

Oregon Medical Board  
**BOARD ACTION REPORT**  
**November 15, 2019**

The information contained in this report summarizes new, interim, and final actions taken by the Oregon Medical Board between October 16, 2019, and November 15, 2019.

Scanned copies of Interim Stipulated Orders, Orders of Emergency Suspension, Stipulated Orders, Final Orders, Termination Orders, Modification Orders and Voluntary Limitations are included at the end of this report in the order that they appear in the report. These orders are marked with an \* asterisk. **Scanned copies of Consent Agreements are not posted, as they are not disciplinary action and impose no practice limitations.** Complaint and Notices of Proposed Disciplinary Action are not listed in this report, as they are not final actions by the Board. Both Orders, however, are public and are available upon request.

Printed copies of the Board Orders not provided with this report are available to the public. To obtain a printed copy of a Board Order not provided in this report, please complete the License Verification and Malpractice Report Request (<http://www.oregon.gov/OMB/ombforms1/request-licensee-info-verification.pdf>) found under the Forms link on the Board's web site. Submit it with the \$10.00 fee *per licensee* and mail to:

**Oregon Medical Board  
1500 SW 1st Ave, Ste 620  
Portland, OR 97201**

*Copies of the Orders listed below are mailed to Oregon hospitals where the Licensee had self-reported that he/she has privileges.*

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**Basilan, Denise Stella Barba, MD; MD189073; Salem, OR**

On November 1, 2019, Licensee entered into a non-disciplinary Consent Agreement for Re-Entry to Practice with the Board. In this Agreement, Licensee agreed to practice under the supervision of pre-approved physician mentors for 1,000 hours, to include reports to the Board by the mentors.

**Brewster, Casey Zerbe, LAc; AC193361; Eugene, OR**

On October 30, 2019, Applicant entered into a non-disciplinary Consent Agreement for Re-Entry to Practice with the Board. In this Agreement, Applicant agreed to complete a 280-hour mentorship with a Board-approved clinical supervisor and complete 105 hours of NCCAOM-approved CEUs.

**Khoury, Erin Nicole, PA; PA01423; Portland, OR**

On November 14, 2019, Licensee entered into a non-disciplinary Consent Agreement for Re-Entry to Practice with the Board. In this Agreement, Licensee agreed to 100% chart review by her Supervising Physician for 30 days.

**Moore, Ross Erick, LAc; AC190895; Portland, OR**

On October 21, 2019, Applicant entered into a non-disciplinary Consent Agreement for Re-Entry to Practice with the Board. In this Agreement, Applicant agreed to complete a 100-hour mentorship with a Board-approved clinical supervisor and complete 12 hours of NCCAOM-approved CEUs.

**Oler, Elizabeth Critchley, MD; MD194341; Roseburg, OR**

On November 13, 2019, Applicant entered into a non-disciplinary Consent Agreement for Re-Entry to Practice with the Board. In this Agreement, Applicant agreed to practice under the supervision of pre-approved physician mentors for 1,000 hours and obtain board certification.

**\*Rushton, Michael James, DPM; DP00321; Baker City, OR**

On November 7, 2019, the Board issued an Order Denying Petition for Stay. This Order denies Licensee's petition to stay the Final Order issued on September 5, 2019.

**Sasich, Randy Louis, MD; MD28977; Portland, OR**

On October 25, 2019, the Board issued an Order Terminating Consent Agreement. This Order terminates Licensee's October 3, 2013, Consent Agreement and October 5, 2017, Order Modifying Consent Agreement.

**\*Zhai, Juan, MD; MD22940; Portland, OR**

On November 7, 2019, the Board issued an Order Terminating Interim Stipulated Order. This Order terminates Licensee's May 29, 2019, Interim Stipulated Order.

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If you have any questions regarding this service, please call the Board at (971) 673-2700 or toll-free within Oregon at (877) 254-6263.

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BEFORE THE  
OREGON MEDICAL BOARD  
STATE OF OREGON

IN THE MATTER OF:

Agency Case No. 15-0239

MICHAEL JAMES RUSHTON, DPM  
LICENSE NO. DP00321  
Petitioner.

ORDER DENYING PETITION FOR STAY

The Oregon Medical Board (Board) issued a Final Order in the present case on September 5, 2019, in which the Board imposed terms and conditions that included a reprimand, probation for 10 years, no-notice office visits and chart audits, completion of a course on medical documentation pre-approved by the Medical Director, a requirement to notify the Board's Compliance Officer of all practice sites, and the assessment of costs of the proceedings. On October 16, 2019, Licensee filed a Request for Stay of Enforcement of the Final Order [Petition] that the Board received on October 17, 2019. ORS 183.482(3) requires an agency to grant a stay if a petitioner demonstrates both irreparable injury to the petitioner and a colorable claim of error in the order. Otherwise, issuance of a stay is subject to the agency's discretion. The Board has now reviewed the Petition for Stay of the Board's Final Order. The Petition for Stay is denied.

**ISSUES**

(1) Has Petitioner demonstrated that, in the absence of a stay of the Final Order, irreparable injury to him would result?

(2) Has Petitioner demonstrated a colorable claim of error in the contested case proceeding?

**IRREPARABLE INJURY**

Petitioner asserts that he will suffer irreparable injury if the petition for stay is not granted and alleges that two colorable claims of error were made in the course of the

1 contested case proceedings. Petitioner contends that the failure to stay enforcement of  
2 the Board's Final Order will harm his professional reputation and damage his business in  
3 a manner that cannot be redressed in a court of law.

4 In order to meet his burden in establishing irreparable injury, Petitioner must  
5 make a showing that failure to grant the stay will probably result in irreparable harm.  
6 Speculation is insufficient to show irreparable injury. In *Arlington Sch. Dist. No. 3 v.*  
7 *Arlington Ed. Assoc.*, 184 Or App 97, 102-04, 55 P3d 546 (2002), the court described the  
8 analysis applied to the question of whether a petitioner has made a "showing" of  
9 irreparable injury:

10  
11 A "showing," in its ordinary legal sense, is "proof or prima facie proof of a matter  
12 of fact or law." *Webster's Third New Int'l Dictionary* 2106 (unabridged ed. 1993);  
13 see *Oregon Health Care Assn. v. Health Div.*, 329 Or. 480, 492-93, 992 P.2d 434  
14 (1999) (adopting the dictionary definition as the meaning of "showing" in ORS  
15 183.480(3)). "Proof," in turn, is evidence that satisfies a burden of production or  
persuasion placed upon the proponent of a fact. *Marvin Wood Products v. Callow*,  
171 Or. App. 175, 179, 14 P.3d 686 (2000). Proof must not leave the existence of  
the fact at issue to speculation. See *Watzig v. Tobin*, 292 Or. 645, 652 n. 6, 642  
P.2d 651 (1982). Therefore, as pertinent here, a "showing" must at least  
demonstrate that irreparable injury *probably* would result if a stay is denied.

16 \* \* \*

17 We concluded [in *Von Weidlein*] that the petitioners had shown an irreparable  
injury and were entitled to a stay. We explained:

18 "By affidavit accompanying their initial motion for a stay and their motion  
19 for a continuance of a stay, petitioners claim that they ' \* \* \* have existing  
20 and ongoing contracts with wholesale distributors,' and that unless the  
Commission's cancellation orders are stayed they will go bankrupt. The  
21 Commission does not dispute these claims. *This, although in general  
terms, is, in the absence of any refutation, a substantial showing of high  
probability of irreparable injury.*"

22 *Von Weidlein/N.W. Bottling v. Young, et al.*, 16Or App 81, 88, 514 P2d 560, 515  
23 P2d 936, 517 P2d 295 (1973), *rev den* (1974) (emphasis added). Although our  
24 decision in *Von Weidlein/N.W. Bottling* did not turn on a construction of particular  
25 statutory language, its focus on the existence of a "probability" that irreparable  
injury would occur in the absence of a stay is consistent with the ordinary legal  
meaning of "showing."

26 Viewed in that light, the district's evidence does not establish a sufficient showing  
of irreparable injury to justify a stay pending judicial review of ERB's arbitration  
order \* \* \*

1 As to the second asserted injury, that the district would be irreparably injured by  
2 the loss of a possible legal victory in this court if the arbitrator were, in the  
3 meantime, to deny the association's grievance on its merits, the problem is  
4 compounded. First, the district's arguable entitlement to relief in this court does  
5 not show that it would suffer irreparable injury if a stay is denied. That argument  
6 more properly relates to whether the district has made a showing of a "colorable  
7 claim of error in the order." ORS 183.482(3)(a)(B). Second, the district's  
8 *conjecture* that it might, before this court issues a decision on review, obtain a  
9 victory on the merits in the arbitration proceeding does not constitute a *showing*  
10 of irreparable injury.

11 We conclude that in both respects the district has not shown that it would suffer  
12 irreparable injury if a stay is denied.

13 *Arlington Sch. Dist. No. 3* 184 Or App at 101-04. Thus, to make a showing of irreparable  
14 injury, Petitioner would have had to provide proof or prima facie proof of a matter of fact  
15 or law that demonstrated irreparable injury in the absence of a stay. In turn, such "proof"  
16 could not leave the existence of the fact at issue to speculation. To demonstrate  
17 "irreparable injury" justifying the granting of a stay, Petitioner must do more than submit  
18 conjecture and unsupported assertions.

19 Petitioner argues that, notwithstanding the publication of the Board's Final Order,  
20 the actual enforcement of the terms of the Final Order – to include probation, medical  
21 documentation education, and chart audits – will adversely impact his reputation in small  
22 communities and cause him to lose contracts with insurance companies. This type of  
23 harm is speculative and does not constitute irreparable harm. *See also Anderson v.*  
24 *PEBB*, 134 Or App 422, 431, 895 P2d 1377 (1995), damage to reputation is an  
25 "...inherent [incident] of the open and public administrative process that the legislature  
26 has created..." quoting *Brian v. Oregon Government Ethics Commission*, 320 Or 676,  
691, 891 P2d 649 (1995) (citation omitted).

1 In regard to Petitioner's comment that he will incur expenses due to the  
2 enforcement of the Final Order, the Board notes that it is well recognized that the costs  
3 and delay caused by participating in the administrative process are not the types of harm

1 that constitute “substantial and irreparable harm.” *See Merle West Medical Center v.*  
2 *SHPDA*, 94 Or App 148, 152-53, 764 P2d 613 (1988) and *Northwestern Title Loans, LLC*  
3 *v. Division of Finance and Corporate Securities, Div. of Dept. of Consumer and Business*  
4 *Services*, 180 Or App 1, 13, 42 P3d 313 (2002). Traditionally, mere quantifiable  
5 economic harm does not constitute irreparable harm. Rather, harm “is irreparable when it  
6 cannot be adequately compensated in damages, or when there exists no certain pecuniary  
7 standard for the measurement of damages \* \* \* due to the nature of the injury itself or to  
8 the nature of the right or property injured.” *Winslow v. Fleischner et al.*, 110 Or 554,  
9 563, 223 P 922 (1924) (citation omitted).

10 Petitioner, therefore, has failed to demonstrate that irreparable harm will result  
11 from enforcement of the sanctions and terms of probation identified in the Final Order.

#### 12 **COLORABLE CLAIM OF ERROR**

13 Petitioner’s Petition for Stay alleges two errors:

14 **First:** Petitioner contends that the Board’s Notice was deficient, because it did  
15 not contain “...allegations regarding any failure to correct charting errors upon discovery  
16 or any failure to note errors in addenda to the record.” Petitioner relies upon the holding  
17 in *Murphy v. Oregon Medical Board*, 270 Or App 621, 348 P3d 1173 (2015), where the  
18 Court reversed the Board’s order, finding that the licensee was not put on notice that he  
19 had violated a community ethical standard, instead of a hospital’s written drug-free  
20 policy, as a basis for a finding that he had engaged in unprofessional or dishonorable  
21 conduct. In contrast to the holding in *Murphy*, there is a direct link between the Board’s  
22 Notice and the critical conclusions contained in the Board’s Final Order. The Board’s  
23 Notice alleged the following in paragraph 3.1:

24 The Board conducted a review of Licensee’s management and treatment of  
25 podiatric patients (Patients A – F), which revealed a pattern of practice that  
26 constituted repeated acts of negligence and posed a danger to the health or safety  
of a patient or the public. Licensee’s chart notes were found to be repetitive, with  
many cut and pasted entries from previous chart notes with little variation from

1 previous entries, or from patient to patient. Licensee's chart entries often failed to  
2 note changes in patient condition and patient response to treatment, with no  
3 substantive findings for the continued treatment course and contained repetitive  
errors regarding treatment and diagnoses. Specific patient care and charting  
deficiency concerns are set forth below.

4 In the conclusions of law of the Final Order, the Board found that "...the standard  
5 of care dictates that cut and pasted language used in chart notes not contain repetitive  
6 errors and that, where appropriate, the language is tailored to an individual patient and the  
7 particular patient encounter." Final Order at 41. These repeated breaches of the standard  
8 of care led to the conclusion that Petitioner had engaged in repeated acts of negligence.  
9 See Final Order at 49.

10 ORS 183.415(3)(d) requires the Board to provide in the Notice: "A short and  
11 plain statement of the matters asserted or charged." The Board cannot be expected to  
12 anticipate defenses and explanations offered by a licensee during a hearing. In this case,  
13 Petitioner was put on notice that he was accused of engaging in repeated acts of  
14 negligence due to repetitive charting errors, and those errors were repeatedly described in  
15 detail within the body of the Notice. Petitioner's first assertion of error is not founded.

16 **Second:** Petitioner contends that the ALJ erred by not ordering the production of  
17 the expert written report from Dr. Elliot Michael, the Board's consultant, after he  
18 completed his testimony on direct during the contested case hearing.

19 Petitioner contends in his argument that ORS 676.175(3) does not govern the  
20 disclosure of investigatory materials, to include expert reports, during the contested case  
21 hearing. Petitioner's assertion represents a faulty interpretation of the statute and the  
22 Attorney General's Opinion No. 8282 (2006), and would be inconsistent with the terms  
23 of the Qualified Protective Order that ALJ Rackstraw approved on March 21, 2017 (*see*  
24 attachment), which makes it clear that protected information remains confidential  
25 throughout the hearing process, to include the identity of the complainant.

26 ///

1           ORS 676.175 provides that a health professional regulatory board "...shall keep  
2 confidential and not disclose to the public any information obtained by the board as part  
3 of an investigation obtained by the board as part of an investigation...." But the statute  
4 contains exceptions to the non-disclosure provision that are set forth in ORS 676.175(3):

5           If a health professional regulatory board votes to issue a notice of intent to impose  
6 a disciplinary sanction, upon written request by the licensee or applicant, the  
7 board shall disclose to the licensee or applicant all information obtained by the  
8 board in the investigation of the allegations in the notice except: (a) Information  
9 that is privileged or confidential under a law other than this section. (b)  
10 Information that would permit the identification of any person who provided  
information that led to the filing of the notice and who will not provide testimony  
at a hearing arising out of the investigation. (c) Information that would permit the  
identification of any person as a person who made a complaint to the board about  
a licensee or applicant. **(d) Reports of expert witnesses.** [Bold added.]

11       There is nothing in the language of the statute that suggests that confidential documents  
12 identified in ORS 676.175(3) lose their protection from disclosure at the inception of a  
13 contested case hearing. The language cited by Petitioner in Attorney General Opinion  
14 No. 8282 does not support this proposition. The caption on page 6 of the AG Opinion  
15 sets the context of the discussion: "When the duty to Disclose Ends." This portion of the  
16 opinion makes it clear that: "...boards have any ongoing duty to keep information that  
17 they obtain in their investigations confidential from the public." The Opinion makes  
18 reference to the time of the contested case hearing to make clear that disclosures required  
19 by statute must be done prior to the time of hearing, so that licensees and applicants have  
20 received disclosed documents in time to defend themselves at hearing. There is nothing  
21 to suggest in the plain language of the statute that somehow the confidentiality  
22 protections evaporate at the inception of the hearing. Petitioner's second assertion of  
23 error misconstrues the statute and is therefore not well founded.

24       To meet his burden that he is making a colorable claim of error, as used in  
25 ORS 183.482(3), Petitioner must show, among other things, that he is entitled to have the  
26 agency order set aside, modified, reversed, or remanded on one or more of the grounds



1 specified in ORS 183.482(8). *Bergerson v. Salem-Keizer Sch. Dist.*, 185 Or App 649,  
2 660, 60 P3d 1126 (2003). The grounds specified in ORS 183.482(8) are: (1) the agency  
3 has erroneously interpreted a provision of law and a correct interpretation compels a  
4 particular action; (2) the agency abused its discretion; and (3) the order is not supported  
5 by substantial evidence in the record.

6 Because none of the errors that Petitioner alleges fall within ORS 183.482(8),  
7 there cannot be colorable claims of error within the meaning of ORS 183.482(3).  
8 Petitioner, therefore, failed to establish this requirement for the Board to grant a stay.

### 9 SUBSTANTIAL PUBLIC HARM

10 While Petitioner has failed to meet his burden as indicated above, the Board also  
11 finds that allowing a stay of the Board's Final Order would subject the public to the risk  
12 of substantial public harm. As set forth in the Board's Final Order, Petitioner was found  
13 to have engaged in repeated acts of negligence. The sanctions set forth in the Board's  
14 Final Order are designed to correct the conduct that culminated in the adverse findings  
15 against him, with terms of probation that include education, chart audits, interviews and  
16 reporting requirements. The Board finds that granting a stay while the case is on appeal  
17 would deprive the Board of the means within the terms of the Final Order to verify that  
18 Petitioner has undertaken the necessary corrective steps to address his previously  
19 identified negligent conduct, and as such, patients would be subjected to the risk of  
20 ongoing negligent conduct by Petitioner.

### 21 CONCLUSION

22 The Board finds that Petitioner failed to show irreparable injury or a colorable  
23 claim of error in the Board's Final Order, OAR 137-003-0700. As a result, the Board  
24 denies the petition for stay pursuant to ORS 183.482(3).<sup>1</sup>

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26 <sup>1</sup> The civil penalty and the cost assessment do not become due and payable until 10 days after the Final  
Order issued by the Board on September 5, 2019, becomes final by operation of law or on appeal, see ORS  
183.745(2) and ORS 677.205(2)(f).

1 **ORDER**

2 For the above-stated reasons, Petitioner's petition for a stay of the Final Order is  
3 DENIED.

4  
5 Dated this 7<sup>th</sup> day of November 2019.

6 OREGON MEDICAL BOARD  
7 State of Oregon  
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9 K. Dean Gubler, DO  
10 BOARD CHAIR  
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BEFORE THE  
OREGON MEDICAL BOARD  
STATE OF OREGON

In the Matter of

JUAN ZHAI, MD  
LICENSE NO. MD22940

)  
)  
) ORDER TERMINATING INTERIM  
) STIPULATED ORDER  
)

1.

On May 29, 2019, Juan Zhai, MD (Licensee) entered into an Interim Stipulated Order with the Oregon Medical Board (Board) in which she agreed to voluntarily withdraw from practice and place her license in Inactive status.

2.

At its meeting on November 7, 2019, the Board reviewed this matter. The Board terminates the May 29, 2019, Interim Stipulated Order effective the date this Order is signed by the Board Chair.

IT IS SO ORDERED this 7<sup>th</sup> day of November, 2019.

OREGON MEDICAL BOARD  
State of Oregon

K. DEAN GUBLER, DO  
Board Chair