



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.med.ohio.gov

August 10, 2005

Kyle Howard, M.D.
3266 McLean Road
Franklin, OH 45005

Dear Doctor Howard:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Sharon W. Murphy, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on August 10, 2005, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal must be taken to the Franklin County Court of Common Pleas.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of an original Notice of Appeal with the State Medical Board of Ohio and a copy of the Notice of Appeal with the Franklin County Court of Common Pleas. Any such appeal must be filed within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12, Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

Lance A. Talmage MD/RM
Lance A. Talmage, M.D.
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL NO. 7002 2410 0002 3141 4540
RETURN RECEIPT REQUESTED

Cc: Thomas W. Hess, Esq.
CERTIFIED MAIL NO. 7002 2410 0002 3141 4526
RETURN RECEIPT REQUESTED

Mailed 8-30-05

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Sharon W. Murphy, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on August 10, 2005, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order; constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Kyle Howard, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

Lance A. Talmage MD / RAW

Lance A. Talmage, M.D.

Secretary

(SEAL)

August 10, 2005

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

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KYLE HOWARD, M.D.

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ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on August 10, 2005.

Upon the Report and Recommendation of Sharon W. Murphy, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for the above date.

It is hereby ORDERED that:

- A. **PERMANENT REVOCATION; STAYED; SUSPENSION:** The certificate of Kyle Howard, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED. Such permanent revocation is STAYED, and Dr. Howard's certificate shall be SUSPENDED for an indefinite period time, but not less than one year.
- B. **INTERIM MONITORING:** During the period that Dr. Howard's certificate to practice medicine and surgery in Ohio is suspended, Dr. Howard shall comply with the following terms, conditions, and limitations:
 1. **Obey the Law and Terms of Criminal Probation:** Dr. Howard shall obey all federal, state, and local laws; all rules governing the practice of medicine and surgery in Ohio; and all terms of the sentence imposed by the Court of Common Pleas for Warren County, Ohio, in *State v. Howard*, criminal case number 04CR21649.
 2. **Personal Appearances:** Dr. Howard shall appear in person for quarterly interviews before the Board or its designated representative. The first such

appearance shall take place within three months of the effective date of this Order, upon the reinstatement or restoration of his certificate to practice medicine and surgery, and/or as otherwise requested by the Board. Subsequent personal appearances must occur every three months thereafter, and/or as otherwise requested by the Board. If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled.

3. **Quarterly Declarations:** Dr. Howard shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which this Order becomes effective. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
 4. **Evidence of Compliance with the Terms of Criminal Probation:** At the time he submits his quarterly declarations, Dr. Howard shall also submit declarations under penalty of Board disciplinary action or criminal prosecution stating whether he has complied with all the terms, conditions, and limitations imposed by the Court of Common Pleas for Warren County, Ohio, in *State v. Howard*, criminal case number 04CR21649.
- C. **CONDITIONS FOR REINSTATEMENT OR RESTORATION:** The Board shall not consider reinstatement or restoration of Dr. Howard's certificate to practice medicine and surgery until all of the following conditions have been met:
1. **Application for Reinstatement or Restoration:** Dr. Howard shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.
 2. **Compliance with Interim Conditions:** Dr. Howard shall have maintained compliance with all the terms and conditions set forth in Paragraph B of this Order.
 3. **Professional/Personal Ethics Course:** At the time he submits his application for reinstatement or restoration, Dr. Howard shall provide acceptable documentation of successful completion of a course or courses dealing with professional and/or personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.

In addition, at the time Dr. Howard submits the documentation of successful completion of the course or courses dealing with professional/personal ethics, he shall also submit to the Board a written report describing the course, setting forth what he learned from the course, and identifying with specificity how he will apply what he has learned to his practice of medicine in the future.

4. **Course Requirement:** At the time Dr. Howard submits his application for reinstatement or restoration, Dr. Howard shall provide acceptable documentation of satisfactory completion of a course on medical billing coding, such course to be approved in advanced by the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.

In addition, at the time Dr. Howard submits the documentation of successful completion of the course or courses on medical billing coding, he shall also submit to the Board a written report describing the course, setting forth what he learned from the course, and identifying with specificity how he will apply what he has learned to his practice of medicine in the future.

5. **Additional Evidence of Fitness To Resume Practice:** In the event that Dr. Howard has not been engaged in the active practice of medicine and surgery for a period in excess of two years prior to application for reinstatement or restoration, the Board may exercise its discretion under Section 4731.222 of the Revised Code to require additional evidence of his fitness to resume practice.

D. **PROBATION:** Upon reinstatement or restoration, Dr. Howard's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least three years:

1. **Terms, Conditions, and Limitations Continued from Suspension Period:** Dr. Howard shall continue to be subject to the terms, conditions, and limitations specified in Paragraph B of this Order.
2. **Tolling of Probationary Period While Out of State:** Dr. Howard shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed.
3. **Violation of Terms of Probation:** If Dr. Howard violates probation in any respect, the Board, after giving him notice and the opportunity to be heard,

may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.

- E. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Howard's certificate will be fully restored.
- F. **REQUIRED REPORTING TO EMPLOYERS AND HOSPITALS:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Howard shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Howard shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments.
- G. **REQUIRED REPORTING TO OTHER STATE LICENSING AUTHORITIES:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Howard shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Howard shall also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration or restoration of any professional license. Further, Dr. Howard shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

EFFECTIVE DATE OF ORDER: This Order shall become effective immediately upon mailing of notification of approval by the Board.

(SEAL)

Lance A. Talmage M.D. / RAW
Lance A. Talmage, M.D.
Secretary

August 10, 2005
Date

2005 JUL -8 P 1: 46

**REPORT AND RECOMMENDATION
IN THE MATTER OF KYLE HOWARD, M.D.**

The Matter of Kyle Howard, M.D., was heard by Sharon W. Murphy, Hearing Examiner for the State Medical Board of Ohio, on March 23, 2005.

INTRODUCTION

I. Basis for Hearing

By letter dated November 10, 2004, the State Medical Board of Ohio [Board] notified Kyle Howard, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board based its proposed action on allegations that Dr. Howard had pleaded guilty to and/or was found guilty of Medicaid Fraud, a felony of the fourth degree, in violation of Section 2913.40(B), Ohio Revised Code.

The Board further alleged that Dr. Howard's guilty plea and/or the judicial finding of guilt constitute a "plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony," as that clause is used in Section 4731.22(B)(9), Ohio Revised Code." Accordingly, the Board advised Dr. Howard of his right to request a hearing in this matter. (State's Exhibit 1A)

On December 9, 2004, Jenifer A. Belt, Esq., submitted a written hearing request on behalf of Dr. Howard. (State's Exhibit 1B)

II. Appearances

On behalf of the State of Ohio: Jim Petro, Attorney General, by Rebecca Albers, Assistant Attorney General.

On behalf of the Respondent: Thomas W. Hess, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

A. Presented by the State

Barbara Jacobs, Esq.

B. Presented by the Respondent

1. Kyle Howard, M.D.
2. Samuel T. Kaetzel
3. Reka Kaetzel

II. Exhibits Examined

- A. State's Exhibits 1A-1N: Procedural exhibits.
- B. State's Exhibit 2: Certified copy of a September 2, 2004, Judgment Entry of Sentence in *State v. Kyle Howard* [*State v. Howard*], Case No. 04CR21649, Warren County Common Pleas Court.
- C. State's Exhibit 3: Copy of a facsimile letter from Dr. Howard to the Board voluntarily surrendering his medical license.
- D. State's Exhibit 4: Copy of the Board's letter of September 2, 2004, regarding Dr. Howard's attempt to surrender his license.
- E. State's Exhibit 5: Certified copy of the Sentencing Hearing Transcript in *State v. Howard*.
- F. State's Exhibit 6: Copies of selected pages from three publications of the American Medical Association: *CPT 2001*; *CPT PLUS! 2002*; and *CPT PLUS! 2003*.

PROCEDURAL MATTERS

At hearing, the Hearing Examiner requested a copy of the CPT billing codes at issue. (Hearing Transcript at 37) On June 23, 2005, Counsel for the State submitted the documents, which were entered into the record as State's Exhibit 6. The hearing record closed at that time.

SUMMARY OF THE EVIDENCE

All exhibits and transcripts of testimony, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

1. Kyle Howard, M.D., testified that he had left high school during his freshman year, after the death of his parents. Dr. Howard testified that he had worked for an automobile dealership for several years until he was involved in an accident, which resulted in multiple vertebral fractures and an extended hospitalization. While recuperating, Dr. Howard

resolved to change his life. Subsequently, he obtained his GED and, in 1979, graduated from Indiana University with a 3.9 grade-point average. Dr. Howard then pursued a master's degree in anatomy and physiology at Purdue University. He left that program upon acceptance into the medical school at Indiana University. (Tr. at 18-30)

After graduating from medical school in 1988, Dr. Howard completed a three-year residency in family medicine at Ball Memorial Hospital in Muncie, Indiana. In 1991, he was accepted into a fellowship in emergency medicine in Charleston, West Virginia. During that time, he obtained his license to practice medicine in West Virginia. Dr. Howard also had a license to practice medicine in Indiana, but he let that license expire when he moved to Ohio. (Tr. at 20-21)

2. After completing his medical training, Dr. Howard accepted a job practicing emergency medicine at St. Elizabeth's Hospital (later Franciscan Medical Center) in Dayton, Ohio. Dr. Howard worked full-time at St. Elizabeth's Hospital for several years and then part-time until 1995, after which time he worked only occasionally until the hospital eventually closed. (Tr. at 23-24)

Thereafter, Dr. Howard obtained board certification in family medicine and, in 1995, he opened a family practice in Lebanon, Ohio. During that time, he held privileges at Middletown Regional Hospital in Middletown, Ohio. Dr. Howard testified that he had been certified as a Medicaid provider during his residency and had continued to provide care under Medicaid in his private practice. (Tr. at 24-25, 29)

3. Dr. Howard testified that, from 1995 to 2003, he had typically seen about twenty patients per day. Then four physicians in the area stopped practicing medicine or stopped taking Medicaid patients. Within a year, Dr. Howard was seeing forty to fifty patients per day. Prior to that time, he had been spending about thirty minutes with each patient, but the amount of time he was able to spend with each patient decreased significantly as he accepted more and more patients. (Tr. at 34-35)
4. Dr. Howard explained that, when he had started practicing medicine, the decision as to which billing code applied to a certain patient visit had been based on the complexity of the patient's presentation rather than the time spent with the patient. He noted, however, that, by 2003, each CPT code had included a recommended amount of time that was to be spent with the patient. (Tr. at 34-37)

Dr. Howard testified that the two CPT codes he had used most often were 99213¹ and 99214². He stated he had not realized that, by 2003, in order to use the 99214 code, he had been

¹ Under the 2003 CPT code manual, an office visit was required to meet the following criteria to be billed under 99213:

Office or other outpatient visit for the evaluation and management of an established patient, which requires at least two of these three key components:

- an expanded problem focused history;
- an expanded problem focused examination;

required to spend thirty minutes with a patient. Dr. Howard testified that he had not been aware of the new requirement and, unknowingly, had been using the wrong code to bill for certain patient visits. (Tr. at 34-37)

He stated that he had never thoroughly read the description for each CPT code; instead, he had been using the codes that his peers used and that the billing company had recommended. In addition, Dr. Howard testified he had chosen billing codes based on his perception of the complexity of the cases. (Tr. at 34-36) He explained as follows:

Well, I knew that the codes for moderate visit, you know, would require more than one diagnosis. So if a patient came in with three, four, or five different problems, you know, I would feel that was equivalent to like a 99214 visit.

What I didn't realize was that the codes required you spend a half hour with that patient [even if] you were able to make that decision in 15 minutes.

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- medical decision making of **low** complexity.

Counseling and coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and or family's needs.

Usually, the presenting problem(s) are of low to moderate severity. Physicians typically spend 15 minutes face-to-face with the patient and/or family. (St. Ex. 6, emphasis added)

² Under the 2003 code manual, an office visit was required to meet the following criteria to be billed under 99214:

Office or other outpatient visit for the evaluation and management of an established patient, which requires at least two of these three key components:

- a detailed history
- a detailed examination;
- medical decision making of **moderate** complexity.

Counseling and coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and or family's needs.

Usually, the presenting problem(s) are of moderate to high severity. Physicians typically spend 25 minutes face-to-face with the patient and/or family. (St. Ex. 6, emphasis added)

In addition, under the 2003 code manual, the AMA listed the following criteria for services billed under 99214:

Office or other outpatient visit for the evaluation and management of an established patient, which requires at least two of these three key components:

- a comprehensive history
- a comprehensive examination;
- medical decision making of **high** complexity.

Counseling and coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and or family's needs.

Usually, the presenting problem(s) are of moderate to high severity. Physicians typically spend 25 minutes face-to-face with the patient and/or family. (St. Ex. 6, emphasis added)

When I was seeing 20 patients a day, I might spend a half hour with them. As it became more and more patients kept coming in, I felt like I was in the ER again. These people were packing in here, and I'm trying to take care of them, and so I would spend less and less time with each one.

(Tr. at 36-37.)

Dr. Howard stated that it had not occurred to him that he may have been using the wrong codes, as he had been using the same codes for many years, and no one had ever suggested that the codes he used were incorrect. Moreover, he stated that he had never been audited, which suggested to him that his billing was appropriate. Dr. Howard also testified that he had thought that his billing company was making sure that his billing was correct. (Tr. at 29-31, 34-35, 37, 43)

Nonetheless, Dr. Howard conceded that the 99214 code required a half an hour per patient and that he had not spent a half hour with each patient whose visit was billed under the 99214 code. (Tr. at 37) He further conceded that, as a Medicaid provider, it had been his responsibility to know what he was "billing the government for." (Tr. at 43-44)

5. In 2004, a criminal action was initiated against Dr. Howard, based on his billing practices during calendar year 2003. Dr. Howard was charged with making false statements to obtain Medicaid reimbursements at a level to which he was not entitled by using incorrect CPT codes that "indicated that he had spent more time with each patient than he had in fact spent." (State's Exhibit [St. Ex] 5 at 9)

Dr. Howard entered into plea negotiations. In August 2004, prior to the conclusion of the criminal case, Dr. Howard closed his office and ceased practicing medicine. (Tr. at 39-40)

On September 2, 2004, Dr. Howard entered a plea of guilty to one count of Medicaid fraud, fourth-degree felony, in violation of Section 2913.40(B), Ohio Revised Code. (St. Exs. 2, 5; Tr. at 38-40) As part of the plea arrangement, Dr. Howard agreed to pay \$215,003.71 in restitution, \$400,000.00 in forfeitures, and agreed to the "immediate surrender" of his medical license and DEA number. (St. Ex. 2)

6. As of the date of this hearing, Dr. Howard had already paid the restitution and fines, and had written to the Board to relinquish his medical license. (St. Ex. 3; St. Ex. 5 at 6)
Dr. Howard testified that the amount of restitution was based on the total he had earned in 2003. He stated that the government had taken all the money he made that year, as if he had not seen patients at all. He explained that: "They didn't apply my – they didn't say, 'Well, maybe you only saw the patient for five minutes. We'll give you half.' They took everything." (Tr. at 42)

Dr. Howard also testified that he lost his status as a Medicare provider and his privileges with every insurance company. (Tr. at 39)

7. At the sentencing hearing, the prosecutor described the negotiated sentence to the court, explaining that Dr. Howard was required among other things to “immediately surrender his DEA license and medical license.” (St. Ex. 5 at 3-4) The court cautioned Dr. Howard as follows:

Dr. Howard, * * * I have to * * * make sure that you understand that you are giving up your rights to a trial by entering a plea.

First as to the consequences. You heard the prosecutor outline what they have agreed to in the sentencing. * * *

You’re going to lose your license to practice medicine and license to write prescriptions drugs * * *. (St. Ex. 5 at 4-6)

Dr. Howard acknowledged to the court that that he understood the court’s statements. (St. Ex. 5 at 6-7) The court accepted Dr. Howard’s guilty plea and ordered Dr. Howard to “surrender his DEA license and medical license immediately” and otherwise comply with all the terms and conditions of the negotiated sentence. (St. Ex. 5 at 9-11)

8. On September 1, 2004, by facsimile letter, Dr. Howard attempted to surrender to the Board his license to practice medicine and surgery in Ohio. On September 2, 2004, the Board replied to Dr. Howard and explained that, under Ohio law, the attempted surrender of his license was not effective until accepted by the Board. (St. Exs. 3, 4)
9. On November 10, 2004, the Board issued a letter notifying Dr. Howard of the proposed disciplinary action based on his felony conviction, and he requested a hearing. (St. Exs. 1A, 1B)
10. At hearing, Dr. Howard testified that, when he had agreed to the sentence in the common pleas court, he did not believe that the court-ordered surrender of his licenses was necessarily a permanent revocation. (Tr. at 38-39, 44.)

Dr. Howard explained that, when he had agreed to surrender his medical license and DEA certificate, he had believed that he could apply for their reinstatement in the future. Moreover, when he surrendered the DEA certificate in person, the DEA agent told him that he could reapply. Likewise, he thought that he could later seek reinstatement of his medical license and that the Board would determine at that time whether to grant reinstatement. Dr. Howard testified that he did not intend, when entering his guilty plea, that the immediate surrender of his license to practice medicine was tantamount to a permanent revocation of his license. (Tr. at 38-39, 44)

11. Dr. Howard also explained that he had wanted to engage in volunteer medicine and had asked that the Board allow him to practice medicine by caring for patients within a charitable program. He noted that he had applied to different charitable organizations, such as the Peace Corps and Doctors Without Borders, and that none of them would accept him as a physician if he did not have an active license. (Tr. at 40)

Dr. Howard added that he had no desire to return to the practice he had had in the past. He stated that

I don't want to go back to practicing medicine with more patients than what I was able to handle. When my patients – when those physicians went out of business, my patient load doubled overnight almost, and I just was overwhelmed with it.

I mean, I should have been able to say no, but it was one of those things I just couldn't. Can you see one more patient? Can you see another patient? There was always one more patient to see —

(Tr. at 40-41)

12. Samuel and Reka Kaetzel, both of whom have served as ministers, missionaries, and educators, testified that they knew Dr. Howard well and that he was a dedicated physician who gave excellent care to his patients and was well-respected in the community. (Tr. at 50-65)

FINDINGS OF FACT

On September 2, 2004, Kyle Howard, M.D., appeared before the Warren County Court of Common Pleas and entered a plea of guilty to one amended count of Medicaid Fraud, a felony of the fourth degree, in violation of Section 2913.40(B), Ohio Revised Code. The Court imposed sentence including payment of restitution of \$215,004.71 and forfeitures of \$400,000.00. Moreover, the court ordered community control for up to three years, and the immediate surrender of Dr. Howard's DEA license and medical license.

CONCLUSION OF LAW

The guilty plea by Kyle Howard, M.D., as described in the Findings of Fact, constitutes a “plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony,” as that clause is used in Section 4731.22(B)(9), Ohio Revised Code.

* * * * *

Dr. Howard admitted that he had billed the Medicaid program under codes that were incorrect and that he had pleaded guilty to a fourth-degree felony in connection with his Medicaid billing for 2003. Dr. Howard stated that his errors in billing had been based on his misunderstanding of the codes. Nevertheless, Dr. Howard was responsible for his billing, and his failure to appreciate the codes was not an excuse to violate the law.

In mitigation, however, it is noteworthy that a review of codes 99213 through 99215 assists in understanding how Dr. Howard could have made the mistakes that he made. The CPT code manual states that code 99213 is to be used in cases involving medical decisions of “low complexity,” whereas the manual states that code 99214 may be used for cases requiring medical decisions of “moderate complexity.” Additionally, it is important to note that the record includes no evidence that Dr. Howard ever sought to overbill by subjecting patients to excessive or medically unnecessary procedures or tests. Finally, Dr. Howard promptly paid substantial sums in restitution and penalties, thus disgorging any profit he may have gained. Therefore, the Board may choose to allow Dr. Howard an opportunity to learn from his mistakes and return to the practice of medicine at some point in the future.

PROPOSED ORDER

It is hereby ORDERED that:

- A. **SUSPENSION:** The certificate of Kyle Howard, M.D., to practice medicine and surgery in the State of Ohio shall be **SUSPENDED** for an indefinite period time, but not less than 180 days.
- B. **INTERIM MONITORING:** During the period that Dr. Howard’s certificate to practice medicine and surgery in Ohio is suspended, Dr. Howard shall comply with the following terms, conditions, and limitations:
 1. **Obey the Law and Terms of Criminal Probation:** Dr. Howard shall obey all federal, state, and local laws; all rules governing the practice of medicine and surgery in Ohio; and all terms of the sentence imposed by the Court of Common Pleas for Warren County, Ohio, in *State v. Howard*, criminal case number 04CR21649.
 2. **Personal Appearances:** Dr. Howard shall appear in person for quarterly interviews before the Board or its designated representative. The first such appearance shall take place within three months of the effective date of this Order, upon the reinstatement or restoration of his certificate to practice medicine and surgery, and/or as otherwise requested by the Board. Subsequent personal appearances must occur every three months thereafter, and/or as otherwise requested by the Board. If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled.
 3. **Quarterly Declarations:** Dr. Howard shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board’s offices on or before the first day of the third month following the month in which this Order becomes effective. Subsequent quarterly declarations must be received in the Board’s offices on or before the first day of every third month.

4. **Evidence of Compliance with the Terms of Criminal Probation:** At the time he submits his quarterly declarations, Dr. Howard shall also submit declarations under penalty of Board disciplinary action or criminal prosecution stating whether he has complied with all the terms, conditions, and limitations imposed by the Court of Common Pleas for Warren County, Ohio, in *State v. Howard*, criminal case number 04CR21649.

C. **CONDITIONS FOR REINSTATEMENT OR RESTORATION:** The Board shall not consider reinstatement or restoration of Dr. Howard's certificate to practice medicine and surgery until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration:** Dr. Howard shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.
2. **Compliance with Interim Conditions:** Dr. Howard shall have maintained compliance with all the terms and conditions set forth in Paragraph B of this Order.
3. **Professional/Personal Ethics Course:** At the time he submits his application for reinstatement or restoration, Dr. Howard shall provide acceptable documentation of successful completion of a course or courses dealing with professional and/or personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.

In addition, at the time Dr. Howard submits the documentation of successful completion of the course or courses dealing with professional/personal ethics, he shall also submit to the Board a written report describing the course, setting forth what he learned from the course, and identifying with specificity how he will apply what he has learned to his practice of medicine in the future.

4. **Additional Evidence of Fitness To Resume Practice:** In the event that Dr. Howard has not been engaged in the active practice of medicine and surgery for a period in excess of two years prior to application for reinstatement or restoration, the Board may exercise its discretion under Section 4731.222 of the Revised Code to require additional evidence of his fitness to resume practice.

D. **PROBATION:** Upon reinstatement or restoration, Dr. Howard's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least three years:

1. **Terms, Conditions, and Limitations Continued from Suspension Period:** Dr. Howard shall continue to be subject to the terms, conditions, and limitations specified in Paragraph B of this Order.

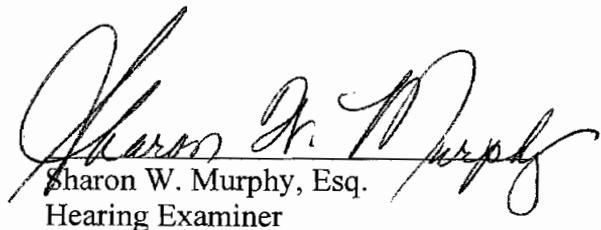
2. **Tolling of Probationary Period While Out of State:** Dr. Howard shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed.
3. **Violation of Terms of Probation:** If Dr. Howard violates probation in any respect, the Board, after giving him notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.

E. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Howard's certificate will be fully restored.

F. **REQUIRED REPORTING TO EMPLOYERS AND HOSPITALS:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Howard shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Howard shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments.

G. **REQUIRED REPORTING TO OTHER STATE LICENSING AUTHORITIES:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Howard shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Howard shall also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration of any professional license. Further, Dr. Howard shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

EFFECTIVE DATE OF ORDER: This Order shall become effective immediately upon mailing of notification of approval by the Board.


Sharon W. Murphy, Esq.
Hearing Examiner



State Medical Board of Ohio

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EXCERPT FROM THE DRAFT MINUTES OF AUGUST 10, 2005

REPORTS AND RECOMMENDATIONS

Dr. Davidson announced that the Board would now consider the findings and orders appearing on the Board's agenda. She asked whether each member of the Board had received, read, and considered the hearing records, the proposed findings, conclusions, and orders, and any objections filed in the matters of Kyle Howard, M.D.; Ralph Arden Hugunin, M.D.; and Ian Nunnally, M.D. A roll call was taken:

ROLL CALL:

Mr. Albert	- aye
Dr. Egner	- aye
Dr. Talmage	- aye
Dr. Varyani	- aye
Dr. Kumar	- aye
Mr. Browning	- aye
Ms. Sloan	- aye
Dr. Robbins	- aye
Dr. Davidson	- aye

Dr. Davidson asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:

Mr. Albert	- aye
Dr. Egner	- aye
Dr. Talmage	- aye
Dr. Varyani	- aye
Dr. Kumar	- aye
Mr. Browning	- aye
Ms. Sloan	- aye
Dr. Robbins	- aye
Dr. Davidson	- aye

Dr. Davidson noted that, in accordance with the provision in Section 4731.22(F)(2), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further

participation in the adjudication of these matters. In the matters before the Board today, Dr. Talmage served as Secretary and Mr. Albert served as Supervising Member.

Dr. Davidson stated that, if there were no objections, the Chair would dispense with the reading of the proposed findings of fact, conclusions and orders in the above matters. No objections were voiced by Board members present.

The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

KYLE HOWARD, M.D.

Dr. Davidson directed the Board's attention to the matter of Kyle Howard, M.D. She advised that no objections were filed to Hearing Examiner Murphy's Report and Recommendation.

Dr. Davidson continued that a request to address the Board has been timely filed on behalf of Dr. Howard. Five minutes would be allowed for that address.

Dr. Howard was accompanied by his attorney, Thomas W. Hess. Mr. Hess indicated that, in light of the hearing record, he requests that the Board adopt Ms. Murphy's Report and Recommendation. He commented that it is appropriate and fair in this particular circumstance.

Dr. Howard thanked the Board for allowing him the opportunity to make a statement. Dr. Howard stated that he did not intend to defraud anyone. The coding practices that he used had been something that he used over the years. When he had an increase in patient visits, he should have changed his coding practices, but he didn't. Dr. Howard stated that he made full restitution for that. He asked that the Board accept the Hearing Examiner's findings.

Mr. Hess indicated that they would answer any questions Board members had.

Dr. Davidson asked whether the Assistant Attorney General wished to respond.

Ms. Berrien stated that, with all due respect, she objects to the Proposed Order in this case. Based on the facts, Dr. Howard's case warrants a harsher penalty. The Board took disciplinary action against Dr. Howard for his guilty plea to one count of Medicaid fraud. The State presented a certified copy of Dr. Howard's guilty plea in Warren County. Ms. Berrien stated that, under the Board's rules, a certified copy of a guilty plea in the courts to any crime is conclusive proof of the commission of all of the elements of that crime. One of the elements of Medicaid fraud is "knowledge;" so Dr. Howard knew what he was doing. When Dr. Howard pled guilty in federal court, he admitted that he knowingly made a false or misleading statement to gain Medicaid reimbursement; however, now, before the Board, he reverses his voluntary statement and says he mistakenly made false statements because he didn't understand the CPT codes.

Ms. Berrien stated that the Hearing Examiner correctly pointed out that Dr. Howard's failure to appreciate the codes was not an excuse to violate the law. Ms. Berrien stated that it shouldn't be used to mitigate any sanction in this case, either. As part of his plea, Dr. Howard was to pay fines and surrender his license. Dr. Howard was convicted for an intentional criminal act and now he's trying to mitigate something that can't be mitigated. The number of patients that Dr. Howard saw each day had increased to 40 to 50 patients, which meant that he spent less time with each patient but continued to bill at a CPT code that recommended a 25-30 minute visit. Ms. Berrien added that the mere number of patients that Dr. Howard was billing for indicates that he couldn't have been innocently confused about the billing codes.

Ms. Berrien continued that the Board members are welcome to take into account their own experience with learning the current CPT codes and how to bill, based on the complexity and the time of each visit. Is it really conceivable for Dr. Howard to innocently bill at this code when he saw each patient for, at most, 15 minutes? She noted that Dr. Howard said that he believed he could bill at a code that required medical decisions of moderate complexity, based not on the severity of the patient's problem, but on the number of problems that the patient presented. She asked whether that was a reasonable interpretation of the code. She stated that it's not, and added that Dr. Howard admitted that he didn't thoroughly read the codes. Dr. Howard was responsible for the billing. Did he knowingly disregard the billing code, or did he mistakenly disregard the billing code? Ms. Berrien reminded the Board that Dr. Howard told the court that he knew that what he was doing was wrong.

Ms. Berrien stated that, in his written motion for adoption of the Report and Recommendation, Dr. Howard tried to analogize this case to other cases where the Board imposed a short suspension. Ms. Berrien noted that the Board is allowed to consider each case on a case-by-case basis; but Dr. Howard has raised a proportionality argument, so she will review it.

Ms. Berrien stated that the Board has in past deliberations said that the dollar amount in these cases matters. She at this time summarized the cases listed in Dr. Howard's motion as follows:

- In the first case Dr. Howard mentions, Dr. Cadsawan's, the Board imposed a 180-day suspension. She noted that Dr. Cadsawan was ordered to pay \$86,000 in restitution. Although the Board didn't condone Dr. Cadsawan's illegal behavior, it did note that the physician was upcoding in order to provide care to the poor in Cleveland. Here, Dr. Howard was ordered to pay over \$215,000 in restitution. There has been no evidence to demonstrate that Dr. Howard was upcoding for anything but personal gain.
- In the case of Dr. Amro, who received a six-month suspension, Dr. Amro's restitution was \$21,000, again, significantly lower than Dr. Howard's.
- Dr. Godshall, who received a two-year suspension from the Board, paid restitution of \$500.00. Ms. Berrien noted that Dr. Howard forgot to mention that the actual sanction imposed on Dr. Godshall was a stayed permanent revocation.

- Dr. Redmond received a 90-day suspension for allowing an advanced practice nurse to provide services to patients and then bill Medicaid, using his number. That case is distinguishable because in that case there was no issue of upcoding.
- Dr. Neufeld, who received a 30-day suspension, was fined \$15.00 for five false claims to Medicare and \$132.00 to Medicaid.
- Dr. Boehm, who received a one-year suspension, was fined one-third of what Dr. Howard's fine was.

Ms. Berrien stated that the fact that the court, in this case, ordered a significantly higher amount of restitution, and ordered Dr. Howard to surrender his license speaks to the magnitude of Dr. Howard's actions. The cases that are most similar to Dr. Howard's case are not even mentioned in his motion to the Board. One of those cases concerned Dr. Michael, who, in 2001, was billing for longer periods of time spent with a patient than actually occurred. Dr. Michael was ordered to pay \$58,000 in restitution. Here, Dr. Howard was involved in a similar billing scheme and was ordered to pay almost four times as much in restitution as was Dr. Michael. The Board permanently revoked Dr. Michael's license.

Ms. Berrien stated that there were other cases where the Board has ordered permanent revocations for health care fraud and convictions. In these other cases restitution was paid, at most, in the amount of \$176,000. In the case of Dr. Howard, restitution was ordered in the amount of \$215,000.

Ms. Berrien stated that the poor choice to over bill for Medicaid has adverse effects, not only on the funding system, but also on other Medicaid patients. This case may not involve multiple counts of health care fraud, but the amount of restitution and forfeitures, which totaled over \$600,000, is telling. Dr. Howard was seeing 40-50 patients a day, and billing at a high code, requiring 30-minute visits. At most he was seeing them for 15 minutes. Dr. Howard admitted himself that his office was similar to running an emergency room.

Ms. Berrien stated that the Board can impose any sanction, but on a spectrum between 180 days, which was recommended here, and a permanent revocation, based on the facts and the amount of restitution, this case moves further away from 180 days and closer to a permanent revocation.

MR. BROWNING MOVED TO APPROVE AND CONFIRM MS. MURPHY'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF KYLE HOWARD, M.D. DR. ROBBINS SECONDED THE MOTION.

Dr. Davidson stated that she would now entertain discussion in the above matter.

Dr. Kumar stated that he read this whole case; and at first glance, it is quite clear that Dr. Howard admitted to a fourth degree felony of fraud on the most vulnerable population in the state. However, when he looks at the case in detail, he gets more puzzled and a little bit befuddled to see exactly what is going on. He stated that he is a little bit lost.

Dr. Kumar explained that there is no question about the fact that Dr. Howard has never been charged for billing for tests that he did not do, procedures that he did not do, office visits that never took place, or any fancy scheme. What he essentially admitted to was that he up-coded to a certain level when he should have billed at a lower level. Dr. Kumar stated that, to understand that, he had to go back and inform what his understanding is of the trials and tribulations physicians went through with the EM coding and the CPT codes and so on and so forth. Dr. Kumar stated that, before 1996 or 1997, the coding system talked about the SOAP format, the "subjective, objective, assessment, plan" format. In the 1996-'97 or 1997-'98 time frames, the system was changed to the current EM (Evaluation and Management) coding, for office visits and so on and so forth. As it came out, it was very complex, very confusing, and very subject to interpretation by different people. The way it was, you had six or seven major groupings, the new patient codes, the established patient codes, the hospital codes, etc. Under each major grouping, there were up to five levels and in each level you have to take into account four or five elements, such as history, physical exam, decision making, time spent, etc., and each of the elements have sub-elements, given bullet points, and you score on the basis of bullet points. Dr. Kumar stated that it was really confusing when the new system came out.

Dr. Kumar stated that public comments started then, and he believes some of them are applicable to this case. Some of the things that were said at that time that were somewhat humorous was that the physician needs to go into the examination room, not with a stethoscope, but with a stopwatch. Another thing said was that it was so confusing to figure out, one essentially needed a mathematician or Ph.D. to figure out which was the valid code. Dr. Kumar stated that another humorous comment made was that, if an ophthalmologist needed to use more than one bullet-point per physical examination, he would need to start doing rectal or pelvic examinations.

Dr. Kumar continued that, with all that going on, there were changes made, and some of the changes are applicable in Dr. Howard's case. One of the changes that was made that is not applicable, is that instead of bullet points, there were system points, so that one wouldn't have to calculate all of the bullet points. The time element was eliminated from exact measurements of the CPT codes. The time measurement was left as a supplement, essentially to go and to be looked at if the other things did not exist. There was reasoning for this because of the fact that in the CPT code you will see the time element as a suggested subset. Currently today, if you look at any compliance program, they eliminate the time element out of any compliance codes.

Dr. Kumar stated that the other thing that came out as a ruling in 1998 or 1999 was that innocent billing disputes or mistakes would not be prosecuted. Dr. Kumar stated that here the Board has a physician who has admitted to all of this. He asked whether he is missing something, or whether there is something deeper in the record to show that Dr. Howard really did something a lot more serious, and by admitting what he has, he is covering it up. Dr. Kumar asked whether this might have just been naiveté or innocence and Dr. Howard really didn't know how the EM codes are functioning. Dr. Kumar stated that that's where he's lost. If he has to simply go by the record, then he has to assume that Dr. Howard did not have effective knowledge of how the EM codes were developed and implemented. Dr. Kumar stated that, even

if Dr. Howard up coded by one level, the difference of payments is no more than about \$45,000 to \$50,000 for the whole year. The difference between the lower level and the next level is \$9.00 to \$10.00.

Dr. Kumar stated that he wonders why Dr. Howard admitted to being paid \$215,000. He questioned whether there was something else going on. Dr. Kumar suggested that, based on the record, the Board should accept Dr. Howard's surrender of his license, to which he agreed in the plea bargain, and if conditions for reinstatement are necessary, the Board could add that. He commented that one of the conditions for reinstatement that must be included is that Dr. Howard must take an EM Coding course, which is not included in the Report and Recommendation.

Mr. Browning asked whether Dr. Kumar is making a proposed amendment.

Dr. Kumar stated that he thinks that, instead of suspending Dr. Howard's license, the Board should accept his license surrender, which Dr. Howard already did. That takes the Board where it needs to be. Beyond that, if the Board wants to give Dr. Howard a chance to reapply, the Board needs to include conditions for that.

Dr. Egner stated that she doesn't think that Dr. Howard surrendered his license. He voluntarily closed his practice.

Dr. Kumar stated that Dr. Howard sent a letter surrendering his license.

Dr. Egner stated that the Board didn't accept that surrender. A physician can surrender his license to the Board, but the Board must determine whether or not it will accept that surrender. Dr. Howard has a license and the Board needs to act on that license.

Dr. Kumar suggested that the Board accept Dr. Howard's surrender.

Dr. Egner questioned accepting the surrender.

Mr. Browning asked for clarification.

Ms. Lubow advised that Dr. Howard tendered his surrender to the Board, but under statute, the Board must accept that surrender before it is effective. The Board did not accept Dr. Howard's surrender.

Dr. Kumar stated that he is confused, and he questioned whether there is something more serious going on, or whether this is just a billing mistake that he accepted to cover something else that is going on.

Mr. Browning stated that he has a high degree of sensitivity to Medicaid fraud, given his professional background and his tenure on a recent Medicaid Reform Commission. It is a major problem in this state, costing citizens millions of dollars. Mr. Browning stated that treating this case very seriously is the right thing to do.

Mr. Browning stated that he agrees with Dr. Kumar that the fact pattern here is such that the Board finds itself in a gray zone. The Hearing Examiner, at least, thinks that it is reasonable to come forward with this approach because the Board doesn't have other facts to show that he has a broader pattern of manipulating the system to enrich himself. There is a single pattern. Mr. Browning noted that there may be some confusion here, and if the Board goes with this approach, it's giving Dr. Howard the benefit of the doubt that, in fact, that's what happened. It shouldn't have happened and it was not responsible, and it was not the good practice of medicine; and though it was large, it was limited to a certain fact pattern. Whether or not it was intentional is the big question. Mr. Browning stated that he thinks that he agrees with the proposal that, given what the Board knows, giving this person the benefit of the doubt is reasonable. He added that, if a Board member thinks that there should be a heavier penalty than what is proposed by the Hearing Examiner, he would be willing to consider that. He commented that 180 days out of practice is not a huge amount of time, and would be a further economic penalty on Dr. Howard. Mr. Browning stated that he feels that the assumptions that drive the Proposed Order are reasonable assumptions.

Dr. Kumar asked whether the Board wants the suspension of Dr. Howard's license to be retroactive since Dr. Howard hasn't practiced since September 1, 2004. Dr. Kumar noted that he has been out of practice for more than six months already.

Dr. Egner stated that she does not think that the suspension should be retroactive, as requested in Dr. Howard's objections. She stated that Dr. Howard voluntarily closed his office. Looking at what Dr. Howard did, she personally would like to see him out of practice for longer than six months. She would certainly not want the suspension to be retroactive. She would want the suspension to be effective from the date that the Report and Recommendation goes into effect and, at least, 180 days forward.

Dr. Egner stated that she thinks that this is more serious than some of the other cases. She stated that she feels that Ms. Berrien presented a very factual and excellent presentation of past cases the Board has had. The money amount is very large in this case, and it's only in keeping with the seriousness of what Dr. Howard did. The Board has no other conclusion to draw than that.

Dr. Kumar stated that he understands that. He added that, however, he is concerned. Dr. Kumar stated that if the billing issue, which can be so confusing, is the only thing there was, then Dr. Howard should have been paying the difference between the various levels of codes instead of the whole amount. Dr. Kumar advised that \$216,000 comes from seeing the entire patient population, 40-50 patients, half of them for the year. Dr. Kumar stated that he does not know why Dr. Howard agreed to pay back the entire amount.

Dr. Egner stated that all doctors are subject to the same coding process. She agreed that it is a hassle to a physician's practice to have to see a patient, practice medicine and then decipher what code fits every step that she does; but that's the system that physicians live under, and they must all abide by it. When physicians don't abide by it, they're felons.

Dr. Robbins stated that he agrees with Dr. Egner. This is much more egregious. The Board has to go by

the record, and the record is that Dr. Howard pled guilty to charges of Medicaid fraud. Dr. Robbins stated that, in his mind, it is not just a matter of Dr. Howard's not understanding the codes, of his upcoding a little bit. Dr. Robbins commented that he thinks that any logical person hearing that would say, "okay, I made a mistake, I'm willing to do restitution, but I'm clearly not going to plead and say that I committed fraud. It wasn't fraud, I just didn't know what was going on." Dr. Robbins stressed that there is a plea of fraud in this case. Dr. Robbins stated that that's what the Board has to go on. He added that the amount is incredible. Dr. Robbins stated that, if the Board does suspend Dr. Howard for six months, that suspension cannot be retroactive. He added that he thinks that six months is a very lenient sanction.

Dr. Robbins stated that all physicians are inundated with coding questions. When cases like this come out, physicians go to people to help them determine, in their offices, what this means: "How do we fix it, how do we get our staff on board, are we coding correctly?" Dr. Robbins stated that that is all part of medicine today, and that's what physicians have to do. What they don't do is decide on their own and start moving up in codes.

Dr. Robbins again noted that Dr. Howard pled guilty to Medicaid fraud. Dr. Robbins stated that he takes that very seriously; and, clearly, the judge took it very, very seriously, and wanted Dr. Howard's license. Dr. Robbins stated that, in his mind, this is much more serious, and he would be in favor of a harsher sanction than that proposed.

Dr. Kumar stated that he is struggling because if it was simply a case of billing or coding errors, why did Dr. Howard admit to fraud? That's what bothers him. In that sense, he is considering that the Board should give him more than a slap on the wrist, perhaps permanent revocation. Dr. Kumar indicated that he didn't feel that the record supported a permanent revocation. He noted that the record constantly talks about the time elements and the upcoding. If you only judge on that, he's not sure you can be harsher than the proposed sanction.

Dr. Robbins stated that he doesn't think that the Board can retry the case. The record is that Dr. Howard pled to Medicaid fraud. Putting himself in that situation, he would never, ever, ever plead to Medicaid fraud, if it was an innocent mistake. Dr. Robbins stressed that that's not what this record is. The Board has to go by the record, and the record is that Dr. Howard pled guilty to Medicaid fraud.

Dr. Egner asked Ms. Sloan to give the Board her opinion. She stated that she feels that it is especially important in these types of cases for the consumer members to voice their reactions.

Ms. Sloan stated that, in her opinion, the proposed sanction is a slap on the wrist and she would favor permanent revocation in this case. Her opinion is based on the fact that what the Board has in front of it, as Dr. Robbins indicated, is that Dr. Howard admitted to a felony charge. The amount of restitution he was ordered to pay is one of the largest she has ever seen. He was ordered to pay a \$400,000 fine in addition to the \$216,000 restitution. This is quite large, and it is unacceptable to say that this is what he had been doing on a regular basis and he never changed. Ms. Sloan stated that, when things change, it's your duty to keep up with the changes, whether medical or administrative. Ms. Sloan again spoke in support of

permanent revocation.

MS. SLOAN MOVED TO AMEND MS. MURPHY'S PROPOSED ORDER IN THE MATTER OF KYLE HOWARD, M.D., TO SUBSTITUTE AN ORDER OF PERMANENT REVOCATION. DR. EGNER SECONDED THE MOTION.

Dr. Kumar stated that he understands what Ms. Sloan is saying, but that why he's a little bit lost. On one hand he sees one thing on the record, but the record itself is conflicting. There is a felony conviction in one place, and what that felony conviction is said to be for. He offered examples from his own practice: One of the criteria for determining what the coding should be is based on the complexity of the case. If he sees a patient with cancer of the rectum, and he wants to bill it on the basis of high complexity, he could argue that that's the right thing to do. At the same time, someone could argue that it's moderate complexity, and that changes the code level by one or two levels very easily. Dr. Kumar stated that he can come up with arguments on both sides, and very effective arguments. It's such a borderline thing. Dr. Kumar stated that he feels that that's where the complexity of the coding system is. Currently, he and his partners are going through this issue where they coded it "moderate complexity cancer of the rectum," and the insurance company said it's a mild complexity because they do it every day. Dr. Kumar stated that it's such an ambiguous thing, and that's one of the reasons why he has a problem.

A vote was taken on Ms. Sloan's motion to amend:

VOTE:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Varyani	- aye
	Dr. Kumar	- nay
	Mr. Browning	- nay
	Ms. Sloan	- aye
	Dr. Robbins	- aye
	Dr. Davidson	- aye

The motion carried.

It was explained to the Board that a motion to amend needs only a majority vote to carry. A motion to take action needs at least six votes.

DR. EGNER MOVED TO APPROVE AND CONFIRM MS. MURPHY'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER, AS AMENDED, IN THE MATTER OF KYLE HOWARD, M.D. DR. ROBBINS SECONDED THE MOTION.

Dr. Davidson stated that she would entertain further discussion in the above matter.

Dr. Egner stated that she came to this meeting not 100% sure of what to do, and she thinks that she has benefited from the discussion. She agrees with a lot of the points Dr. Kumar has made, and she understands what he's saying; but Dr. Howard pled guilty to fraud, and the guidelines state that the minimum penalty is permanent revocation. To substantiate that sanction, the case involves a large restitution payment, as well as an extremely large fine. It's logical to take from that the seriousness of what Dr. Howard did. Dr. Egner stated that she feels confident that the amended order is the right thing to do.

Mr. Browning stated that there is too much gray area in this case. Mr. Browning stated that he thinks that a serious sanction is in order and would vote for one, but spoke against permanent revocation in this case. Mr. Browning noted that the Board has seen many, many cases of Medicaid fraud and has not taken people out permanently. All the cases are different, all the cases are individual, and he recognizes that. He understands the logic of permanent revocation; in some ways, it's the easiest thing to do, particularly given the significance of the problem of Medicaid fraud in this state and nation. Mr. Browning stated that he just thinks that there's too much gray area in this case for him to vote for it.

Dr. Kumar agreed with Mr. Browning. He added that, regardless of whether Dr. Howard gets a license back or not, he's not going to be able to practice effectively because he will be barred from Medicare, Medicaid and most of the insurance companies. If the Board grants Dr. Howard a license, the best he will be able to do is work with some sort of agency such as "Doctors Without Borders," or other charitable organizations.

A vote was taken on Dr. Egner's motion to approve and confirm, as amended:

VOTE:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Varyani	- aye
	Dr. Kumar	- nay
	Mr. Browning	- nay
	Ms. Sloan	- aye
	Dr. Robbins	- aye
	Dr. Davidson	- aye

The motion failed.

Mr. Browning suggested amending the original Proposed Order to increase the suspension time to one year and to include a course in coding.

Dr. Egner suggested including a stayed permanent revocation. She stated that this sanction is much less than many others the Board has imposed for Medicaid fraud.

MR. BROWNING MOVED TO AMEND THE AMENDED ORDER TO READ AS FOLLOWS:

- A. **PERMANENT REVOCATION; STAYED; SUSPENSION:** The certificate of Kyle Howard, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED. Such permanent revocation is STAYED, and Dr. Howard's certificate shall be SUSPENDED for an indefinite period time, but not less than one year.
- B. **INTERIM MONITORING:** During the period that Dr. Howard's certificate to practice medicine and surgery in Ohio is suspended, Dr. Howard shall comply with the following terms, conditions, and limitations:
1. **Obey the Law and Terms of Criminal Probation:** Dr. Howard shall obey all federal, state, and local laws; all rules governing the practice of medicine and surgery in Ohio; and all terms of the sentence imposed by the Court of Common Pleas for Warren County, Ohio, in *State v. Howard*, criminal case number 04CR21649.
 2. **Personal Appearances:** Dr. Howard shall appear in person for quarterly interviews before the Board or its designated representative. The first such appearance shall take place within three months of the effective date of this Order, upon the reinstatement or restoration of his certificate to practice medicine and surgery, and/or as otherwise requested by the Board. Subsequent personal appearances must occur every three months thereafter, and/or as otherwise requested by the Board. If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled.
 3. **Quarterly Declarations:** Dr. Howard shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which this Order becomes effective. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
 4. **Evidence of Compliance with the Terms of Criminal Probation:** At the time he submits his quarterly declarations, Dr. Howard shall also submit declarations under penalty of Board disciplinary action or criminal prosecution stating whether he has complied with all the terms, conditions, and limitations imposed by the Court of Common Pleas for Warren County, Ohio, in *State v. Howard*, criminal case number 04CR21649.
- C. **CONDITIONS FOR REINSTATEMENT OR RESTORATION:** The Board shall not consider reinstatement or restoration of Dr. Howard's certificate to practice medicine and surgery until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration:** Dr. Howard shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.
2. **Compliance with Interim Conditions:** Dr. Howard shall have maintained compliance with all the terms and conditions set forth in Paragraph B of this Order.
3. **Professional/Personal Ethics Course:** At the time he submits his application for reinstatement or restoration, Dr. Howard shall provide acceptable documentation of successful completion of a course or courses dealing with professional and/or personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.

In addition, at the time Dr. Howard submits the documentation of successful completion of the course or courses dealing with professional/personal ethics, he shall also submit to the Board a written report describing the course, setting forth what he learned from the course, and identifying with specificity how he will apply what he has learned to his practice of medicine in the future.

4. **Course Requirement:** At the time Dr. Howard submits his application for reinstatement or restoration, Dr. Howard shall provide acceptable documentation of satisfactory completion of a course on medical billing coding, such course to be approved in advanced by the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.

In addition, at the time Dr. Howard submits the documentation of successful completion of the course or courses on medical billing coding, he shall also submit to the Board a written report describing the course, setting forth what he learned from the course, and identifying with specificity how he will apply what he has learned to his practice of medicine in the future.

5. **Additional Evidence of Fitness To Resume Practice:** In the event that Dr. Howard has not been engaged in the active practice of medicine and surgery for a period in excess of two years prior to application for reinstatement or restoration, the Board may exercise its discretion under Section 4731.222 of the Revised Code to require additional evidence of his fitness to resume practice.

D. **PROBATION:** Upon reinstatement or restoration, Dr. Howard's certificate shall be subject to

the following PROBATIONARY terms, conditions, and limitations for a period of at least three years:

1. **Terms, Conditions, and Limitations Continued from Suspension Period:** Dr. Howard shall continue to be subject to the terms, conditions, and limitations specified in Paragraph B of this Order.
 2. **Tolling of Probationary Period While Out of State:** Dr. Howard shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed.
 3. **Violation of Terms of Probation:** If Dr. Howard violates probation in any respect, the Board, after giving him notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.
- E. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Howard's certificate will be fully restored.
- F. **REQUIRED REPORTING TO EMPLOYERS AND HOSPITALS:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Howard shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Howard shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments.
- G. **REQUIRED REPORTING TO OTHER STATE LICENSING AUTHORITIES:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Howard shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Howard shall also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration of any professional license. Further, Dr. Howard shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

EFFECTIVE DATE OF ORDER: This Order shall become effective immediately upon mailing of notification of approval by the Board.

DR. EGNER SECONDED THE MOTION. A vote was taken:

VOTE:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Varyani	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Ms. Sloan	- nay
	Dr. Robbins	- aye
	Dr. Davidson	- aye

The motion carried.

DR. KUMAR MOVED TO APPROVE AND CONFIRM MS. MURPHY'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER, AS AMENDED, IN THE MATTER OF KYLE HOWARD, M.D. DR. VARYANI SECONDED THE MOTION. A vote was taken:

VOTE:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Varyani	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Ms. Sloan	- nay
	Dr. Robbins	- aye
	Dr. Davidson	- aye

The motion carried.



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.med.ohio.gov

November 10, 2004

Kyle Howard, M.D.
3266 McLean Road
Franklin, OH 45005

Dear Doctor Howard:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio [Board] intends to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand you or place you on probation for one or more of the following reasons:

- (1) On or about September 2, 2004, in the Warren County Court of Common Pleas, Warren County, Ohio, you entered a plea of guilty to the amended charge of Medicaid Fraud, in violation of Section 2913.40(B), Ohio Revised Code, a felony of the fourth degree. You were sentenced to pay restitution of \$215,004.71 and forfeitures of \$400,000.00, subjected to community control for up to three years, and further ordered to surrender your DEA license and medical license immediately.

Your plea of guilty or the judicial finding of guilt as alleged in paragraph (1) above, individually and/or collectively, constitute “[a] plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony,” as that clause is used in Section 4731.22(B)(9), Ohio Revised Code.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty days of the time of mailing of this notice.

You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

Mailed 11-12-04

KYLE HOWARD, M.D.

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In the event that there is no request for such hearing received within thirty days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand you or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, provides that "[w]hen the board refuses to grant a certificate to an applicant, revokes an individual's certificate to practice, refuses to register an applicant, or refuses to reinstate an individual's certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Lance A. Talmage, M.D.
Secretary

LAT/blt
Enclosures

CERTIFIED MAIL # 7000 0600 0024 5143 7889
RETURN RECEIPT REQUESTED

cc: Jenifer A. Belt, Esq.
Shumaker, Loop & Kendrick
North Courthouse Square
1000 Jackson
Toledo, OH 43624-1573

CERTIFIED MAIL # 7000 0600 0024 5143 7896
RETURN RECEIPT REQUESTED