

Public

NEW YORK
state department of
HEALTH

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

November 6, 2013

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Kyle Otto, R.P.A.

REDACTED

Re: License No. 012448

Dear Mr. Otto:

Enclosed is a copy of the New York State Board for Professional Medical Conduct (BPMC) Order No. 13-364. This order and any penalty provided therein goes into effect November 13, 2013.

Please direct any questions to: Board for Professional Medical Conduct, 90 Church Street, 4th Floor, New York, NY 10007-2919, telephone # 212-417-4445.

Sincerely,

REDACTED

Katherine A. Hawkins, M.D., J.D.
Executive Secretary
Board for Professional Medical Conduct

Enclosure

cc: Ray Belair, Esq.
Belair and Evans, LLP
61 Broadway
New York, NY 10006

**IN THE MATTER
OF
KYLE OTTO, R.P.A.**

**CONSENT
ORDER**

Upon the application of (Respondent) KYLE OTTO, R.P.A., in the attached Consent Agreement and Order, which is made a part of this Consent Order, it is

ORDERED, that the Consent Agreement, and its terms, are adopted and

it is further

ORDERED, that this Consent Order shall be effective upon issuance by the Board,

either

by mailing of a copy of this Consent Order, either by first class mail to Respondent at the address in the attached Consent Agreement or by certified mail to Respondent's attorney, OR

upon facsimile transmission to Respondent or Respondent's attorney,

whichever is first.

SO ORDERED.

DATE: 11/5/2013

REDACTED

ARTHUR S. HENGERER, M.D.
Chair
State Board for Professional Medical Conduct

IN THE MATTER
OF
KYLE OTTO, R.P.A.

CONSENT
AGREEMENT

KYLE OTTO, R.P.A., represents that all of the following statements are true:

That on or about February 29, 2008, I was authorized to practice as a registered physician assistant in the State of New York, and issued License No. 012448 by the New York State Education Department.

My current address is REDACTED

and I will advise the Director of the Office of Professional Medical Conduct of any change of address.

I understand that the New York State Board for Professional Medical Conduct (Board) has charged me with one or more specifications of professional misconduct, as set forth in a Statement of Charges, marked as Exhibit "A", attached to and part of this Consent Agreement.

I agree that I cannot successfully defend against at least one of the acts of misconduct alleged, in full satisfaction of the charges against me, and agree to the following penalty:

Pursuant to N.Y. Pub. Health Law § 230-a(9), I shall be placed on probation for a period of 36 months, subject to the terms set forth in attached Exhibit "B."

I further agree that the Consent Order shall impose the following conditions:

That Respondent shall refrain from prescribing controlled substances for the treatment of chronic pain conditions (which for purposes of this agreement is defined as pain associated with a chronic medical condition where the pain condition has existed for at least 6 months) until such time as Respondent has successfully completed a continuing education program in the area of prescribing controlled substances as set forth in paragraph 12 of the terms of probation annexed hereto as "Exhibit B". If Respondent encounters a patient where treatment for chronic pain with controlled substances should be considered, Respondent agrees to refer the patient to an appropriately qualified physician for evaluation and treatment.

That Respondent shall remain in continuous compliance with all requirements of N.Y. Educ. Law § 6502 including but not limited to the requirements that a licensee shall register and continue to be registered with the New York State Education Department (except during periods of actual suspension) and that a licensee shall

pay all registration fees. Respondent shall not exercise the option provided in N.Y. Educ. Law § 6502(4) to avoid registration and payment of fees. This condition shall take effect 120 days after the Consent Order's effective date and will continue so long as Respondent remains a licensee in New York State; and

That Respondent shall cooperate fully with the Office of Professional Medical Conduct (OPMC) in its administration and enforcement of this Consent Order and in its investigations of matters concerning Respondent. Respondent shall respond in a timely manner to all OPMC requests for written periodic verification of Respondent's compliance with this Consent Order.

Respondent shall meet with a person designated by the Director of OPMC, as directed. Respondent shall respond promptly and provide all documents and information within Respondent's control, as directed. This condition shall take effect upon the Board's issuance of the Consent Order and will continue so long as Respondent remains licensed in New York State.

I stipulate that my failure to comply with any conditions of this Consent Order shall constitute misconduct as defined by N.Y. Educ. Law § 6530(29).

I agree that, if I am charged with professional misconduct in future, this Consent Agreement and Order shall be admitted into evidence in that proceeding.

I ask the Board to adopt this Consent Agreement.

I understand that if the Board does not adopt this Consent Agreement, none of its terms shall bind me or constitute an admission of any of the acts of alleged misconduct; this Consent Agreement shall not be used against me in any way and shall be kept in strict confidence; and the Board's denial shall be without prejudice to the pending disciplinary proceeding and the Board's final determination pursuant to N.Y. Pub. Health Law.

I agree that, if the Board adopts this Consent Agreement, the Chair of the Board shall issue a Consent Order in accordance with its terms. I agree that this Consent Order shall take effect upon its issuance by the Board, either by mailing of a copy of the Consent Order by first class mail to me at the address in this Consent Agreement, or to my attorney by certified mail, OR upon facsimile transmission to me or my attorney, whichever is first. The Consent Order, this agreement, and all attached Exhibits shall be public documents, with only patient identities, if any, redacted. As public documents, they may be posted on the Department's website. OPMC shall report this action to the National Practitioner Data Bank and the Federation of State Medical Boards, and any other entities that the Director of OPMC shall deem appropriate.

I stipulate that the proposed sanction and Consent Order are authorized by N.Y. Pub. Health Law §§ 230 and 230-a, and that the Board and OPMC have the requisite powers to carry out all included terms. I ask the Board to adopt this Consent Agreement of my own free will and not under duress, compulsion or restraint. In consideration of the value to me of the Board's adoption of this Consent Agreement, allowing me to resolve this matter without the various risks and burdens of a hearing on the merits, I knowingly waive my right to contest the Consent Order for which I apply, whether administratively or judicially, I agree to be bound by the Consent Order, and I ask that the Board adopt this Consent Agreement.

I understand and agree that the attorney for the Department, the Director of OPMC and the Chair of the Board each retain complete discretion either to enter into the proposed agreement and Consent Order, based upon my application, or to decline to do so. I further understand and agree that no prior or separate written or oral communication can limit that discretion.

DATE

16/30/13

REDACTED

KYLE OTTO, R.P.A.
RESPONDENT

The undersigned agree to Respondent's attached Consent Agreement and to its proposed penalty, terms and conditions.

DATE: 30 October, 2013

REDACTED

RAYMOND W. BELAIR, ESQ.,
Belair and Evans, LLP.
Attorney for Respondent

DATE: 10/30/13

REDACTED

DANIEL GUENZBURGER
Associate Counsel
Bureau of Professional Medical Conduct

DATE: 11/4/13

REDACTED

KEITH W. SERVIS
Director
Office of Professional Medical Conduct

NEW YORK STATE DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
KYLE OTTO, R.P.A.

STATEMENT
OF
CHARGES

KYLE OTTO, R.P.A., the Respondent, was authorized to perform medical services as a physician assistant in New York State on or about February 29, 2008, by the issuance of license number 012448 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. Respondent, a physician assistant, practiced under the supervision of an orthopedist, Respondent Patrick J. DeRosa, M.D., at an office located at 1101 Stewart Avenue, Garden City, New York. Both Respondents treated Patient A, a 32 year old male, from on or about September 29, 2008, through September 20, 2010. On or about January 12, 2010, Respondent DeRosa performed arthroscopy on Patient A's left shoulder. (Patients A through E are identified in the Appendix.) During the post-operative period Respondent Otto deviated from medically accepted standards in his treatment of Patient A in that:

1. On or about January 15, 2010, Respondent prescribed an inappropriately high dose of opiate medication, Oxycontin, 40 mg, Q6 hours.
2. On multiple occasions on or about and between January 15, 2010, and September 20, 2010, the Respondent inappropriately instructed Patient A to take Oxycontin, a sustained release medication, on an as needed ("PRN") basis.
3. On multiple occasions Respondent Otto violated Public Health Law Section 3332(3) by prematurely issuing additional prescriptions of the schedule II controlled substance, Oxycontin. Section 3332(3) provides that "No additional prescriptions for a

controlled substance may be issued by a practitioner to an ultimate user within thirty days of the date of any prescription previously issued unless and until the ultimate user has exhausted all but a seven day supply of the controlled substance provided by any previously issued prescription." Respondent issued additional prescriptions of Oxycontin before Patient A exhausted all but a seven day supply from a previously issued prescription.

4. Respondent failed to appropriately evaluate Patient A for addiction/diversion risk factors.
5. Respondent failed to appropriately coordinate Patient A's care with another health care provider who concurrently treated the Patient with opiate medication.

B. Respondent Otto treated Patient B for right knee pain from on or about February 2009, through November 19, 2010. The Patient had previously been treated by Respondent DeRosa from July 2007, including having undergone surgery with Respondent DeRosa. Respondent Otto's treatment with opiate medication deviated from medically accepted standards in that:

1. On multiple occasions Respondent wrote prescriptions of Oxycontin with instructions to take the medication at inappropriate intervals, including instructing the patient to take the medication on an as needed ("PRN") basis.
2. Respondent failed to adequately assess the Patient for addiction risk factors and/or possible drug diversion.
3. Respondent failed to appropriately coordinate Patient B's care with another health care provider who concurrently treated the patient with opiate medication.
4. Respondent failed to maintain an adequate record that accurately reflects the evaluation and treatment, including failing to maintain an accurate record of the amounts of prescribed opiate medication.

C. On or about and between April 30, 2008, and December 6, 2010, Respondent Otto and Respondent DeRosa treated Patient C, a 43 year old male at the onset of treatment. Patient C complained of pain related to problems with his left knee and right hip.

Respondent Otto deviated from medically accepted standards in that:

1. On multiple occasions Respondent wrote prescriptions of Oxycontin with instructions to take the medication at inappropriate intervals, including instructing the patient to take the medication on an as needed ("PRN") basis.
2. Respondent failed to maintain an adequate record that accurately reflects the evaluation and treatment, including failing to maintain an accurate record of prescriptions issued for opiate medication.
3. Respondent failed to appropriately evaluate for addiction/diversion risk factors.

D. Both Respondent DeRosa and Respondent Otto treated Patient D from December 22, 2008, through November 24, 2010. Patient D, a 26 year old male, reported that on December 19, 2008, he felt a sharp pain in his back after a work-related accident. Patient D was diagnosed with low back muscle strain/sprain with pain radiating down the right leg and was treated with physical therapy and opiate medication, primarily Percocet.7.5/ 325 mg. Q4-6. On or about December 15, 2009 Respondent DeRosa evaluated Patient D for injuries reportedly sustained in a motor vehicle accident dated September 25, 2009. From January 2010, through September 2010, Respondent Otto increased the frequency of visits from once a month to twice a month and he doubled the amount opiate medication prescribed to the Patient. Respondent Otto's treatment of Patient D with opiate medication deviated from medically accepted standards in that:

1. Respondent inappropriately prescribed a quantity of Percocet that exceeded the amount the Patient was instructed to take.
2. Respondent failed to maintain a record that accurately reflected the evaluation and treatment of the patient, including but not limited to failing to note in the medical record that from on or about between January 2010, and September 2010 he had doubled the prescribed amount of Percocet.
3. During the period in or about and between January 2010, and September 2010:

- a. Respondent Otto violated Public Health Law Section 3332(3) by issuing new prescriptions of Percocet within 30 days of a previously issued prescription.
 - b. Respondent doubled the amount of prescribed opiate medication without adequate justification and/or he failed to note an adequate justification.
4. Failed to adequately assess the Patient for addiction risk factors and/or possible drug diversion.

7/2/17 E. On or about and between May 29, 2009, and April 30, 2010, Respondent Otto treated Patient ~~Q~~^E, a 37 year old male for left shoulder pain. Respondent treated Patient ~~Q~~^E with physical therapy, NSAIDs and opioid analgesics. Respondent Otto's treatment of Patient ~~Q~~^E with opiate medication deviated from medically accepted standards in that he:

1. Repeatedly escalated the dosage of opiate medication without adequate justification and/or failed to note an adequate justification for the increased dose.
2. Failed to appropriately assess the therapeutic result of each increase in dosage of opiate medication and/or failed to note such an assessment.
3. Failed to adequately assess the Patient for addiction risk factors and/or possible drug diversion
4. Failed to maintain an adequate record that accurately reflects the evaluation and treatment, including failing to maintain an accurate record of the amounts of prescribed opiate medication and failing to note instructions for using the medication.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of:

1. Paragraphs A through E and their respective subparagraphs.

SECOND SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(5) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of:

2. Paragraphs A through E and their respective subparagraphs.

THIRD THROUGH SEVENTH SPECIFICATION

GROSS NEGLIGENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(4) by practicing the profession of medicine with gross negligence on a particular occasion as alleged in the facts of the following:

3. Paragraph A and its subparagraphs.

4. Paragraph B and its subparagraphs.
5. Paragraph C and its subparagraphs.
6. Paragraph D and its subparagraphs.
7. Paragraph E and its subparagraphs

EIGHTH THROUGH TWELFTH SPECIFICATIONS

GROSS INCOMPETENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(6) by practicing the profession of medicine with gross incompetence as alleged in the facts of the following:

8. Paragraph A and its subparagraphs.
9. Paragraph B and its subparagraphs.
10. Paragraph C and its subparagraphs.
11. Paragraph D and its subparagraphs.
12. Paragraph E and its subparagraphs.

THIRTEENTH SPECIFICATION

FAILURE TO MAINTAIN RECORDS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(32) by failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient, as alleged in the facts of:

13. Paragraphs B4, C2, D2 and E4.

FOURTEENTH AND FIFTEENTH SPECIFICATIONS
GROSSLY NEGLIGENTLY FAILING TO COMPLY WITH SUBSTANTIAL LAWS
GOVERNING THE PRACTICE OF MEDICINE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(16) by a willfully or grossly negligently failure to comply with substantial provisions of federal, state or local laws, rules, or regulations governing the practice of medicine (to wit: Article 33 of the Public Health Law and regulations promulgated pursuant to the authority thereof) as alleged in the facts of the following:

14. Paragraphs A and A3.
15. Paragraphs D and D3.

DATE: April 5, 2013
New York, New York

REDACTED

ROY NEMERSON
Deputy Counsel
Bureau of Professional Medical Conduct

EXHIBIT "B"

Terms of Probation

- 1) Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by N.Y. Educ. Law §§ 6530 or 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to N.Y. Pub. Health Law § 230(19).
- 2) Respondent shall maintain active registration of Respondent's license (except during periods of actual suspension) with the New York State Education Department Division of Professional Licensing Services, and shall pay all registration fees.
- 3) Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Riverview Center, 150 Broadway, Suite 355, Albany, New York 12204-2719 with the following information, in writing, and ensure that this information is kept current: a full description of Respondent's employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; and all investigations, arrests, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility. Respondent shall notify OPMC, in writing, within 30 days of any additions to or changes in the required information.
- 4) Respondent shall cooperate fully with, and respond in a timely manner to, OPMC requests to provide written periodic verification of Respondent's compliance with the terms of this Consent Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
- 5) The probation period shall toll when Respondent is not engaged in active practice as a physician assistant in New York State for a period of 30 consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive 30 day period. Respondent shall then notify the Director again at least 14 days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period shall resume and Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose as reasonably relate to the matters set forth in Exhibit "A" or as are necessary to protect the public health.

- 6) The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records, hospital charts, and/or electronic records; and interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.
- 7) Respondent shall adhere to federal and state guidelines and professional standards of care with respect to infection control practices. Respondent shall ensure education, training and oversight of all office personnel involved in medical care, with respect to these practices.
- 8) Within thirty days of the Consent Order's effective date, Respondent shall practice only when supervised in practice by at least one licensed physician, who must be willing to report to OPMC (hereafter "Reporting Practice Supervisor") proposed by Respondent and subject to the written approval of the Director of OPMC. The Reporting Practice Supervisor must serve as Respondent's practice supervisor for purposes of Education Law Section 6542 (1) in at least one location where the Respondent practices.
 - a) Respondent shall make available to the Reporting Practice Supervisor any and all records or access to the practice requested by the Reporting Practice Supervisor, including on-site observation. The Reporting Practice Supervisor must have unrestricted access to any location where Respondent practices, including but not limited to unrestricted access for the purpose of selecting and reviewing medical records of patients that Respondent has treated and, if the Reporting Practice Supervisor deems necessary, unrestricted access for purpose of observing Respondent's practice. The Reporting Practice Supervisor shall examine a selection of records obtained from all locations where Respondent practices (no fewer than 20 per month including the record of each patient in which Respondent prescribed a controlled substance). The Reporting Practice Supervisor shall review patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the Reporting Practice Supervisor shall be reported within 24 hours to OPMC.
 - b) Respondent shall be solely responsible for all expenses associated with complying with the Order, including fees, if any, to the Reporting Practice Supervisor.
 - c) Respondent shall cause the Practice Supervisor to report quarterly, in writing, to the Director of OPMC.

- 9) Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients and contain all information required by State rules and regulations concerning controlled substances.
- 10) Respondent shall maintain, in a format that is acceptable to OPMC, a log of all his ordering, prescribing, administering, and/or dispensing of controlled substances. The log shall include the following information: the drug, the dose, the patient, the diagnosis, the date that the drug was prescribed, and such other information related to the prescribing as may be requested by OPMC. This log shall be subject to review by the Reporting Practice Supervisor and Respondent shall make this log, and the records of any patient referenced in this log, immediately available to OPMC, upon demand.
- 11) Respondent shall enroll in and successfully complete a continuing education program in the area of prescribing controlled substances for pain management. This continuing education program is subject to the Director of OPMC's prior written approval and shall be successfully completed within the first 90 days of the probation period.
- 12) Respondent shall comply with this Consent Order and all its terms, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with, or a violation of, these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.