and Drug Acts which includes the regulation of the manufacture and distribution of drug products. As part of its regulatory powers, the F.D.A. approves or disapproves drugs for human consumption. It does not approve or disapprove uses or treatments of drugs. Once the drug has been approved as a prescriptive agent, physicians are not limited by the F.D.A. in their utilization of approved drugs to the specific indications set forth in the F.D.A. package inserts. D.M.S.O. has been approved for human consumption. The package insert for D.M.S.O. as reported in the Physician's Desk Reference (PDR), a standard reference used by practicing physicians, recognizes it as indicated for treatment of the condition of interstitial cystitis only, a condition Laine did not have. E.D.T.A. has also been approved by the F.D.A. for human consumption. Its package insert as reported in PDR recognizes it as indicated for treatment of the conditions of digitalis toxicity, hypercalcemia, lead, and other heavy metal toxicities.

39. The undersigned has considered the testimony of all the experts qualified in this case subject to differing weight and credibility considerations of their education, training, and experience. The definition of "experimental treatment" as that type of treatment which has not been shown to be effective or safe under clinical studies conducted after F.D.A. approval of the drug involved is accepted. With some minor variation of choice of words, that is the definition advanced by Dr. Gladding, D.O., Dr. Blechman, M.D. and by toxicologist Mark Montgomery, even though clinical tests also precede F.D.A. approval. D.M.S.O. and E.D.T.A. in the quantities and treatments used by Respondent are experimental and not approved or recognized as acceptable for treatment of either copper poisoning or rheumatoid arthritis by a respectable minority of the medical profession. The opinions of the Florida physicians board certified or with a majority of their practices in rheumatology or internal medicine and of Mark Montgomery, who teaches both medical physicians and osteopathic physicians the physical and physiological operation of various drugs, are considered more credible on this issue than that of Dr. Gordon, drafter of the American Academy of Preventics' protocol using E.D.T.A. and D.M.S.O. together in chelation. Dr. Gordon admits that in many ways all D.M.S.O. and E.D.T.A. treatments are practiced only by members of the American Academy of Medical Preventics, which has not yet been recognized by the American Medical Association and which represents a minority of physicians nationwide.

40. Even by the construction of the evidence most favorable to Respondent, that is, the testimony of Dr. Jacob, Respondent's expert in D.M.S.O., the small quantities of D.M.S.O. administered by Respondent in the course of eight treatments would not have been therapeutically effective in reducing the copper levels in Laine's body and would not have been therapeutically effective in treatment of rheumatoid arthritis. A stronger solution than that used by Respondent would have been necessary to have either a positive or negative effect upon Laine. Dr. Jacob does not use D.M.S.O. for chelation but when using it by intravenous injection requires a release be signed.

41. Laine was not physically harmed by the treatments administered by Respondent. The most that can be said is that the Respondent's misdiagnosis and useless treatments delayed his obtaining appropriate treatment.

42. There is no recognized cure for rheumatoid arthritis and it has been shown that any of the numerous treatments utilized for rheumatoid arthritis will work on some individuals while not working on others. The symptoms of rheumatoid arthritis may alleviate without any treatments or conversely may get progressively worse regardless of any treatment utilized or they may clear up for no apparent reason.

#### CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction of the parties and subject matter hereto.

44. Respondent's Motions to Dismiss as to Counts I, III, IV, V, and VI are denied.

45. Under the provisions of Section 459.015, Florida Statutes, the Board of Osteopathic Medical Examiners is empowered to revoke, suspend or otherwise discipline an osteopathic physician who has been found to have violated any of the following provisions of Section 459.015(1), Florida Statutes:

(h) by failing to perform any statutory or legal obligation placed upon a licensed osteopathic physician;

(1) by making deceptive, untrue or fraudulent representations in the practice of osteopathic medicine or employing a trick or scheme in the practice of osteopathic medicine when such scheme or trick fails to conform to the generally prevailing standards of treatment in the medical community;

(n) by failing to keep written medical records justifying the course of treatment of a patient, including but not limited to patient histories, examination results and test results;

(o) by exercising influence on a patient in such a manner as to exploit the patient for financial gain;

(t) by gross or repeated malpractice or the failure to practice medicine with that level of care, skill and treatment which is recognized by a reasonably prudent similar osteopathic physician as being acceptable under similar conditions and circumstances;

(u) by performing any procedure or prescribing any therapy which, by the prevailing standards of medical

practice in the community, would constitute experimentation on human subjects, without first obtaining, full informed and written consent.

46. Inherent in interpreting the alleged violation of Section 459.015(1)(h), F.S., we must look to Section 459.0154 F.S., which provides:

1. As used in this section, unless the context clearly requires otherwise, "physician" means a doctor of medicine or osteopathic medicine licensed under Chapter 458 or this Chapter;

2. No physician shall be subject to disciplinary action by the Board of Medical Examiners or Board of Osteopathic Medical Examiners for prescribing or administering dimethyl sulfoxide (DMSO) to a patient under his care who has requested the substance;

3. The patient, after being fully informed as to alternative methods of treatment and their potential for cure and upon request for the administration of dimethyl sulfoxide (DMSO) by his physician, shall sign a written release releasing the physician and, when applicable, the hospital or health facility from any liability therefore;

4. The physician shall inform the patient in writing if dimethyl sulfoxide (DMSO) has not been approved as a treatment or cure by the Food and Drug Administration of the United States Department of Health and Human Services for the disorder for which it is being prescribed;

5. This act shall not apply to conditions for which dimethyl sulfoxide (DMSO) has been approved as a treatment by the Food and Drug Administration of the United States.

47. Petitioner has the burden of proof in these penal proceedings and that standard of proof is to establish the violations actually alleged by clear and convincing evidence. *Bowling v. Department of Insurance*, 394 So.2d 165 (Fla. 1st DCA 1981); *Robinson v. Florida Board of Dentistry*, 447 So.2d 930 (Fla. 3rd DCA 1984); and *Sneij v. Department of Professional Regulation*, 454 So.2d 795 (Fla. 3rd DCA 1984).

48. Upon the foregoing findings of fact, it is determined that Respondent has violated Section 459.0154. Laine did not request the substance, D.M.S.O. Laine was not fully informed of alternate methods of treatment of either copper poisoning, which he did not have or of rheumatoid arthritis which he did have.

Respondent failed to secure a written release which would have insured that Laine understood the nature of his treatment with D.M.S.O. Although a release would have principally served Respondent's own interests, failure to obtain the release reflects Respondent's failure to properly inform Laine about the nature of his treatment. Respondent suggests that because the F.D.A. does not approve a "treatment or cure" but only the right to market the drug itself, sub-paragraphs 459.0154(4) and (5) constitute an anomaly. That argument is not persuasive. A reasonable interpretation of those sub-paragraphs is that Respondent was required to inform Laine that D.M.S.O. is deemed by the F.D.A. to be indicated only for treatment of the conditions enumerated in the package insert.

49. In reaching this conclusion of law the decision in *United States v. Evers*, 643 F. 2d 1043 (5th Cir. 1981) which interpreted "misbranding" of drugs by a physician has not been overlooked. In *Evers* the parties were agreed that the federal statutes and laws in effect relative to the F.D.A. did not prevent a physician from prescribing for uses not approved by the F.D.A. drugs which have been approved by the F.D.A. That case is consistent with the instant one only in that both Dr. Evers and Respondent have created a use for certain drugs different from their previously approved and labelled use in the treatment of specific conditions. The primary difference between *Evers*' situation and Respondent's situation is that Florida has, pursuant to Section 459.0154, placed an additional responsibility upon Respondent to make full disclosure when he does create a use for D.M.S.O. which is different from its previously F.D.A.-approved and F.D.A.-labelled use in the treatment of specific conditions. Respondent here has not met this state-imposed responsibility. Accordingly, he has also thereby violated Section 459.015(1)(h) in that he has failed to perform a statutory or legal obligation placed upon a licensed osteopathic physician.

50. Respondent's failure to make full and complete disclosure of other methods of treatment and of the potential side effects of the type of chelation therapy employed by Respondent is the element upon which any finding of a violation of Sections 459.015(1)(1) and (u) must be predicated. Although chelation therapy per se does not constitute experimental medicine either by virtue of dicta contained in *State Board of Medical Examiners v. Rogers*, 387 So.2d 937 (Fla. 1980) or by the bulk of the competent substantial evidence in the instant case, the type of chelation therapy as practiced by Respondent on Frank R. Laine is both useless and experimental. The strength of the solution administered by Respondent to Frank Laine did not even conform to the strength recommended by Dr. Jacob, Respondent's expert on D.M.S.O. Use of D.M.S.O. to aid E.D.T.A.'s permeability of cell membranes is not accepted by a respectable minority of the medical community. See *Clark v. Department of Professional Regulations Board of Medical Examiners*, 463 So.2d 325 (Fla. 5th D.C.A. 1985). Herein, we have a dissimilar set of facts than existed in *Rogers*. In *Rogers*, there was no evidence that the therapy was harmful and the patients were also carefully informed of the procedure and the possibility of no improvement.

51. Respondent's records are facially complete in that they recorded histories and test results. If they do not cover physical examination results, it is because Respondent did not make any physical examinations of his patient Frank Laine which he might record. However, absent these physical examinations and upon the other failures of diagnosis based on tests recorded in his records, those records clearly do not justify the course of treatment. Thus, Respondent has violated Section 459.015(1)(n) F. S.

52. There is no clear and convincing evidence to establish that Section 459.015(1)(o) has been violated and Count II should be dismissed with prejudice.

53. Respondent has violated Section 459.015(1)(t) because by his treatment of Laine he failed to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar osteopathic physician under similar facts and circumstances in that he failed to properly evaluate Laine using tests and physical examinations to determine the presence of rheumatoid arthritis, because he failed to diagnose rheumatoid arthritis, and because his treatment would have been ineffective for either rheumatoid arthritis (not diagnosed) and/or copper poisoning (diagnosed). Respondent's treatment of Laine indicates a lack of diagnostic skill and lack of understanding as to the actions and therapeutic dosages of the drugs and vitamins he utilized.

54. Counts VII and VIII, upon which no evidence has been taken, are procedurally defective and should be dismissed.

55. In considering the issue of penalty, the undersigned has considered the guidelines established in Section 21R-11.01 F.A.C., including but not limited to the following matters: that no affirmative harm was done to Laine; that Laine's condition subsequently has resisted even conservative and appropriate treatment; that Respondent has been previously disciplined but apparently not for any identical offense; 3/ that Respondent has practiced successfully for approximately 40 years; that it has been several years since the earlier offenses arose; that Respondent ultimately received no financial gain from treating Laine; and the extent of Respondent's potential danger to the public. It is accordingly, recommended:

#### RECOMMENDATION

That the Board of Osteopathic Medical Examiners enter a final order finding Respondent guilty of violations of Count I [sections 459.015(h) and 459.0154], Count III [Section 459.015(1)(t)], Count IV [Section 459.015(1)(u)], Count V [Section 459.015(1)(n)], and Count VI, (section 459.015(1)(l)), suspending Respondent's license for a total period of one year therefor, and dismissing Count II [Section 459.015(1)(o)] with prejudice and dismissing Counts VII and VIII without prejudice.

DONE and ORDERED this 14th day of May, 1986, in Tallahassee, Florida.

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ELLA JANE P. DAVIS  
Hearing Officer  
Division of Administrative Hearings  
The Oakland Building  
2009 Apalachee Parkway  
Tallahassee, Florida 32301  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of May, 1986.

## ENDNOTES

1/ In an attempt to impeach Respondent's testimony on this point; Petitioner had admitted in evidence prior orders of the Board of Osteopathic Physicians which limit or by which Respondent has agreed not to hold himself out, solicit patients, or advertise himself in the area of preventive medicine. There is no evidence that Respondent has violated those orders and they do not deprive him of the right to testify that he thinks of himself as a holistic or preventive physician. Indeed, holistic and preventive medicine is a goal of all osteopathic physicians as expressed by Dr. Gladding D.O.

Respondent repeatedly moved for a mistrial upon the ground that these admitted documents should only be used for the "penalty phase" and upon the ground that yet another prior recommended order against Respondent was offered by Petitioner for judicial notice, which judicial notice was denied, and the combination of all prior orders were "highly prejudicial." The motions were denied as without merit.

The orders admitted have been only considered in assessing penalty.

2/ Where physician called as expert witness in a medical malpractice action is not similar health care provider as such term is used in statute governing who may so testify, trial judge must determine whether proffered expert possesses sufficient training, experience and knowledge to provide expert medical testimony as to acceptable standard of care in given cause. One may be qualified to give expert testimony on standard of care in medical malpractice action even though he is not of same specialty branch of medicine as defendant. See also *Musachia v. Terry*, 140 So.2d 605 (Fla. 3d DCA 1962), a medical physician may testify upon medical malpractice of an osteopathic physician.

3/ See footnote 1, supra.

## APPENDIX TO RECOMMENDED ORDER 84-2844

At the outset, it is observed that 71 numbered paragraphs and 112 numbered paragraphs of proposed findings of fact were received from Petitioner and Respondent respectively. This seems excessive in the extreme and borders on an abuse of the opportunity to file proposed recommended orders. Moreover, in many instances, the numbered paragraphs of each litigant comprised several sentences and frequently no transcript page number or record reference was provided as required by procedural order.

Petitioner's Proposed Findings of Fact (FOF):

1. Covered in FOF 1.
2. Material matters bearing on material issues of disputed fact are covered in FOF 2. Matters not covered in FOF 2 are rejected as irrelevant, immaterial, and not dispositive of any issue at bar.
3. Covered in FOF 2.
4. Covered in FOF2 and 3.
5. Covered in FOF 3
6. Covered in FOF 2.
7. Material matters bearing on material issues of disputed fact are covered in FOF 2, 27, and 28. The remainder is rejected as unnecessary and subordinate.
8. Covered in FOF 2.
9. Covered in FOF 2
10. Rejected as irrelevant.

11. Covered in FOF 4-6.
12. Covered FOF 4 and 5. To the extent it is rejected as stated it is rejected as subordinate, unnecessary and not dispositive of any issue at bar.
13. Covered in FOF 4.
14. Covered in FOF 4.
15. Material matters covered in FOF 4, 5, and 16; the remainder is rejected as subordinate, unnecessary and not dispositive of any issue at bar.
16. Material matters covered in FOF 4, 25; the remainder is rejected as immaterial.
17. Covered in FOF 5, but cumulative.
18. Covered in FOF 5.
19. Covered in FOF 8.
20. Covered in FOF 7; what is not accepted is rejected as subordinate and unnecessary.
21. Covered in FOF 9.
22. Covered in FOF 5.
23. Covered in FOF 4, 12 and 25.
24. Covered in FOF 12.
25. Covered in FOF 12.
26. Covered in FOF 4, 13, and 25.
27. Covered in FOF 13.
28. Covered in FOF 13.
29. Covered in FOF 13.
30. Covered in FOF 4, 14, and 25.
31. Covered in FOF 14.
32. Covered in FOF 14.
33. Covered in FOF 4, 15, and 25.
34. Covered in FOF 15.
35. Covered in FOF 17.
36. Covered in 4, 16 and 25.
37. Rejected as stated because of the stipulation and direct uncontroverted evidence that sulfur cyl was given intravenously, not intramuscularly. See FOF 16.
38. Covered in FOF 16.
39. Covered in FOF 4, 18, and 25.
40. Covered in FOF 18 and 19.
41. Covered in FOF 4, 20 and 25.
42. Covered in FOF 20.
43. Rejected as irrelevant, immaterial and not dispositive of any issue at bar.
44. Covered in FOF 21.
45. Rejected as cumulative-see FOF 4.
46. Covered in FOF 4.
47. Covered in FOF 22.
48. Covered in FOF 23; see cross references therein.
49. Covered in FOF 21.
50. Covered in FOF 11.
51. Covered in FOF 21.
52. Covered in FOF 6.
53. Rejected as mostly irrelevant and as otherwise subordinated unnecessary, and cumulative. See FOF 21.
54. Covered in FOF 26. What is not accepted is rejected as irrelevant, subordinate, or unnecessary.
55. Covered in FOF 26. What is not accepted is rejected as irrelevant, subordinate, or unnecessary.
56. Covered in FOF 26. What is not accepted is rejected as irrelevant, subordinate, or unnecessary.

57. To the extent it is supported in the record this proposal has been accepted as covered in FOF 19. The remainder is rejected as not supported upon the weight of the direct credible evidence in the record as a whole and because it only "culls" the evidence selectively.

58. Material matters bearing on material issues of disputed fact are covered in FOF 19. The remainder is accepted but not adopted as subordinate and unnecessary.

59. Material matters bearing on material issues of disputed fact are covered in FOF 10. The remainder is accepted but not adopted as subordinate and unnecessary.

60. Covered in FOF 25. To the extent not covered it is accepted but not adopted as unnecessary and subordinate and not dispositive of any material issue at bar.

61. Accepted but not adopted as unnecessary and subordinate and not dispositive of any material issue at bar.

62. Accepted but not adopted as unnecessary and subordinate and not dispositive of any material issue at bar. Further, portions thereof are irrelevant.

63. Accepted but not adopted as unnecessary, subordinate, and cumulative, and not dispositive of any material issue at bar.

64. Accepted but not adopted as unnecessary to a resolution of any issue at bar.

65. Covered in FOF 19. To the extent it is not adopted therein, this proposal is accepted but not adopted as subordinate and unnecessary and not dispositive of any issue at bar.

66. The first sentence is rejected; the evidence shows adequate information to correctly diagnose Laine but a persistent incorrect diagnosis. See FOF 27. The second sentence is accepted in FOF 13 and 17. The remaining 2 sentences are covered in FOF 19, 33-35.

67. Rejected in part as not supported in the record and in part as irrelevant to any issue at bar See FOF 28.

68. Covered in FOF 35.

69. Rejected as a conclusion of law which requires no ruling but the subject matter is covered in FOF 34.

70. Introduction is covered in FOF 27 and 32-35. A is covered in FOF 13 with parts rejected as subordinate and unnecessary. B is covered in FOF 23 and 30. C is covered in FOF 4 and 25. The remainder is rejected as cumulative.

71. Rejected as a conclusion of law not requiring a ruling. To the extent any portion constitutes a proposal of fact, it is cumulative and previously covered in FOF 4, 23 and 25.

#### Respondent's Proposed Findings of Fact

1. Covered in FOF 1.
2. Constitutes a conclusion of law requiring no ruling.
3. Covered under PROCEDURAL AND EVIDENTIARY MATTERS.
4. Covered under FOF 2; date is rejected as not supported by the record as a whole.
5. Covered in FOF 3.
6. Covered in FOF 2.
7. Sentences 1 and 2 are covered in FOF 2. Sentence 3 is rejected and covered in FOF 28.
8. Covered in FOF 2 and 28. What is not accepted is rejected as irrelevant and unnecessary to resolution of any issue at bar.
9. Covered in FOF 16, 29, 30 and 34. What is not accepted is rejected as immaterial, unnecessary, and not supported by the greater weight of the direct credible expert testimony as set out in FOF 32-35.

10. Covered in FOF 16, 29, 30 and 34. What is not accepted is rejected as immaterial unnecessary; and not supported by the greater weight of the direct credible expert testimony as set out in FOF 32-35.

11. Largely irrelevant but accepted to degree set out in FOF 29 especially n. 1 and FOF 30, 32.

12. Accepted in part but except as covered in FOF 29-30 is rejected as irrelevant.

13. Rejected as set out in FOF 27-25.

14. Covered in FOF 2 and 21.

15. Up to the third sentence, the proposal is covered in FOF 4, 5, 23, 25, 27 and 28. From the word "primarily" through the phrase "eight times and" the proposal is covered in FOF 5. The remainder is covered in FOF 35.

16. Covered in FOF 12, 13, 14, and 20.

17. Rejected as not supported by the greater weight of the direct credible expert testimony; especially the representations concerning "free radical scavengers" are not supported by the greater weight of the evidence.

15. "Ingestion" is rejected as not supported by the competent substantial evidence in the record as a whole and further the proposal as stated does not address an ultimate material issue of disputed fact. See FOF 3 and 28.

19. Rejected upon "free radical scavenger" theory not supported by greater weight on the evidence; otherwise covered in FOF 7, 24, 30, and 34-35.

20. Rejected on "free radical scavenger" theory, particularly the contrary testimony of Mark Montgomery PhD and Dr. Blechman. See FOF 27 and 32-35.

21. Rejected on "free redical scavenger" theory, particularly the contrary testimony of Mark Montgomery PhD and Dr. Blechman. See FOF 27 and 32-35.

22. Rejected as not supported by the greater weight of the direct credible expert evidence in the record as a whole as set out in FOF 23, 27, 30-31.

23. Rejected as set out in FOF 10, 30, 34-35 and because as stated it is contrary to the greater weight of the credible expert evidence.

24. Largely rejected as not supported by the greater weight of the direct credible expert evidence in the record as a whole. More fully discussed and covered in FOF 18, 23-24, 27-28, 30-31, and 33-35.

25. Rejected as not supported by the direct credible expert evidence as set out in FOF 19.

26. Rejected as set out in FOF 23-24, 27-28, 30-31, and 34-35.

27. Rejected as immaterial.

28. Covered in FOF 3.

29. Covered in FOF 4.

30. Covered in FOF 4.

31. Material matters bearing on material issues of disputed fact are covered in FOF 4 and 16. Matters not covered are rejected as immaterial.

32. Rejected as cumulative but see FOF 4.

33. Accepted but subordinate and unnecessary. See FOF 4 and 26.

34. Accepted in part and rejected in part as not supported by the credible evidence in the record as a whole. See FOF 23, 26, and 27.

35. Rejected as not supported by the evidence as a whole; see FOF 25.

36. Covered in FOF 25.

37. Rejected as stated as giving misleading view of the evidence concerning Respondent's physical examinations of Laine which are more accurately set out in FOF 4 and 25.

38. Accepted; covered in FOF 4.

39. Accepted but not adopted. Covered in FOF 24-25.

40. Accepted in FOF 24.

41. Accepted in part and rejected in part. Although the test may be acceptable, E.D.T.A. used this way was not acceptable. Covered in FOF 19, and 32-35.

42. Accepted but not adopted as irrelevant and not dispositive of any issue at bar.

43. Rejected as contrary to the evidence as a whole and as contrary to the explicit testimony of Drs. Blechman and Gladding which is of greater weight and credibility than certain other experts. See FOF 25.

44. Rejected as contrary to the direct testimony of Respondent and Laine; see FOF 21.

45. Accepted but subordinate, unnecessary and not dispositive of any material issue at bar. See FOF 37.

46. Accepted but subordinate and unnecessary. See FOF 37.

47. Accepted but subordinate and unnecessary. See FOF 37.

48. Rejected as contrary to the evidence as a whole as set out in FOF 26.

49. Rejected as contrary to the evidence of record. See FOF 11 and 21.

50. Sentence 1 is covered in FOF 13.

Sentence 2 is rejected as contrary to the evidence; see FOF 13, 14, and 27.

51. Accepted in part and rejected in part as set out in FOF 5, 15, 17, 22, 23, 27, 30 and 31.

52. Accepted but subordinate, unnecessary, and cumulative in part. See FOF 17.

53. Accepted but not dispositive of any material issue at bar.

54. Covered in FOF 24.

55. Rejected as subordinate and unnecessary and misstating Dr. Blechman's full testimony. See FOF 24.

56. Rejected as cumulative and as contrary to the evidence in the record as a whole. See FOF 5, 22-23, and 27.

57. Rejected in part as contrary to the evidence as a whole and in part as cumulative. See FOF 4, 5, 22-23 and 27.

58. Accepted but not dispositive of any issue at bar and irrelevant.

59. Accepted up to the word "and" but not dispositive of any issue at bar. From the word "and" rejected as contrary to the evidence as a whole.

60. Rejected as not supported by the evidence and cumulative.

61. Accepted but irrelevant and not dispositive of any issue at bar.

62. Accepted but subordinate, unnecessary and not dispositive of any issue at bar.

63. Accepted but subordinate, unnecessary and not dispositive of any issue at bar.

64. Covered in FOF 22.

65. Covered FOF 32 and 34.

66. Rejected as not dispositive of any issue at bar. See FOF 28.

67. Rejected as not dispositive of any issue at bar. See FOF 32-35.

68. Rejected as not dispositive of any issue at bar. See FOF 28-30.

69. Accepted but not dispositive of any issue at bar.

70. Accepted but not dispositive of any issue at bar. See FOF 35.

71. The first sentence is rejected as not supported by the record and is covered in FOF 26, 32, and 34. The second sentence is accepted but is nondispositive as covered in FOF 26, 32 and 34.

72. Rejected in part as contrary to the evidence and in part as not dispositive of any issue at bar. See FOF 8, 32, and 34.

73. Rejected in part as contrary to the evidence and in part as not dispositive of any issue at bar. See FOF 32 and 34.

74. Rejected as contrary to the evidence and as not dispositive of any issue at bar. See FOF 32 and 34.

75. Rejected as contrary to the evidence and, as stated, the proposal is misleading of Dr. Montgomery's opinion as a whole. See FOF 32 and 34.

76. Rejected as contrary to the evidence as a whole. See FOF 32 and 34.

77. Rejected as contrary to the evidence as a whole. See FOF 8, 32 and 34.
78. Rejected as cumulative.
79. Rejected as cumulative.
80. Covered in FOF 24 except that "required" is not supported by the record. See FOF 28.
81. Rejected in part as not supported by the evidence and where accepted is cumulative. See FOF 4, 24, and 27, among other FOF.
82. Rejected as cumulative.
83. Covered in FOF 22 and rejected.
84. Accepted in part as set out in FOF 26. Conclusionary phraseology of "rarely prescribed", and "overly aggressive treatment," are rejected as not supported by the record. The remainder is rejected as irrelevant, subordinate and unnecessary.
85. Rejected as irrelevant and not supported by the record as set out in FOF 26.
86. Rejected as immaterial. See FOF 26.
87. Rejected as immaterial. See FOF 26.
88. Rejected as immaterial in part, as unsupported in part; and otherwise it is covered in FOF 19.
89. Rejected as immaterial and not dispositive of any issue at bar.
90. Covered under BACKGROUND.
91. Rejected as subordinated unnecessary and not dispositive of any issue at bar, but is peripherally covered under BACKGROUND and ISSUES.
92. Rejected as subordinated unnecessary and not dispositive of any issue at bar but is covered peripherally under BACKGROUND and ISSUES.
93. Covered in introductory material.
94. Covered in FOF 33.
95. Accepted but not adopted as it is mostly irrelevant and not dispositive of any issue at bar; see FOF 31 and 35.
96. Accepted but not adopted as it is not dispositive of any issue at bar; see FOF 34-35.
97. Accepted but not adopted as it is not dispositive of any issue at bar; see FOF 34-35.
98. Rejected as not supported by the greater weight of the credible expert testimony; see FOF 33, 34, and 35..
99. Rejected as this is taken out of context; and is misleading as stated of the opinion of Dr. Blechman fully expressed and as contrary to the greater weight of the credible expert testimony as a whole; see FOF 32 and 34.
100. Rejected as taken out of context, and as misleading as stated of the full opinion of Dr. Blechman and as contrary to the greater weight of the credible expert testimony as a whole; see FOF 34.
101. Covered FOF 33-34.
102. Covered in FOF 33.
103. Accepted but immaterial, subordinate and unnecessary.
104. Accepted but immaterial, subordinated and unnecessary.
105. Covered in FOF 33.
106. Accepted in part and rejected in part as not supported by the weight of the credible expert testimony. Covered in FOF 19, 23 and 33.
107. Rejected upon the greater weight of the evidence See FOF 32-34.
108. Covered in FOF 33.
109. Rejected as set out in FOF 19, 32-24.
110. Rejected as stated as not supported by the credible expert testimony as a whole; subject matter covered peripherally in FOF 13.
111. Rejected as irrelevant.
112. Covered in FOF 9.

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