

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-17-00562-CV**

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**Carl Cuthbert Davis, M.D., Appellant**

**v.**

**Texas Medical Board, Appellee**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT  
NO. D-1-GN-16-006146, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Carl Cuthbert Davis, M.D., appeals from the trial court’s final judgment affirming the Texas Medical Board’s final order revoking his Texas medical license. Dr. Davis challenges the judgment in two appellate issues, arguing that he should not have been held strictly liable for delegated acts performed by mid-level practitioners and that the Texas Medical Board failed “to establish the standards for reviewing the charts of collaborative mid-level practitioner[s] by competent expert testimony.” We will affirm the trial court’s final judgment.

**BACKGROUND**

Dr. Davis was the medical director at two clinics in Houston. One was owned and operated by Pamela Metoyer, an advanced practice registered nurse (APN), and the other was owned and operated by Cheryl Jackson, APN. Pursuant to collaborative agreements, Dr. Davis was the

supervising physician for mid-level practitioners Metoyer and Jackson and delegated medical acts to them, including prescribing controlled substances.

At the hearing before the State Office of Administrative Hearings (SOAH), the Texas Medical Board (TMB) presented seven patient charts from the two clinics. The TMB's expert witness testified that the treatment that these patients received fell below the standard of care for the treatment of pain. Generally speaking, the TMB alleged that the clinics were "pill mills" at which patients were prescribed non-therapeutic pain medication, including a dangerous combination of drugs known as the "Houston Cocktail."

Dr. Davis, representing himself at the hearing, did not deny that the clinics were "pill mills" or that Metoyer and Jackson were inappropriately prescribing controlled substances. Instead, he contended that he had no knowledge of their inappropriate activities while they were ongoing, that he did not encourage these activities, that he had no incentive to participate in a "pill mill," that he terminated his relationships with Metoyer and Jackson as soon as he discovered their inappropriate activities, and that he was suffering from serious medical conditions that the nurses took advantage of. He argued that he should not be held responsible for delegated medical acts of which he had no knowledge and that were contrary to his express instructions.

After the hearing, the SOAH administrative law judge (ALJ) issued a proposal for decision (PFD). This PFD included about 100 findings of fact and 20 conclusions of law. The findings explained how the treatment of each of the seven patients discussed at the hearing fell below the standard of care. The findings also described ways in which Dr. Davis failed to adequately supervise the APNs to whom he delegated authority. Among other things, the ALJ found the following:

- Respondent [Dr. Davis] had no current, written protocols in place for the APNs at [the two clinics.]
- Respondent maintained no record of the dates and times when he was at [the two clinics] or of the patient files he reviewed.
- Respondent did not randomly review patient charts at the clinics.
- The [APNs] failed to obtain and document treatment records from past medical providers, data about patient compliance with past treatments, or the therapeutic benefit of any of the medications or treatments they had taken[.]
- Patient histories were superficial, contained inconsistencies, and lacked useful detail[.]
- Physical examinations were superficial and lacked key elements that could easily have been performed and documented[.]
- Treatment plans were based on unreliable diagnoses and contained no short- or long-term goals in terms of patient function[.]
- Dangerous combinations of drug cocktails were prescribed non-therapeutically[.]
- The consents used to inform the patients of the risks and benefits of their medications were inadequate and demonstrated a fundamental lack of understanding regarding the disease of addiction[.]
- Massages administered for 8-15 minutes to Patients 3, 4, 6, and 7 by unknown individuals with no listed qualifications appeared to be attempts to “paper the record,” rather than to provide meaningful healthcare[.]
- The patients were neither assessed for substance abuse nor monitored for abuse or diversion of their medications through urine drug screens or any other meaningful, objective data[.]
- The [APNs] did not adequately develop and document specific treatment plans for the patients with short- or long-term goals for the management of their pains; and
- Other than narcotic medications, the [APNs] did not offer meaningful, conservative treatment options as alternatives.

- Respondent was grossly negligent in not retaining any records documenting his supervision of the clinics.

Based on these and other findings, the ALJ made the following conclusions of law, among others:

- Respondent, through the APNs, did not treat Patients 1 through 7 according to the generally accepted standard of care for the treatment of chronic pain. 22 Tex. Admin. Code § 190.8(1)(A)[.]
- Respondent did not use proper diligence in his professional practice. 22 Tex. Admin. Code § 190.8(1)(C)[.]
- Respondent did not safeguard against potential complications. 22 Tex. Admin. Code § 190.8(1)(D)[.]
- Respondent failed to disclose reasonably foreseeable side effects of a procedure or treatment. 22 Tex. Admin. Code § 190.8(1)(G)[.]
- Respondent failed to disclose reasonable alternative treatments to proposed treatments. 22 Tex. Admin. Code § 190.8(1)(H)[.]
- Because Respondent failed to practice medicine in an acceptable professional manner consistent with public health and welfare as defined at 22 Texas Administrative Code § 190.8(1)(A), (C), (D), (G), and (H) . . . , the Board is authorized to discipline him pursuant to Texas Occupations Code § 164.051(a)(3) and (a)(6)[.]
- Respondent did not maintain adequate medical records. 22 Tex. Admin. Code § 165.1(a)[.]
- Respondent did not adhere to established guidelines and requirements for the treatment of pain. 22 Tex. Admin. Code § 170.3[.]
- Respondent was responsible for the acts he delegated to the APNs and did not adequately supervise them to ensure that the treatment of Patients 1 through 7 met the standard of care. Tex. Occ. Code § 157.001(b)[.]
- The Board is authorized to take disciplinary action against Respondent pursuant to Texas Occupations Code § 164.051(a)(3) . . . based on his violation

of 22 Texas Administrative Code §§ 165.1(a), 170.3, and 190.8(a)(A), (D), (G)[.]

- The Board is authorized to take disciplinary action against Respondent for committing unprofessional or dishonorable conduct that is likely to deceive or defraud the public. Tex. Occ. Code §§ 164.051(a)(1), .052(a)(5), .053(a)(1)[.]
- The Board is authorized to take disciplinary action against Respondent for committing a prohibited act or practice connected with the physician's practice of medicine by prescribing a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is prescribed. Tex. Occ. Code § 164.053(a)(5)[.]
- The Board is authorized to take disciplinary action against Respondent for committing a prohibited act or practice by prescribing dangerous drugs . . . and controlled substances . . . in a manner inconsistent with public health and welfare. Tex. Occ. Code § 164.053(a)(6)[.]
- The Board is authorized to take disciplinary action against Respondent due to his failure to adequately supervise the APNs. Tex. Occ. Code § 164.053(a)(8)[.]

The ALJ summarized her findings and conclusions as follows:

Board Staff established by a preponderance of the evidence that [Dr. Davis] engaged in unprofessional conduct by inadequately supervising APNs at [the clinics]. Through the acts he delegated to them, [Dr. Davis] failed to practice medicine in an acceptable professional manner consistent with public health and welfare in that he did not use proper diligence in his professional practice, did not safeguard against potential complications, failed to disclose reasonably foreseeable side effects of a procedure or treatment, failed to disclose reasonable alternative treatments to a proposed treatment, and prescribed controlled substances non-therapeutically.

The TMB later adopted the ALJ's findings of fact and conclusions of law and issued a final order revoking Dr. Davis's Texas medical license. Dr. Davis sought judicial review of that order. *See* Tex. Gov't Code § 2001.171. The trial court affirmed the TMB's order, and this appeal followed.

## DISCUSSION

### Strict Liability

In his first issue, Dr. Davis contends that the TMB improperly held him strictly liable for the APNs' actions. Relying on the Texas Medical Practice Act (TMPA), Dr. Davis argues that he may only be held liable for the APNs' actions if he had reason to believe that they were incompetent. We review questions of statutory construction de novo. *See Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017).

The TMPA provides the following:

Unless the physician has reason to believe the physician assistant or advanced practice registered nurse lacked the competency to perform the act, a physician is not liable for an act of a physician assistant or advanced practice registered nurse solely because the physician signed a standing medical order, a standing delegation order, or another order or protocol, or entered into a prescriptive authority agreement, authorizing the physician assistant or advanced practice registered nurse to administer, provide, prescribe, or order a drug or device.

Tex. Occ. Code § 157.060. Dr. Davis argues that this language means that “‘unless a physician has reason to believe the physician assistant or advance nurse practitioner lacked the competency’ the physician is not liable for the midlevel practitioner’s practice.” He further argues that “[t]he only way Dr. Davis would know whether the [APNs] were competent was to review the [APNs’] patient’s chart.” According to Dr. Davis, because he reviewed all the charts required by the TMB’s regulations and because the charts that the TMB relied on at the SOAH hearing were not among those that he was required to review, the TMB failed to show that he had reason to believe that the APNs were incompetent.

The TMPA, however, also provides, “The delegating physician remains responsible for the medical acts of the person performing the delegated medical acts.” *Id.* § 157.001(b). Although we agree with Dr. Davis that section 157.060 is more specific than section 157.001(b), we also conclude that section 157.060 does not mean that a physician may *never* be responsible for delegated medical acts unless he has reason to believe that the APN lacked the competency to perform the act. Instead, the provision means that a physician will not be held responsible for delegated medical acts in the absence of such knowledge *solely* because of the supervisory relation he has with the APN, but he may still be held responsible for other reasons—including a failure to appropriately supervise the APN. *See id.* § 157.060. In other words, section 157.060’s more specific provision does not eliminate the general rule of section 157.001(b), it only limits it in certain circumstances.

As discussed above, the ALJ and TMB found that Dr. Davis failed to adequately supervise the APNs and document his supervision. Specifically, the ALJ and TMB found that Dr. Davis: (1) had no current, written protocols in place for the APNs; (2) maintained no record of the dates and times when he was at the clinics or of the patient files he reviewed; (3) did not randomly review patient charts at the clinics; and (4) was grossly negligent in not retaining any records documenting his supervision of the clinics. In his appellate brief, Dr. Davis has not challenged any of these findings.<sup>1</sup> Therefore, we accept these findings as established. *See Garcia v. Texas Real Estate Comm’n*, No. 03-14-00349-CV, 2016 WL 3068408, at \*9 (Tex. App.—Austin May 27,

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<sup>1</sup> In his reply brief, Dr. Davis arguably challenges the finding that he failed to maintain adequate records. However, because Dr. Davis raised this issue for the first time in his reply brief, we will not consider it. *See Ross v. Sims*, No. 03-16-00179-CV, 2017 WL 672458, at \*8 n.12 (Tex. App.—Austin Feb. 15, 2017, pet. denied) (mem. op.); *DeWolf v. Kohler*, 452 S.W.3d 373, 388 n.13 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

2016, no pet.) (mem. op.); *Madden v. State Bd. for Educator Certification*, No. 03-11-00584-CV, 2014 WL 2191927, at \*4 n.4 (Tex. App.—Austin May 22, 2014, pet. denied) (mem. op.) (citing *Helbing v. Texas Dep’t of Water Res.*, 713 S.W.2d 134, 137 (Tex. App.—Austin 1986, no writ)). Moreover, these findings support the ALJ and TMB’s conclusions that the TMB was authorized to discipline Dr. Davis because he: (1) did not use proper diligence in his professional practice, *see* 22 Tex. Admin. Code § 190.8(1)(C) (2018)<sup>2</sup> (Tex. Med. Bd., Violation Guidelines); (2) did not maintain adequate medical records, *see id.* § 165.1(a) (2018) (Tex. Med. Bd., Medical Records); and (3) did not adequately supervise the APNs to ensure that the treatment of Patients 1 through 7 met the standard of care, *see* Tex. Occ. Code §§ 157.001(b), 164.053(a)(8).

For these reasons, the TMB’s decision to discipline Dr. Davis does not rest solely on the misdeeds of the nurses. It also rests on Dr. Davis’s failure to adequately supervise the APNs and to document that supervision. Therefore, even if Dr. Davis is correct that he may not be held strictly liable for the APNs’ actions, he may still be liable for his failure to supervise. Accordingly, we overrule Dr. Davis’s first issue.

### **Standard of Care**

In his second appellate issue, Dr. Davis contends that the TMB failed “to establish the standards for reviewing the charts of collaborative midlevel practitioner[s] by competent expert testimony.” Under this heading, Dr. Davis argues that the TMB’s expert witness was “required to

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<sup>2</sup> The regulations cited in this opinion do not differ in any material way from the regulations as they existed at the time of Dr. Davis’s SOAH hearing.



show familiarity with the protocols of advance nurse practitioners, not just familiarity with the standards of care for a physician,” and that “[w]hether the [APN] violated the required standard of care was not established by the Board Expert.” Dr. Davis further argues that “[t]he Board expert’s opinions regarding the advance nurse practitioners care was not relievable [sic] based on unfounded assumptions and was conclusory. The Board Expert testimony was not reliable thus there was no evidence to support the Board’s findings.” We construe these statements as arguing that the TMB’s order is not supported by substantial evidence.<sup>3</sup>

To the extent Dr. Davis is arguing that the TMB failed to establish the standard of care applicable to APNs, we note that the TMB’s expert testified that the same standard for the treatment of chronic pain applies to all medical practitioners and that the expert described the standard in detail both in his testimony and in his expert report, which was admitted into evidence at the SOAH hearing without objection. Moreover, Dr. Davis himself admitted at the hearing that the APNs were inappropriately prescribing controlled substances and that he himself was partly to blame, testifying, for example, as follows:

I look back on my actions, and I admit my shortcomings. I have great regret over that. If I could have done better, I could have done better, and I should have done

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<sup>3</sup> “Substantial evidence ‘does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion of fact.’” *Swate v. Texas Med. Bd.*, No. 03-15-00815-CV, 2017 WL 3902621, at \*7 (Tex. App.—Austin Aug. 31, 2017, pet. denied) (mem. op.) (quoting *Slay v. Texas Comm’n on Env’tl. Quality*, 351 S.W.3d 532, 549 (Tex. App.—Austin 2011, pet. denied)). Dr. Davis “has the burden of demonstrating a lack of substantial evidence.” *See id.* “The burden is significant—evidence in the record may preponderate against the agency’s decision but still provide a reasonable basis for the decision and thereby meet the substantial-evidence standard.” *Id.* (citing *Texas Health Facilities Comm’n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 452 (Tex. 1984)).

better. I would like to say I'm not alone in mankind in being able to look in the retrospectroscope [sic] and see that I could have done better things, and I humbly admit that.

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Were my boundaries too low? Were I not suspicious [sic]? Well, retrospectively, yes.

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If I had it to do over again, I would have enforced more stringent policies . . . . If I knew then—if I knew earlier what I knew then, would I have acted differently? Yes. It's an evolutionary process.

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Now, in retrospect, it is certainly now possible to present the seven charts and to appropriately say they are not well-documented. I have not disagreed, substantially, with [the TMB's expert witness].

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[I] [d]id not devote as much time as I now know I should have. I trusted these women.

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I wish I had done differently. I wish I had implemented all the parameters taught to me at the PACE course, but I hadn't taken the course at the time.

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I accept the error that I committed, albeit it's unintentional. I ask forgiveness for my error, which I truly acknowledge. And certainly pledge it will never happen again . . . . But I do accept responsibility for my susceptibility.

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[TMB's Attorney:] You would agree with me that Ms. Jackson [was] running what I believe you called a pill mill in your—

[Dr. Davis:] That was my unfortunate conclusion, yes.

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[TMB's Attorney:] You understand that you are responsible for all of the patients, not just the patients that you review charts for, correct?

[Dr. Davis:] That is correct.

In addition, as discussed above, the TMB's order is supported not only by findings that the APNs violated statutory provisions and TMB rules but also by findings that Dr. Davis failed to adequately supervise them. Therefore, Dr. Davis's arguments that the TMB failed to establish the standard of care with respect to APNs are both incorrect and unavailing.

To the extent Dr. Davis is arguing that the TMB failed to establish the standard of care applicable to his supervision of the APNs, we disagree. As noted above, Dr. Davis essentially admitted to inadequate supervision. Further, the TMB's expert established the standard of care applicable to supervision in his testimony and expert report. For example, the TMB's expert witness testified that a supervising physician should randomly review patient charts "to get a fair sampling of the patient population and the treatments." The ALJ and TMB found that Dr. Davis "did not randomly review patient charts at the clinics." This finding supports the TMB's conclusion that Dr. Davis was subject to discipline because he failed to adequately supervise the APNs. *See* Tex. Occ. Code §§ 164.053(a)(8) (providing that failing to adequately supervise "the activities of those acting under the supervision of the physician" constitutes "unprofessional or dishonorable conduct likely to deceive or defraud the public"); 164.052(a)(5) (providing that "unprofessional or dishonorable conduct that is likely to deceive or defraud the public" is "a prohibited practice"); 164.051(a)(1) (providing that the TMB may "take disciplinary action against a person" if the person commits an act prohibited under section 164.052).

Given Dr. Davis’s inculpatory testimony, the evidence concerning the applicable standard of care provided by the TMB’s expert witness through his testimony and expert report, and the ALJ and TMB’s unchallenged findings, we conclude that the TMB’s order is supported by sufficient evidence “to allow reasonable minds to have reached the conclusion the agency must have reached to justify the disputed action.” *Swate v. Texas Med. Bd.*, No. 03-15-00815-CV, 2017 WL 3902621, at \*7 (Tex. App.—Austin Aug. 31, 2017, pet. denied) (mem. op.). Accordingly, we conclude that Dr. Davis has failed to carry his burden of showing that the TMB’s order is not supported by substantial evidence, and we overrule Dr. Davis’s second appellate issue.

### **CONCLUSION**

Having overruled Dr. Davis’s appellate issues, we affirm the trial court’s final judgment affirming the TMB’s final order revoking Dr. Davis’s Texas medical license.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: April 17, 2018