

Burden upped for temp suspension of doctors

By: Brandon Gee June 26, 2015



A temporary suspension by the Board of Registration in Medicine must be based on the preponderance of the evidence, not merely substantial evidence, a single justice of the Supreme Judicial Court has ruled in a matter of first impression.

A Division of Administrative Law Appeals magistrate concluded that a temporary suspension, also known as a summary suspension, is warranted if supported by substantial evidence that the licensee poses an immediate and serious threat to the public health, safety

or welfare.

But Justice Robert J. Cordy was not convinced.

"While I agree that the standard for appellate review by courts of the adequacy of the evidence supporting administrative decisions is 'substantial evidence,' I disagree that that is the standard to be applied in the first instance," Cordy wrote. "While due process requirements may be lessened in the context of a temporary suspension, resulting in shorter time frames and the consideration of the available evidence in less than pristine or complete form, such a suspension must still be based on the preponderance of the evidence actually considered."

Cordy remanded the matter to the administrative magistrate and medical board for reconsideration.

The five-page decision is *Randall v. Massachusetts Board of Registration in Medicine*, Lawyers Weekly No. 10-095-15. The full text of the ruling can be found at masslawyersweekly.com.

Absurd outcomes

Bariatric surgeon Dr. Sheldon Randall appealed his temporary suspension by the medical board to the SJC's single justice session and was represented on appeal by Andover's Joel Rosen as well as Andrew L. Hyams, of Kerstein, Coren & Lichtenstein in Wellesley.

Both praised Cordy's willingness to challenge a status quo that, at times, has resulted in absurd outcomes when board decisions to temporarily suspend a physician are reviewed by the Division of Administrative Law Appeals, they said.

"It used to be that a physician could be summarily suspended, go to a hearing, prove by a preponderance of the evidence that he or she was not a danger to the public, and still lose the case," Hyams said.

That occurred because administrative magistrates were using the substantial evidence standard, and thus upholding the board's summary suspension decisions if they could find any reasonable evidence to support them, Rosen explained.

According to state regulations for physician discipline, the Board of Registration in Medicine can summarily suspend someone if it "determines that a licensee is an immediate and serious threat to the public health, safety, or welfare," but also must "provide a hearing on the necessity for the summary action within seven days after the suspension." If upheld at that hearing, the temporary suspension remains in effect pending a hearing on the merits of the allegations against the licensee and a final decision.

Rosen acknowledged that, when appealing a final determination of the board, substantial evidence is the correct standard for review. But he and other administrative law attorneys told Lawyers Weekly that the substantial evidence test also has erroneously been applied for decades at the administrative hearings required within seven days of a temporary suspension.

In other words, administrative magistrates were treating the hearings required to adjudicate, for the first time, the necessity of summary suspensions as if they were appeals.

Hyams, former general counsel to the board, said that inappropriately shifted the burden of proof, at the very outset of a disciplinary matter, to physicians faced with the difficult burden of trying to prove a negative: that they are not

a threat.

"When you think about it, it's unimaginable that the board wouldn't have the burden before such draconian relief could be imposed," said Bruce A. Singal of Boston's Donoghue, Barrett & Singal.

Not all lawyers are pleased with the decision, however. Medical-malpractice plaintiffs' lawyer Benjamin R. Novotny said Cordy's ruling could make it harder to win cases against doctors who would have been temporarily suspended if not for the heightened standard of proof.

"It's potentially a hit on a case-by-case basis," the Lubin & Meyer attorney said. "But looking overall at patient safety, it could be a bigger impact for those who never know the board had substantial evidence but couldn't meet the new preponderance of the evidence standard. ... How do you explain to a patient that there was substantial evidence impacting patient safety, but the board couldn't do anything about it?"

Rosen said he is glad the temporary suspension mechanism exists to deal with truly dangerous situations. He also noted that, in the most egregious of situations, doctors often voluntarily agree not to practice while their disciplinary cases are pending.

"It's a good thing that this process exists," Rosen said. "But for somebody like Dr. Randall, there's a question about whether he deviated from the standard of care or whether he just had a couple bad results. More and more in recent years, the board has started suspending people without any due process at all."

The board handed down no more than two temporary suspensions a year from 2009 to 2013, according to the most recent annual report on the board's website. A review of disciplinary records shows that there were five temporary suspensions in 2014 and two already in 2015.

But those numbers do not capture the full impact of the board bearing a low burden of proof to justify a summary suspension.

"One of the most abusive practices of the board has been the threat to seek summary suspension — and the attendant publicity — unless the doctor voluntarily agrees to stop practicing," said Singal, a former member of the Board of Registration in Medicine. "What this decision should do is give people perhaps more courage to challenge the board when confronted with that kind of draconian threat."

David M. Gould, of Ficksman & Conley in Boston, said that is a huge win for doctors facing allegations because "a summary suspension can be a career-ender, even if a person is ultimately exonerated."

James P. Rooney, the first administrative magistrate at the Division of Administrative Law Appeals, said he did not expect Cordy's decision to cause "any particular strain" on what DALA does.

"It wasn't entirely clear what the standard should be on the burden of proof in these types of cases," he said. "Now that we know, we'll follow that."

Board of Registration in Medicine officials would not discuss the Randall case while it is pending.

Grave allegations

The board accused Randall, 63, of failing to meet the standard of care in his treatment of six patients, three of whom died.

In March 2012, Hallmark Health System imposed a precautionary suspension of Randall's privileges pending its investigation into one of the patient deaths.

The following month, Hallmark terminated Randall's staff membership and revoked his clinical privileges, citing the patient death and "other areas of broad concern that called into serious question [Randall's] ability to abide by the principles and display the integrity required to be a member of the Hallmark Health Medical Staff," according to the board's statement of allegations against Randall.

In early 2013, MetroWest Medical Center investigated Randall's care of two patients, one of whom died. Following the review, Randall was required to clear some procedures with the hospital's chair of surgery or have a second surgeon in attendance during operations.

The board filed its first statement of allegations against Randall on Aug. 16, 2013, and summarily suspended him that same day.

The board's specific allegations against Randall included that he insisted on performing open gastric bypasses instead of less risky laparoscopic gastric bypasses; ordered the transfer of a medically unstable patient who died of

sepsis during the transport; performed medically unnecessary transfusions; failed to recognize infections; failed to address complications in a timely manner; and mistakenly placed a gastrostomy tube in a patient's colon.

A hearing on Randall's temporary suspension was held on Oct. 1, 2013, and a magistrate recommended that it be upheld on June 10, 2014. The Board of Registration in Medicine accepted the recommendation on Oct. 22, 2014.

Randall then appealed his temporary suspension to the SJC.

Randall, now represented by Paul R. Cirel of the law firm Collora, denies that he failed to meet the standard of care.

"At best what these cases present are known complications in a particular kind of surgery, and the evidence already available is that Dr. Randall's complication rate is below the national average," Cirel said.

Randall reportedly performed more than 6,000 successful weight-loss operations over the course of his career, and Cirel noted that surgery programs he oversaw at local hospitals were recognized nationally for excellence. The Boston lawyer said Randall looks forward to a new hearing at which a magistrate will decide whether his summary suspension is supported by a preponderance of the evidence.

Try again

On appeal, Cordy ruled that Randall's case presented an issue of first impression.

"The one matter of substance that has not apparently been resolved by our courts, and is therefore worthy of further discussion at this point, relates to the standard of proof necessary in a summary/temporary suspension proceeding of this nature," Cordy wrote.

The justice noted that Randall initially agreed that substantial evidence was the correct standard at his Division of Administrative Law Appeals hearing, before later arguing that it was inadequate.

"While it seems apparent that this argument was waived prior to the June 14 recommended decision by the magistrate, it was raised promptly thereafter, and was essentially before the Board when it made its final decision," Cordy wrote.

Cordy agreed that substantial evidence was the standard to be applied when administrative decisions are appealed to the courts, but said it was not appropriate when a matter is being adjudicated for the first time.

"Insofar as this 'temporary suspension' has been in effect for more than eighteen months without apparent resolution of the underlying allegations, it is appropriate to revisit the findings and conclusions of the magistrate and the Board at the time of the final decision of temporary suspension, based on the preponderance standard of evidence," Cordy wrote. "While the record may well be adequate to support such a standard, the matter is remanded for consideration on this ground."

Randall v. Massachusetts Board of Registration in Medicine

THE ISSUE: Can a temporary suspension by the Board of Registration in Medicine be based merely on substantial evidence — rather than a preponderance of the evidence — that the licensee poses an immediate and serious threat to the public health, safety or welfare?

DECISION: No (Supreme Judicial Court)

LAWYERS: Joel Rosen of Andover, and Andrew L. Hyams of Kerstein, Coren & Lichtenstein, Wellesley (plaintiff), Board of Registration in Medicine (defense)

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