

BEFORE THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

In The Matter of:

ANDREW W. KELLY, D.D.S.) ORDER OF SUMMARY SUSPENSION
(License No. 7950)) OF MODERATE SEDATION PERMIT
)

Dr. Andrew W. Kelly, D.D.S. ("Dr. Kelly"), is the Respondent in a formal contested case hearing commenced by the filing of a Notice of Hearing ("NOH"), dated October 28, 2014. An amended NOH was filed on April 1, 2015. The amended notice alleges that Dr. Kelly engaged in negligence in the practice of dentistry relating to the treatment he provided to three patients ("PM," "BM" and "RD"). The amended NOH further alleges that these acts of negligence constitute violations of a 2011 Consent Order that should result in the activation of the one-year suspension of Dr. Kelly's dental license that was stayed in the 2011 Consent Order. A hearing on the merits of this contested case is set for August 7, 2015.

During the course of this contested case proceeding the Investigative Panel ("IP") of the Board became aware of circumstances that led it to believe that summary suspension of Dr. Kelly's moderate sedation permit may be necessary. On March 24, 2015, the IP received a report from Joseph E. Sullivan, D.D.S., an expert witness the IP had retained to review the treatment Dr. Kelly had provided to patient BM in April 2012. Dr. Sullivan reported that Dr. Kelly had grossly overdosed BM with sedative drugs, Halcion and Versed, that BM's medical condition should have precluded sedation with those drugs and that the overdose caused a severe adverse reaction requiring emergency medical care. Dr. Sullivan recommended that Dr. Kelly's moderate sedation permit be suspended immediately. He signed an affidavit setting forth his findings, reasoning and conclusions on March 26, 2015. That same day the IP had a Notice of Hearing to Show Cause issued that notified Dr. Kelly that a hearing would be held on April 10, 2015, to determine whether the Board of Dental Examiners ("Board") should summarily suspend his moderate conscious sedation permit, pursuant to G.S. 150B-3 (c). On April 9, 2015, Dr. Kelly filed a response objecting to any summary suspension of his moderate sedation permit on the ground that he does not pose an imminent danger to the public health, safety or welfare necessitating suspension of his moderate sedation permit pending his contested case hearing in August.

The motion was heard on April 10, 2015 by the Hearing Panel ("HP") of the Board comprised of the following Board members: Dr. Merlin W. Young; Dr. William M. Litaker, Jr.; Dr. Clifford O. Feingold; and Dr. Stanley L. Allen, presiding officer. Dr. Kelly was represented by attorneys Leon E. Porter, R. Jonathan Charleston and Jose A. Coker. The IP was represented by Douglas J. Brocker and Crystal S. Carlyle. The HP was represented by Thomas F. Moffitt.

During the hearing the IP and Dr. Kelly submitted affidavits and exhibits that were admitted in evidence. The IP submitted affidavits of two expert witnesses: (1) the affidavit of Dr. Sullivan cited earlier in this order, including attached detailed medical and dental records upon which Dr. Sullivan relied in rendering his opinion; and (2) the affidavit of Dr. K. Kevin Neshat, D.D.S., M.D., in which he concurred with Dr. Sullivan's analysis and opinion. Dr. Neshat concluded his opinion by stating that "it was fortunate that [BM] did not suffer severe consequences from Respondent's sedation of her." (Neshat Affidavit, Paragraph 8, at page 2). In addition, the IP introduced the affidavit of BM's granddaughter ("KA") in which she described her grandmother's condition on April 10, 2012 after Dr. Kelly's treatment, transport of her grandmother by EMS to the hospital emergency room and admission to the hospital for observation, and KA's fear for her grandmother's health and safety during this episode.

During the hearing, Dr. Kelly also submitted an affidavit and exhibits. He introduced his own affidavit (Exhibit "A") in which he offered his account of the treatment and sedation he provided to BM on April 10, 2012. He also introduced: (1) his curriculum vitae (Exhibit "B"); (2,3) letters from two dental instructors (Dr. Ibrahim Duqum, D.D.S., M.S.; and Dr. Eric M. Rivera, D.D.S., M.S.; Exhibits "C" collectively) about completion of remedial courses Dr. Kelly had taken at the UNC School of Dentistry, as required by his 2011 Consent Order; (4) the initial chart evaluation by Dr. Neshat (Exhibit "D"); (5) the health questionnaire completed by BM before Dr. Kelly's sedation treatment on April 10, 2012 (Exhibit "E"); and (5) a transcript from the Academy of General Dentistry of continuing dental education course Dr. Kelly had taken in 2013, 2014 and 2015 (Exhibit "F"). However, the HP finds that this evidence did not rebut or refute the evidence offered by the IP supporting summary suspension of Dr. Kelly's moderate sedation permit.

Under the provisions of G.S. 150B-3 (c), "[i]f the agency [here, the Board] finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date

specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined." As noted earlier in this Order, the contested case proceedings are ongoing and will be determined in August 2015.

Based on the evidence presented during the summary suspension hearing, the HP finds that there is ample credible evidence for the HP to conclude that Dr. Kelly may not be practicing safe sedation dentistry, and consequently that public health, safety or welfare requires emergency action to determine whether he should be allowed to continue to practice sedation dentistry until his hearing on the merits of his contested case in August 2015. However, the HP needs some additional information to make a more definitive determination since three years have elapsed since Dr. Kelly treated BM, and the HP finds that in the interest of fairness it also is important for Dr. Kelly to have the opportunity to provide, and for the HP to review, additional evidence of the sedation dentistry Dr. Kelly has provided to other patients since April 2012 and any other actions Dr. Kelly may have taken to assure that he currently is practicing safe sedation dentistry and poses no immediate risk of harm to the public health, safety or welfare.

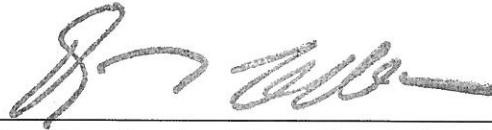
Based on the evidence presented and the arguments of counsel, the HP finds and concludes that Dr. Kelly's moderate sedation permit should be suspended effective upon service of this order and remain in effect until the Board's next scheduled meeting on May 13, 2015. During this period of interim suspension Dr. Kelly must submit to inspection of his records and inspection of his office by a qualified sedation inspector appointed by the Board. The summary suspension shall remain in effect unless Dr. Kelly demonstrates to the Board's satisfaction that he is competent and qualified to safely practice sedation dentistry pending the August hearing.

NOW, THEREFORE, it is ORDERED as follows:

1. Dr. Kelly's Moderate Sedation Permit (No. 348) is suspended effective upon service of this order and shall remain in effect until the Board's next scheduled meeting on May 13, 2015.
2. During this period of summary suspension Dr. Kelly shall submit to inspection of his records and inspection of his office by a qualified sedation inspector appointed by the Board.

3. At its next Board meeting on May 13, 2015, the Board will resume this hearing to decide whether to continue this summary suspension until the August 2015 hearing on the merits.
4. The IP is directed to have an evaluation of the information to be obtained pursuant to this Order made by an independent evaluator who has not yet participated in the review of matters at issue in this contested case.

This is the 14 day of April, 2015.

A handwritten signature in black ink, appearing to read "S. L. Allen", is written above a horizontal line.

Dr. Stanley L. Allen, Presiding Officer