

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY
98 NOV 24 PM 12:00
CLERK OF COURTS

Alan Weiner, D.P.M., :
Appellant, :
v. :
The State Medical Board of Ohio, :
Appellee. :

No. 98AP-605
(REGULAR CALENDAR)

O P I N I O N

Rendered on November 24, 1998

Gary B. Garson Co., L.P.A., Gary B. Garson and Paul W. Flowers, for appellant.

Betty D. Montgomery, Attorney General, and Anne Berry Strait, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

YOUNG, J.

Appellant, Alan Weiner, appeals from the judgment of the Franklin County Court of Common Pleas affirming the order of appellee, the State Medical Board of Ohio ("board"), revoking appellant's license to practice podiatry.

After notice and a hearing regarding allegations of appellant's violations of R.C. 4731.22(B), the board adopted the hearing Examiner's findings of fact and conclusions of law, that:

1. Dr. Weiner failed to properly document complete patient histories and the result of palpation examinations. Examiner's Report at 217-220.

2. Dr. Weiner's records failed to reflect clinical notes or other reports regarding radiological findings. *Id.* at 221-222.

3. Dr. Weiner failed to properly evaluate laboratory test results prior to the initiation of treatment. *Id.* at 222.

4. Dr. Weiner recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies, and other related procedures without justification with respect to eighteen of the sixty-two patients [whose records were reviewed]. *Id.* at 222-228.

5. Dr. Weiner inappropriately cut the tendons of one toe of one patient. *Id.* at 228.

6. Dr. Weiner performed serial surgery (performing surgery on successive dates rather than at one time in one setting) without justification with respect to six of the sixty-two patients. *Id.* at 228-229.

7. Dr. Weiner used the wrong CPT code numbers with respect to nine patients. *Id.* at 230.

8. Dr. Weiner improperly prescribed systemic steroids to four patients [over the ten year period reviewed]. *Id.* at 230-232.

9. Dr. Weiner performed elective surgery on three known diabetic patients without first ascertaining whether their diabetes was controlled. *Id.* at 232-233.

10. Dr. Weiner failed to prepare adequate clinical postoperative evaluations of surgical wounds and patient status and failed to record such in his records with respect to six of the sixty-two patients and failed to properly document the existence, development, and treatment of postoperative complications that did arise with regard to three of these patients. *Id.* at 233-235.

The board, in adopting the Examiner's report, found that appellant had violated R.C. 4731.22(B)(5), (6), and (18). In so finding, the board determined that appellant had solicited patients or published false, fraudulent, deceptive, or misleading

statements (R.C. 4731.22[B][5]); departed from or failed to conform to minimal standards of care of similar practitioners under the same or similar circumstances (R.C. 4731.22[B][6]); and violated a provision or provisions of the American Podiatric Medical Association Code of Ethics (R.C. 4731.22[B][18]). The board, after consideration of the penalty of suspension recommended by the Examiner and upon a vote of not fewer than six members, permanently revoked appellant's license in accordance with R.C. 4731.22. See *Brost v. Ohio State Medical Bd.* (1991), 62 Ohio St.3d 218.

Appellant appealed the board's decision to the Franklin County Court of Common Pleas, which affirmed the board's order finding that, although appellant did not violate the provisions of R.C. 4731.22(B)(5) because intent was not shown, the board's decision to revoke appellant's license based upon the other two violations was supported by reliable, probative and substantial evidence. This appeal followed.

Appellant asserts the following assignment of error:

"THE LOWER COURT ERRED, AS A MATTER OF LAW, BY FAILING TO VACATE THE DECISION ISSUED BY PETITIONER-APPELLEE, AND EITHER REDUCING THE PENALTY IMPOSED OR REMANDING THE PROCEEDINGS TO THE AGENCY."

In essence, appellant asserts that the trial court should not have affirmed the board's order after it determined that the board's finding that appellant had violated R.C. 4731.22(B)(5) was invalid. Appellant argues that the other two violations, those of practice below a minimal standard of care and ethics violations, are "trifling violation[s]"

and do not warrant revocation of appellant's license, and that the trial court thus erred in affirming the board's revocation order. We disagree.

In the matter of *In Re Ghali* (1992), 83 Ohio App.3d 460, 465-466, this court held:

"In reviewing a decision of an administrative agency, pursuant to R.C. 119.12, the court of common pleas must determine whether the decision is supported by reliable, probative and substantial evidence and is in accordance with law. *Arlen v State* (1980), 61 Ohio St.2d 168 ***. In determining whether the board's order was supported by reliable, probative and substantial evidence, the trial court was required to give due deference to the decision of the board since that body was in the best position to review and weigh the evidence presented. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108 ***. When reviewing an order of the court of common pleas which determined an appeal from an administrative agency *** this court's scope of review is limited to determining whether the common pleas court abused its discretion. *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257 ***. An abuse of discretion connotes *** a decision which is without a reasonable basis or one which is clearly wrong. *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159 ***."

At the outset, we find it distressing that appellant attempts to argue that the inappropriate cutting of the tendon of a patient's toe, performing surgery without first ascertaining the medical status of patients to undergo such surgery, improperly prescribing systemic steroids over a ten year period, and performing unjustified surgeries are to be considered mere "trifling" violations under R.C. 4731.22(B).

As to the court's affirmance of the board's order, we note that the board has discretion under R.C. 4731.22(B) to revoke a practitioner's license upon a finding of only

one violation under that section, and upon a vote of not fewer than six members. See *Korn v. Ohio State Medical Bd.* (1988), 61 Ohio App.3d 677. In *Roy v. Ohio State Med. Bd.* (1995), 101 Ohio App.3d 352, this court concluded that the Ohio Medical Board has the statutory authority to permanently revoke a physician's medical license for violations of R.C. 4731.22(B). *Id.* at 355.

The record reflects that, at the hearing before the board, the board's three expert witnesses testified that appellant's actions fell below the minimal standards of care for a podiatrist, in violation of R.C. 4731.22(B)(6). These same experts also testified that appellant violated the American Podiatric Medical Association Code of Ethics, a violation of R.C. 4731.22(B)(18). See *Snyder v. Ohio State Medical Bd.* (1984), 18 Ohio App.3d 47 (the court found that the medical board has its own expertise to establish the minimal standards of care under R.C. 4731.22[B][6]).

The evidence in the record is sufficient for a finding that appellant violated the provisions of R.C. 4731.22(B)(6) and (18). Further, appellant does not dispute the board's findings regarding these violations, but asserts only that such violations do not warrant revoking his license by the board. However, since R.C. 4731.22(B) provides for permanent revocation of appellant's license for the violations found under that section, under the facts of this case, the trial court did not err in affirming the board's order. See *Roy, supra.*

Because the trial court did not abuse its discretion in finding that the board's order is supported by reliable, probative and substantial evidence and is in accordance

with law, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

DESHLER, P.J., and BRYANT, J, concur.

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98 MAY 27 AM 11:28
SERVICES SECTION

IN THE FRANKLIN COUNTY COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO

98APE05 0605

ALAN WEINER, D.P.M.
31257 Cainsworth dr.
Pepper Pike Plaintiff-Appellant
OK 4/12/98
vs.

CASE NO. 96CVF12-9948

JUDGE NODINE MILLER

STATE MEDICAL BOARD OF OHIO
177 South High St 17th Fl
Columbus Defendant-Appellee
43266

NOTICE OF APPEAL

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
98 MAY 19 AM 10:27
CLERK OF COURTS

NOTICE OF APPEAL

Plaintiff-Appellant, Alan Weiner, D.P.M., hereby serves notice that he is appealing this Court's Final Order of April 20, 1998, a copy of which is appended hereto, and all other rulings in these proceedings, to the Ohio Court of Appeals, Tenth Judicial District, Franklin County.

Respectfully submitted,

Gary B. Garson

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Attorney for Plaintiff-Appellant

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
98 MAY 19 AM 10:31
CLERK OF COURTS

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed by regular U.S. Mail to: Anne Berry Strait, Assistant Attorney General, Attorney for State Medical Board of Ohio, Health & Human Services Section, 30 East Broad Street, 26th Floor, Columbus, OH 43215-3428, this 14th day of May, 1998.



GARY B. GARSON, ESQ.
GARY B. GARSON CO., L.P.A.
Attorneys for Plaintiff-Appellant

Louren

STATE MEDICAL BOARD OF OHIO

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

98 APR 22 AM 9:11

FINAL APPEALABLE ORDER

ALAN WEINER, D.P.M. :
: Appellant, :
: vs. :
: STATE MEDICAL BOARD OF OHIO :
: Appellee. :

CASE NO. 96CVF12-9948
JUDGE NODINE MILLER

TERMINATION NO. 18
BY *lp*

**JUDGMENT ENTRY
AFFIRMING THE DECEMBER 4, 1996 ORDER
OF THE STATE MEDICAL BOARD OF OHIO**

98 APR 20 PM 1:29
CLERK OF COURT
JUDGES COURT
FRANKLIN COUNTY, OHIO

This case is before the Court upon the appeal, pursuant to R.C. 119.12, of the December 4, 1996 order of the State Medical Board of Ohio. For the reasons stated in the decision of this Court filed on March 20, 1998, which decision is incorporated by reference as if fully rewritten herein, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of Appellee, State Medical Board of Ohio, and the December 4, 1996 order of the State Medical Board in the matter of Alan Weiner, D.P.M. is hereby AFFIRMED. Costs to Appellant.

IT IS SO ORDERED.

JUDGE NODINE MILLER

DATE

JUDGE NODINE MILLER

Approved:

Submitted to counsel per Rule 25.01,
who refused to agree to an entry
affirming the Medical Board's order

GARY B. GARSON (0003738)

PAUL W. FLOWERS (0046625)

Gary B. Garson Co., L.P.A.

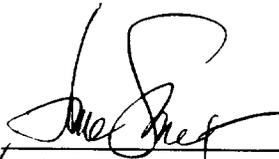
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ATTORNEY GENERAL

BETTY D. MONTGOMERY



ANNE BERRY STRAIT (0012256)

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(614) 466-8600

Attorneys for the State Medical Board of Ohio

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
GENERAL DIVISION

ALAN WEINER, D.P.M.,]	CASE NO. 96CVF12-9948
]	
Appellant,]	JUDGE MILLER
]	HEALTH & HUMAN
vs.]	
]	MAR 25 1998
STATE MEDICAL BOARD OF OHIO,]	SERVICES SECTION
]	
Appellee.]	

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
98 MAR 20 PM 3:30
JESSE D. ODDI
CLERK OF COURTS

**DECISION ON MERITS OF REVISED CODE 119.12
ADMINISTRATIVE APPEAL, AFFIRMING DECEMBER 4,
1996 ORDER OF STATE MEDICAL BOARD OF OHIO**

Rendered this 20th day of March 1998.

MILLER, J.

This case is a Revised Code 119.12 administrative appeal, by Alan Weiner, D.P.M., from a December 4, 1996 Order in which the State Medical Board of Ohio permanently revoked Dr. Weiner's certificate to practice podiatric medicine and surgery. The record which the Board has certified to the Court reflects the following.

By letter dated September 14, 1994, the Board notified Dr. Weiner that the Board proposed to take disciplinary action against Dr. Weiner's certificate. In the letter, the Board charged Dr. Weiner with having violated R.C. 4731.22(B)(5), (6), (8), and (18), arising out of Dr. Weiner's care and treatment of sixty-two patients over a nine-year period from 1984 to 1993.

Dr. Weiner requested a hearing. In February, March, May, and June 1996, over the course of twenty-four days, an Attorney Hearing Examiner conducted a

hearing, during which fourteen witnesses testified and numerous exhibits were admitted into evidence.

On October 15, 1996, the Hearing Examiner issued a 240-page Report and Recommendation, in which he painstakingly reviewed the evidence and rendered findings of fact and conclusions of law. The Hearing Examiner concluded that Dr. Weiner had violated R.C. 4731.22(B)(5), (6), and (18), and recommended that Dr. Weiner's certificate be suspended for a minimum of one year, with conditions for reinstatement.

On December 4, 1996, over Dr. Weiner's written objections, the Board adopted the Hearing Examiner's findings of fact and conclusions of law, and permanently revoked Dr. Weiner's certificate. This appeal followed.

Dr. Weiner has presented eight arguments in support of his appeal.

Dr. Weiner's first argument is that the Board did not possess the legal authority to revoke his certificate for what he characterizes as "at worst, really nothing more than poor record-keeping." This argument is not well-taken.

The Board's three expert witnesses, Dr. Rudi Van Enoo, Dr. Richard Stewart, and Dr. Donald Kushner, all podiatrists, testified that Dr. Weiner's failure to prepare and maintain complete and accurate patient records fell below the minimal standard of care for a podiatrist. Revised Code 4731.22(B)(6) provides that the Board may revoke the certificate of a practitioner who departs from or fails to conform to minimal standards of care of similar practitioners under the same or similar circumstances. The Board therefore possessed the legal authority to revoke Dr. Weiner's certificate for his failure to prepare and maintain complete and accurate patient records.

Dr. Weiner's second argument is that it was improper for the Board's experts and the Hearing Examiner to assume that, "if it wasn't written down, it wasn't done." This argument is not well-taken. Dr. Van Enoo and Dr. Kushner testified that it is essential that a podiatrist prepare and maintain complete and accurate patient records and that a failure to do so constitutes a departure from the minimal standards of care in the profession. It is axiomatic that, "if it wasn't written down, it wasn't done."

Dr. Weiner's third argument is that the Board erred in concluding that Dr. Weiner violated R.C. 4731.22(B)(5), inasmuch as the Hearing Examiner found that Dr. Weiner did not intend to defraud his patients or their third-party payers. This argument is well-taken. In order for there to be a violation of R.C. 4731.22(B)(5), there must be an intention to deceive or misrepresent the facts. *Rajan v. State Med. Bd. of Ohio* (Feb. 13, 1997), Franklin App. No. 96APE07-914, unreported, discretionary appeal not allowed (1997), 79 Ohio St. 3d 1449. As a matter of law, Dr. Weiner did not violate R.C. 4731.22(B)(5).

Dr. Weiner's fourth argument is that it was improper for the Hearing Examiner to discredit Dr. Weiner's experts because they assumed that Dr. Weiner performed complete physical examinations of his patients. This argument is not well-taken. In *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111, the Ohio Supreme Court held:

In undertaking this [R.C. 119.12] hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the

administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility.

The Hearing Examiner found that there was not sufficient evidence that Dr. Weiner did not actually perform examinations. But the Hearing Examiner also found that there was sufficient evidence that Dr. Weiner did not sufficiently document his examinations. Inasmuch as Dr. Weiner did not sufficiently document his examinations, it was permissible for the Hearing Examiner to discredit Dr. Weiner's experts for having assumed that Dr. Weiner performed such examinations.

Dr. Weiner's fifth argument is that he was deprived of procedural due process because some of the evidence which the Board adduced exceeded the scope of the charges which the Board had issued against Dr. Weiner. This argument is not well-taken. The Hearing Examiner stated, in his Report and Recommendation, that evidence which exceeded the scope of the Board's charges would not be considered in the Hearing Examiner's Findings of Fact, Conclusions of Law, or Proposed Order. Dr. Weiner was not, therefore, deprived of procedural due process.

Dr. Weiner's sixth argument is that the Board members did not base their Order upon the evidence, judging from their comments during their meeting on December 4, 1996. This argument is not well-taken. When the Board members' comments are read in context and in their entirety, and not in a piecemeal fashion, it is evident that the Board members based their decision to revoke Dr. Weiner's certificate upon the evidence adduced at the hearing.

Dr. Weiner's seventh argument is that the Board's revocation Order is not supported by reliable, probative, and substantial evidence. This argument is not well-taken. Revised Code 4731.22(B) provides, in pertinent part:

§ 4731.22 Grounds for discipline *.**

(B) The board, pursuant to an adjudication under Chapter 119. of the Revised Code and by a vote of not fewer than six of its members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, *** or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established;

(18)(a) The violation of any provision of a code of ethics of *** the American podiatric medical association ***.

The American Podiatric Medical Association Code of Ethics states:

SECTION 1. PRINCIPLES OF ETHICS

B. Providing Podiatric Medical Services: Podiatric medical services must be provided with compassion, respect for human dignity, honesty, and integrity.

E. Fees for Podiatric Medical Services: Fees for podiatric medical services must not exploit patients or others who pay for the services.

G. Ethical Rules: It is the duty of a podiatrist to place the patient's welfare and rights above all other considerations. To this end, one must subscribe to the ethical rules which are for the benefit of the patient.

SECTION 2. RULES OF ETHICS

F. Preoperative Assessment: Surgeries shall be recommended only after careful consideration of the patient's physical, social, emotional, and occupational needs. The preoperative work-up must document the indications for surgery. Performance of unnecessary surgery is an extreme, serious ethical violation.

I. Medical and Surgical Procedures: A podiatrist must not misrepresent the services that are performed or the charges made for those services.

J. Procedures and Materials: A podiatrist should order only those procedures, devices, or pharmacological agents that are in the best interest of the patient. Ordering unnecessary procedures or materials for pecuniary gain is unethical.

In Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St. 3d 570,

571, the Ohio Supreme Court held:

The evidence required by R.C. 119.12 can be defined as follows: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. *** (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *** (3) "Substantial" evidence is evidence with some weight; it must have importance and value. ***

In this case, the record contains reliable, probative, and substantial evidence, provided primarily by Dr. Van Enoo, Dr. Stewart, and Dr. Kushner, that, during the nine-year period from 1984 to 1993, Dr. Weiner departed from or failed to conform

to minimal standards of care in his profession, and that, during that time period, he violated the American Podiatric Medical Association Code of Ethics.

Dr. Weiner's eighth, and final, argument is that, even if the Board proved its case against Dr. Weiner, the penalty of revocation was too harsh. This argument is not well-taken. A common pleas court is precluded from interfering with or modifying the penalty which an administrative agency has imposed, so long as the penalty is authorized by law. *DeBlanco v. Ohio State Med. Bd.* (1992), 78 Ohio App. 3d 194, 202 (citing *Henry's Cafe, Inc. v. Bd. of Liquor Control* [1959], 170 Ohio St. 233). The penalty of revocation is authorized by R.C. 4731.22(B) and will not be disturbed by this Court.

Upon consideration of the entire record on appeal, the Court finds that the Order which the Board issued on December 4, 1996, revoking Dr. Weiner's certificate to practice podiatric medicine and surgery in the state of Ohio, is supported by reliable, probative, and substantial evidence and is in accordance with law. Although Dr. Weiner did not violate R.C. 4731.22(B)(5), the record contains reliable, probative, and substantial evidence that Dr. Weiner violated R.C. 4731.22(B)(6) and (18)(a). The Court will therefore **AFFIRM** the Board's Order.

Counsel for Appellee shall submit an appropriate journal entry in accordance with Local Rule 25.

MM 3.20.98

JUDGE NODINE MILLER

Copies mailed to:

GARY B. GARSON, Esq., PAUL W. FLOWERS, Esq., Counsel for Appellant
ANNE BERRY STRAIT, AAG, Counsel for Appellee

Wagner

97 JAN 27 11:19 AM
FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
97 JAN 27 AM 10:41
JESSE D. CDDI
CLERK OF COURTS

ALAN WEINER, D.P.M.

Appellant,

vs.

STATE MEDICAL BOARD OF OHIO

Appellee.

CASE NO. 96CVF12-9948

JUDGE NODINE MILLER

**ENTRY DENYING APPELLANT'S MOTION
TO STAY LICENSE SUSPENSION PENDING APPEAL
FILED 12/30/96**

This matter is before the Court on the administrative appeal pursuant to R.C. 119.12 filed by Appellant Alan Weiner, D.P.M. of the order entered by the Appellee State Medical on December 4, 1996, which permanently revoked Appellant's license to practice podiatry. On December 30, 1996, Appellant filed a Motion to Stay License Suspension Pending Appeal, which the Appellee opposed.

Upon consideration of the memoranda filed by the parties and the oral arguments presented at hearing on January 21, 1997, the Court finds that Appellant has not shown that an unusual hardship will result from the execution of the revocation order pending the determination of this appeal. The Court further finds that the health, safety and welfare of the public would be threatened by the suspension of that order.

Therefore, the Appellant's Motion to Stay License Suspension Pending Appeal is hereby DENIED.

IT IS SO ORDERED.

Date

JUDGE NODINE MILLER

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Attorneys for Appellee State Medical Board of Ohio

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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE MEDICAL BOARD OF OHIO)
77 South High Street, 17th Floor)
Columbus, OH 43266-0315)

Petitioner-Appellee)

v.)

ALAN WEINER, D.P.M.)
30799 Pinetree Road, #249)
Pepper Pike, OH 44124)

Respondent-Appellant)

CASE NO.

JUDGE *Miller*

NOTICE OF ADMINISTRATIVE
APPEAL

96 DEC 30 PM 2:37
CLERK OF COURT
OF OHIO

NOTICE

Respondent-Appellant, Dr. Alan Weiner, hereby appeals the Finding and Order of the Petitioner-Appellee, State Medical Board of Ohio, served December 23, 1996, and all other rulings in this matter, to the Franklin County Court of Common Pleas. *ORC §119.12*. This decision is not supported by reliable, probative, and substantial evidence and is not in accordance with law. A copy of the final Entry of Order is appended

LAW OFFICES
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CERTIFICATE OF SERVICE

A copy of the foregoing NOTICE OF APPEAL has been faxed and mailed by regular U.S. Mail to Anne Berry Strait, Assistant Attorney General, Attorney for State Medical Board of Ohio, Health & Human Services Section, 30 East Broad Street, 26th Floor, Columbus, OH 43215-3428, this 23rd day of December, 1996.

GARY B. GARSON, ESQ.
PAUL W. FLOWERS, ESQ.
GARY B. GARSON CO., L.P.A.
Attorney for Dr. Alan Weiner

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96 DEC 30 PM 2:37
OFFICE OF THE
ATTORNEY GENERAL
STATE OF OHIO



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

December 6, 1996

Alan Weiner, D.P.M.
31251 Ainsworth Drive
Pepper Pike, Ohio 44124-5440

Dear Doctor Weiner:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of R. Gregory Porter, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on December 4, 1996, including Motions approving and confirming the Findings and Fact, amending the Conclusions of Law 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 may be taken to the Franklin County Court of Common Pleas only.

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

THE STATE MEDICAL BOARD OF OHIO

Thomas E. Gretter, M.D.
Secretary

TEG:em
Enclosures

Certified Mail Receipt No. P 152 982 937
Return Receipt Requested

cc: Gary B. Garson, Esq.

Certified Mail No. P 152 982 938
Return Receipt Requested

Mailed 12-17-96



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; attached copy of the Report and Recommendation of R. Gregory Porter, Attorney Hearing Examiner, State Medical Board; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on December 4, 1996, including Motions approving and confirming the the Findings of Fact, amending the Conclusions of Law 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 Alan Weiner, D.P.M., 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.

(SEAL)

Thomas E. Gretter, M.D.
Secretary

12/4/96

Date



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

ALAN WEINER, D.P.M.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on the 4th day of December, 1996.

Upon the Report and Recommendation of R. Gregory Porter, Hearing Examiner, Medical Board, in this matter designated 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:

The certificate of Alan Weiner, D.P.M., to practice podiatric medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the State Medical Board of Ohio.

Thomas E. Gretter, M.D.
Secretary

(SEAL)

12/4/96

Date

96 OCT 15 PM 2:27

**REPORT AND RECOMMENDATION
IN THE MATTER OF ALAN WEINER, D.P.M.**

The matter of Alan Weiner, D.P.M., was heard by R. Gregory Porter, Esq., Attorney Hearing Examiner for the State Medical Board of Ohio, on February 5-8, 12, 13, 15, 20-22, 26-28; March 4-6, May 13-17, and June 24-26, 1996.

INTRODUCTION

I. Basis for Hearing

- A. By letter dated September 14, 1994 (State's Exhibit 63), the State Medical Board notified Alan Weiner, D.P.M., that it proposed to take disciplinary action against his certificate to practice podiatric medicine and surgery in Ohio, based upon allegations concerning Dr. Weiner's care and treatment of Patients 1 through 62 (identified in a Patient Key to be withheld from public disclosure) "[d]uring the nine year period from 1984 through at least 1993." Specifically, the Board alleged that:
1. Concerning Patients 1 through 62, "[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:"
 - a. "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis";
 - b. Dr. Weiner did not attempt "to localize symptoms to specific anatomic structure[s]";
 - c. Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."
 2. "[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:"
 - a. "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint (see, e.g., Patients (1)

through (7), (9) through (13), (15) through (44), (47), (49), (50) and (52) through (62));

- b. “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures (see, e.g., Patients (1) through (19), (21) through (25), (27) through (50), (52) through (55), (57), (58), and (60) through (62)).”
3. Concerning Patients 1 through 62, “even though [Dr. Weiner] routinely took x-rays, [Dr. Weiner’s] records fail to reflect clinical notes or other reports regarding any radiological findings.”
4. “[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [Dr. Weiner] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results (see, e.g., Patients (1), (2), (4) through (10), (12) through (14), (16) through (19), (21) through (24), (26), (31), (33), (35), (36), (40), (41), (44), (45), (48), (52), (57), and (60)).”
5. “[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification (see, e.g., Patients (1) through (47), (49), (50), (52), through (54), and (56) through (62)).”
6. The procedures discussed in paragraph 5, above, “were frequently being performed upon the great toes and tendons were cut inappropriately (see, e.g., Patients (3), (5) through (7), (9), (10), (12), (13), (18), (19), (23), (29), (31), (33), (34), (37), (40), (44), (45), (50), (52), (56), (57) and (60)).”
7. “[Dr. Weiner] routinely performed the procedures in paragraph (5) above in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost (See e.g. Patients (1) through (12), (14) through (37), (39) through (47), (49), (50), (52) through (54), and (56) through (62)).”

8. “[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures (see, e.g., Patients (1), (2), (4) through (6), (9) through (14), (17), (18), (23), (24), (27), (28), (30), (31), (33) through (38), (41) through (43), (45) through (47), (50), (52) through (54), (56) through (58), (60), and (61)).”
9. “[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:”
 - a. “[Dr. Weiner] billed for performing a plantar fasciotomy when [his] records indicate that surgical incisions were done only at the toe level of the foot where there is no plantar fascia (see, e.g., Patients (5), (6), (10), (12), (15), (18), (22), (23), (29), (30), (31), (39), (40), (43), (44), (53), (58) through (60), and (62)).”
 - b. “[Dr. Weiner] billed for arthrotomy [of the metatarsophalangeal joint] when [Dr. Weiner’s] records reflect the performance of at most a tenotomy or capsulotomy only (see, e.g., Patients (1), (4) through (6), (8), (10), (12), (13), (15), (18), (19), (22) through (24), (29) through (32), (34) through (36), (39) through (41), (43) through (45), (47), (50), (54), and (56) through (62)).”
10. “[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated (see, e.g., Patients (1), (7), (9), (10), (12) through (14), (20), (23), (25), (26), (28), (30), (33), (35), (37), (39) through (42), (45) through (48), (50), (53) through (55), (57), (58), (60), and (61)).”
11. “[Dr. Weiner] performed elective podiatric surgery on known diabetics without first ascertaining whether their diabetes was controlled (see, e.g., Patients (14), (17), (24), and (31)). In fact, [Dr. Weiner’s] record for Patient (17) indicates ‘BS +2’ for the day of surgery; her glucose test result, which was completed three days later, was 294 mg%.”
12. “[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and

patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy' (see, e.g., Patients (1) through (12), (14) through (31), and (33) through (62))."

- a. "Further, even when postoperative complications occurred, [Dr. Weiner] failed to document adequately the existence, development and treatment of such complications (see, e.g., Patients (9), (19), (38), (43), and (51))."

The Board alleged that "[Dr. Weiner's] acts, conduct, and/or omissions as alleged in paragraphs (1) through (8) and (10) through (12) above, individually and/or collectively, constitute '(a) departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established,' as that clause is used in Section 4731.22(B)(6), Ohio Revised Code."

In addition, the Board alleged that "[Dr. Weiner's] acts, conduct, and/or omissions as alleged in paragraph (9) above, individually and/or collectively, constitute 'publishing a false, fraudulent, deceptive, or misleading statement,' as that clause is used in Section 4731.22(B)(5), Ohio Revised Code."

Moreover, the Board alleged that "[Dr. Weiner's] acts, conduct, and/or omissions as alleged in paragraph (9) above, individually and/or collectively, constitute '(t)he obtaining of, or attempting to obtain money or anything of value by fraudulent misrepresentations in the course of practice,' as that clause is used in Section 4731.22(B)(8), Ohio Revised Code."

Finally, the Board alleged that "[Dr. Weiner's] acts, conduct, and/or omissions as alleged in paragraphs (2), (5), (7), (8), (9) and (10) above, individually and/or collectively, constitute '(t)he violation of any provision of a code of ethics of a national professional organization,' as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: American Podiatric Medical Association Code of Ethics, Section 1. Principles of Ethics, paragraphs B., E. and G., and Section 2. Rules of Ethics, paragraphs F., I. and J."

Dr. Weiner was advised of his right to request a hearing in this Matter.

- B. By letter received by the Board on October 12, 1994 (State's Exhibit 64), Gary B. Garson, Esq., requested a hearing on behalf of Dr. Weiner.

II. Appearances

- A. On behalf of the State of Ohio: Betty D. Montgomery, Attorney General, by Anne B. Strait, Assistant Attorney General.
- B. On behalf of Respondent: Gary B. Garson, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

- A. Presented by the State
 - 1. Rudi E. Van Enoo, D.P.M.
 - 2. Richard C. Stewart, D.P.M.
 - 3. Alan Weiner, D.P.M., as on cross-examination
 - 4. Donald Kushner, D.P.M.
 - 5. Patient 50
 - 6. Patient 2
 - 7. Muneer Mirza, D.P.M.
 - 8. James R. Holfinger, D.P.M.
 - 9. Patient 61
 - 10. Patient 9
 - 11. Sandra Samuels

B. Presented by the Respondent:

1. Eric M. Goldenberg, M.S., D.P.M.
2. Lawrence Kobak, D.P.M.
3. Patricia J. Noga
4. Alan Weiner, D.P.M.

II. Exhibits Examined

In addition to State's Exhibits 63 and 64, noted above, the following exhibits were identified and admitted into evidence:

A. Presented by the State

1. State's Exhibits 1 through 62: Copies of Dr. Weiner's medical records for Patients 1 through 62, respectively. St. Ex. 14A is a series of blood test results for Patient 14. (**Note:** These exhibits have been sealed to protect patient confidentiality.)
 - 1a. In conjunction with the above-referenced medical records, the following x-rays were admitted into evidence: State's Exhibits 1A through 1D, 2A, 2B, 3A, 3B, 4A through 4C, 5A through 5D, 9A through 9G, 10A, 10B, 13A through 13C, 16A through 16C, 17A, 18A, 18B, 19A, 19B, 23A through 23F, 24A, 24B, 25A through 25C, 26A through 26D, 27A through 27E, 34A through 34C, 35A through 35D, 37A through 37C, 38A through 38C, 39A through 39C, 40A, 41A through 41C, 42A through 42C, 43A, 43B, 45A through 45C, 46A through 46C, 47A, 47B, 50A through 50C, 55A, 56A through 56C, 57A through 57D, 58A, 58B, and 62A. (**Note:** These x-rays shall be available for viewing by Board Members at the offices of the State Medical Board. **Further Note:** These exhibits have been sealed to protect patient confidentiality.)

(It bears mentioning that, although all of the above x-rays were identified as State's Exhibits for simplicity's sake, a number of them were marked and admitted at the request of the Respondent.)

2. State's Exhibit 65: October 13, 1994, letter to Gary B. Garson, Esq., from the Board, advising that a hearing had been set for October 26,

1994, and further advising that the hearing was postponed pursuant to §119.09, Ohio Revised Code.

3. State's Exhibit 66: October 25, 1994, letter to Attorney Garson from the Board, scheduling the hearing for February 13, 1995, and scheduling a prehearing teleconference for November 7, 1994.
4. State's Exhibit 67: November 2, 1994, letter from Attorney Garson to the Board, requesting a continuance of the February 13, 1995, hearing.
5. State's Exhibit 68: November 15, 1994, Entry granting the Respondent's request for a continuance, and rescheduling the hearing for a two-week period commencing April 17, 1995.
6. State's Exhibit 69: November 18, 1994, Entry reserving judgment on the issue of expanding the time allotted for the hearing pending a teleconference with the parties' representatives.
7. State's Exhibit 70: November 25, 1994, letter from Attorney Garson to the Board, concerning the scheduling of a prehearing teleconference.
8. State's Exhibit 71: November 28, 1994, Entry rescheduling a prehearing teleconference to December 9, 1994.
9. State's Exhibit 72: December 2, 1994, Nunc Pro Tunc Entry correcting the scheduled time of the December 9, 1994, prehearing teleconference.
10. State's Exhibit 73: December 9, 1994, Entry, expanding the time for hearing to the four-week period commencing April 17, 1995.
11. State's Exhibit 74: State's February 1, 1995, Motion for Continuance. (3 pp.)
12. State's Exhibit 75: February 27, 1995, Entry granting the State's February 1, 1995, Motion for Continuance, and rescheduling the hearing for September 7 through October 13, 1995.

13. State's Exhibit 76: August 2, 1996, letter to the Board from Attorney Garson, requesting that the start of the hearing be delayed until September 11, 1995.
14. State's Exhibit 77: August 14, 1996, Entry granting the Respondent's request to delay the start of the hearing until September 11, 1995.
15. State's Exhibit 78: August 18, 1995, letter from Attorney Garson to the Board, concerning scheduling issues.
16. State's Exhibit 79: Respondent's August 23, 1995, request for continuance.
17. State's Exhibit 80: September 1, 1995, Entry granting the Respondent's request for continuance, and rescheduling the hearing to February 5 through March 8, 1996.
18. State's Exhibit 81: Respondent's December 21, 1995, Notice of Hearing Deposition. (2 pp.)
19. State's Exhibit 82: December 27, 1995, Entry concerning Respondent's Notice of Hearing Deposition. (2 pp.)
20. State's Exhibit 83: Respondent's Motion to Take Trial Deposition of Expert Outside the State of Ohio. (2 pp.)
21. State's Exhibit 84: State's January 4, 1996, Response to Respondent's Motion to Take Trial Deposition of Expert Outside the State of Ohio. (2 pp.)
22. State's Exhibit 85: January 4, 1996, Entry, denying the Respondent's Motion to Take Trial Deposition of Expert Outside the State of Ohio, setting the place of the deposition as Franklin County, Ohio, and apprising the parties of the division of expenses for video depositions.
23. State's Exhibit 86: Not admitted, but held as proffered material.
24. State's Exhibit 87: Code of Ethics of the American Podiatric Medical Association. (2 pp.)

25. State's Exhibit 88: Patient key. (3 pp.) (**Note:** This exhibit has been sealed to protect patient confidentiality.)
26. State's Exhibit 89: Curriculum vitae of Rudi E. Van Enoo, D.P.M. (3 pp.)
27. State's Exhibit 90: Curriculum vitae of Richard C. Stewart, D.P.M. (2 pp.)
28. State's Exhibit 91: Curriculum vitae of Donald Kushner, D.P.M. (9 pp.)
29. State's Exhibit 92: Respondent's February 1, 1996, Motion for Reconsideration of Order Overruling Respondent's Motion to Take Trial Deposition of Expert Outside the State of Ohio; affidavit and copy of January 4, 1996, Entry are attached. (5 pp.)
30. State's Exhibit 93: *Preferred Practice Guideline: Hammer Toe Syndrome*, The American College of Foot Surgeons (1992). (29 pp.)
31. State's Exhibit 94: Color chart of superior view of the right foot.
32. State's Exhibit 95: Article entitled *Minimal Incision Surgery: A Plastic Technique or a Cover Up?*, by Rudi Van Enoo, D.P.M., and Elise M. Cane, D.P.M.; *Clinics in Podiatric Medicine And Surgery*, Vol. 3, No. 2, April 1986. (15 pp.)
33. State's Exhibit 96: Excerpt and title page from *Physicians' Desk Reference* (37th Ed. 1983), regarding Medrol. (4 pp.)
34. State's Exhibit 97: Excerpts and title page from *Physicians' Current Procedural Terminology (CPT)* (4th Ed. 1984), American Medical Association. (39 pp.)
35. State's Exhibit 98: Excerpts and title page from *Physicians' Current Procedural Terminology (CPT)* (4th Ed. 1990), American Medical Association. (54 pp.)
36. State's Exhibit 99: Excerpts and title page from *Physicians' Current Procedural Terminology (CPT)* (4th Ed. 1994), American Medical Association. (47 pp.)

37. State's Exhibit 100: Color chart of plantar muscles.
38. State's Exhibit 101: Drawing captioned: "Figure 1. Attachments of the plantar aponeurosis and plantar plate to the base of the proximal phalanx."
39. State's Exhibit 102: Color chart of plantar muscles.
40. State's Exhibit 103: Color chart of lateral view of arch of right foot.
41. State's Exhibit 104: January 18, 1996, statement signed by Patient 9, concerning her treatment by Dr. Weiner. (**Note:** This exhibit has been sealed to protect patient confidentiality.)
42. State's Exhibit 105: Textbook chapter entitled *The Podiatric History and Examination*, by Myron C. Boxer, D.P.M., and Susan J. Tokarski, D.P.M.; Principles and Practice of Podiatric Medicine (Churchill Livingstone Inc. 1990). (22 pp.)

B. Presented by the Respondent

1. Respondent's Exhibit A: Curriculum vitae of Eric M. Goldenberg, M.S., D.P.M. (5 pp.)
2. Respondent's Exhibit B: Excerpt from *Principles and Practices of Podiatric Medicine*, entitled "Lesser Metatarsal Surgery," by Vincent J. Mandracchia, D.P.M., and Walter W. Strash, D.P.M. (Churchill Livingstone [no date]) (13 pp.)
3. Respondent's Exhibit C: Article entitled *Role of the Plantar Fascia in Digital Stabilization: A Case Report*, by Jane Pontious, D.P.M., K. Paul Flanigan, B.A., and Howard J. Hillstrom, Ph.D., from the Journal of the American Podiatric Association (Vol. 86, No. 1, January 1996). (5 pp.)
4. Respondent's Exhibit D: Article entitled *Hallux Tenotomy-Capsulotomy*, by L. Bruce Ford, D.P.M., from Clinics in Podiatric Medicine and Surgery (Vol. 8, No. 1, January 1991). (3 pp.)
5. Respondent's Exhibit E: Two articles from Clinics in Podiatric Medicine and Surgery (Vol. 8, No. 1, January 1991); the first entitled

Minimal Incision Tenotomy for Hallux Interphalangeal Joint Extensus, by Donald D. McGowan, D.P.M.; the second article is a duplicate of Respondent's Exhibit D. (8 pp.)

6. Respondent's Exhibit F: Curriculum vitae of Lawrence Kobak, D.P.M. (7 pp.)
7. Respondent's Exhibit G: Preferred Practice Guidelines of the Academy of Ambulatory Foot Surgery (revised February 1993).
8. Respondent's Exhibit H: Excerpt from *Legal Guide for Physicians*, by Joseph M. Taraska, J.D. (Matthew Bender 1987). (3 pp.)
9. Respondent's Exhibit I: Excerpt from an article entitled *Minimal Incision Techniques for Digital Deformities*, by Dennis L. White, from *Clinics in Podiatric Medicine and Surgery* (Vol. 3, No. 1, January 1986). (3 pp.)
10. Respondent's Exhibit J: Excerpt from *Management of Diabetic Foot Problems*, Second Edition, by George P. Kozak, et al. (W.B. Saunders 1995). (3 pp.)
11. Respondent's Exhibit K: Excerpt from *The Olympic Book of Sports Medicine*, (Blackwell Scientific Publications 1988). (3 pp.)
12. Respondent's Exhibit L: Article entitled *The Effect of Locally Administered Corticosteroids (Soluble and Insoluble) on the Healing Times of Surgically Induced Wounds in Guinea Pigs*, by Stephen F. Stern, D.P.M., and Allen Shuman, D.P.M., from the *Journal of the American Podiatry Association* (Vol. 63, No. 8, August 1973). (9 pp.)
13. Respondent's Exhibit M: Excerpt from *Essentials of Human Anatomy*, by Russell T. Woodburne, A.M., Ph.D. (Oxford University Press 1969). (3 pp.)
14. Respondent's Exhibit N: Not admitted, but held as proffered material.
15. Respondent's Exhibit O: Excerpt from the 1995 *Physicians' Desk Reference*, Forty-ninth Edition, regarding Medrol. (3 pp.)

16. Respondent's Exhibit P: Excerpt from *Webster's New World Dictionary of the American Language*, Second College Edition, including the definition of the word "stiff." (2 pp.)
17. Respondent's Exhibit Q: Not admitted, but held as proffered material.
18. Respondent's Exhibit R: August 11, 1995, letter to the Board from Rudi E. Van Enoo, D.P.M. (2 pp.)
19. Respondent's Exhibit S: Paper entitled *Steroid treatment*, by Steven B. Sorin, M.D.; and fax cover page. (3 pp.)
20. Respondent's Exhibit T: Excerpt from *Disorders of the Foot, Volume 1*, by Melvin H. Jahss, M.D. (W.B. Saunders Co. 1982) (3 pp.)

III. Post-Hearing Exhibit

On the Respondent's motion, Respondent's Exhibit U was presented. This exhibit was not admitted to the record, but will be held as proffered material.

PROCEDURAL MATTERS

1. State's Exhibit 86 was not admitted to the hearing record, but is being held as proffered material for the State.
2. Respondent's Exhibits N, Q, and U were not admitted to the hearing record, but are being held as proffered material for the Respondent.
3. The Respondent's objection on page 246 of the transcript is overruled.
4. The Respondent's motion, appearing on pages 377 and 378 of the transcript, that Dr. Van Enoo's response to a question be stricken as not responsive to the question, is denied.
5. The Hearing Examiner made a ruling that appears on Transcript page 614, lines 19-20, that is somewhat ambiguous. For purposes of clarification, Dr. Van Enoo's statement that appears on Transcript page 614, lines 4-11, is stricken.

6. On Transcript pages 639-642, Respondent made an objection to a question or line of questioning then being made by the State to a State's witness on re-direct examination. The Hearing Examiner reserved ruling on the objection pending his review of the transcript. Having made such review, the Hearing Examiner hereby overrules the Respondent's objection.
7. The Respondent objected to a question asked by the State to a State's witness on re-direct examination. The question began on Transcript page 649, and the exchange continued through page 652 when the Hearing Examiner reserved ruling on the objection pending his review of the transcript. Having made such review, the Hearing Examiner hereby overrules the Respondent's objection.
8. The Hearing Examiner reserved ruling on an objection made by Respondent at Tr. 1058-1059. After due consideration, the Hearing Examiner sustains the objection. The prejudicial nature of the line of questioning outweighs its probative value. Therefore, the material from Transcript page 1058, Line 13 through Transcript page 1059 Line 13, inclusive, was redacted from the record by the Hearing Examiner.
9. During the Respondent's direct examinations of Respondent's experts, the State entered a standing objection to the Respondent's characterization of earlier testimony of State's experts as being inaccurate. The Hearing Examiner reserved ruling on such objections until such time as he reviewed the transcript. The Hearing Examiner finds that in each such instance, except for those listed immediately below, Respondent's characterizations were substantially and sufficiently accurate, and the State's continuing objection(s) are overruled unless specifically sustained as follows:
 - a. Transcript pages 2084-2087: sustained as far as Respondent's question implies that Dr. Kushner testified that the standards of practice at the Ohio College of Podiatric Medical Clinic and its affiliated Beachwood Clinic would be and are the standards for the entire podiatric community. Dr. Kushner actually stated that office-based and hospital-based podiatric practices follow the same standard of care. Dr. Goldenberg's answers along these lines need not be redacted or disregarded, however, because he focused on whether standards of care differ among colleges, college clinics, hospitals, and private offices, which was essentially the issue addressed in Dr. Kushner's testimony.
 - b. Transcript pages 2135-2136: sustained. Respondent indicated that Dr. Stewart referred to a 3-4-85 procedure as a tenotomy. The Hearing Examiner could find no such reference. However, Dr. Goldenberg's

testimony will not be redacted, since it does not imply that Dr. Stewart testified that a tenotomy was performed.

- c. Transcript pages 2193-2194: sustained. Strike questions and responses from Transcript page 2193, line 25, through and including Transcript page 2194, line 10. In questioning Dr. Goldenberg, Respondent indicated that Dr. Kushner criticized Dr. Weiner for two entries in the progress notes for Patient 35 “because [Dr. Weiner] failed to indicate the size and provide pathology reports in connection with the excision of the neoplasms on those dates.” Dr. Goldenberg was then asked if he agreed with Dr. Kushner’s criticism. However, on Transcript pages 1264-1265, although Dr. Kushner criticized Dr. Weiner for failing to obtain a pathology report, he did not criticize Dr. Weiner for failing to note the sizes of the neoplasms. In fact, he even referred to the size of one of them on Transcript page 1264, lines 18-19. He did, however, criticize Dr. Weiner for failing to note the locations of the neoplasms. Consequently, Respondent’s questions and Dr. Goldenberg’s answers along these lines are stricken.
10. The Hearing Examiner reserved ruling on an objection by the State concerning Respondent’s questioning of Respondent’s Expert Dr. Kobak on quotes from the written report prepared by State’s expert Dr. Kushner. Dr. Kushner’s written report was not identified or admitted into evidence. This objection is sustained. Therefore, Dr. Kobak’s testimony from Transcript page 2666, line 22, through Transcript page 2667, line 5, is stricken and shall be disregarded.
11. The Hearing Examiner reserved ruling on an objection by the Respondent’s representative to the State’s questioning of Respondent’s expert Dr. Goldenberg on Transcript pages 2999-3000. The objection is overruled.
12. The Hearing Examiner reserved ruling on objections by both of the parties on Transcript pages 3157-3158. These objections are overruled.
13. The Hearing Examiner reserved ruling on an objection by the State that the Respondent’s re-direct examination of Dr. Goldenberg went beyond the scope of cross-examination. The objection appears on Transcript pages 3294-3295. The objection is overruled.
14. The name of Patients 9 and 62 were inadvertently mentioned and included on pages 3825, 3828, and 3829 of the original transcript. The Hearing Examiner redacted the names and substituted the patient numbers. The original, unmarked pages of the transcript will be sealed and not distributed.

SUMMARY OF THE EVIDENCE

All transcripts of testimony and exhibits, whether or not specifically referred to hereinafter, were thoroughly reviewed and considered by the Attorney Hearing Examiner in preparing this Report and Recommendation.

BACKGROUND INFORMATION CONCERNING EXPERTS

1. Several individuals, including Dr. Weiner, testified as experts in this Matter:

- a. Rudi E. Van Enoo, D.P.M., testified as an expert on behalf of the State of Ohio. Dr. Van Enoo graduated in 1969 from the California College of Podiatric Medicine. After a rotating externship during 1970 and 1971, Dr. Van Enoo began practicing in Southern California. He is a fellow of the American College of Foot Surgeons, and is a diplomate of the American College of Foot Surgery. He has a Foot and Ankle Certificate. He is also board certified by the American Board of Quality Assurance and Utilization Review and by the American Academy of Pain Management. (State's Exhibit [St. Ex.] 89; Transcript [Tr.] 47-51)

Dr. Van Enoo testified that in January 1993, he and his wife sold their podiatric practice. Dr. Van Enoo continued working at the office until January 1994 and took a sabbatical through September 1995. He currently practices in Los Olivos, California. (Tr. 48, 53-57, 325-337)

- b. Richard C. Stewart, D.P.M., testified as an expert on behalf of the State. Dr. Stewart received his Doctor of Podiatric Medicine degree from the Ohio College of Podiatric Medicine in 1973. He completed a one-year residency in Baltimore, Maryland, in the Maryland Podiatry Residency Program, which was primarily focused on foot surgery and included instruction on minimal incision surgery. Dr. Stewart practices in Columbus, Ohio. In addition to a private general podiatry practice, Dr. Stewart runs the podiatry clinic at Ohio State University [OSU] Hospitals. The OSU clinic consists of three podiatrists who practice there on a part-time basis. The clinic renders general podiatric care, as well as teaching OSU medical students, interns, and residents. In addition to OSU Hospital, Dr. Stewart is also on the staff of Doctors Hospital, Riverside Methodist Hospital, and Mt. Carmel Medical Center, all located in Columbus. Dr. Stewart is board certified in foot and ankle surgery by the American Board of Podiatric Surgery. He is active in the American Podiatric Medical Association, and its Ohio affiliate, and was president of OPMA from 1981-1982. (St. Ex. 90, Tr. 698-708)

- c. Donald Kushner, D.P.M., testified as an expert on behalf of the State. Dr. Kushner graduated from the California College of Podiatric Medicine, San Francisco, in 1976. Dr. Kushner completed two years of podiatric residency in 1978. The first year was a rotating internship at the California College of Podiatric Medicine and Affiliated Hospitals. Dr. Kushner spent his second year at Podiatric Medical Center Hospital and Outpatient Clinic, San Francisco. The second year focused on podiatric surgery. (St. Ex. 91; Tr. 1193-1195)

In 1988, Dr. Kushner was hired as Chairman of the Podiatric Medicine Department of the Ohio College of Podiatric Medicine in Cleveland, Ohio. In 1995, Dr. Kushner switched from the Chairmanship of the Podiatric Medicine Department to become Chairman of the Podiatric Surgery Department. Among Dr. Kushner's responsibilities is curriculum development concerning surgery for the college, surgical patient clinical care, and supervision of four other department members. Dr. Kushner is also part of the Clinical Practice Plan at the college, which is a private practice that the college owns in Beachwood, Ohio. Dr. Kushner testified that they see a wide variety of patients. Dr. Kushner is board certified by the American Board of Podiatric Surgery, and is a fellow of the American College of Foot Surgeons. (St. Ex. 91; Tr. 1195-1201)

- d. Eric M. Goldenberg, M.S., D.P.M., testified as an expert on behalf of the Respondent. Dr. Goldenberg is a podiatrist who practices in Des Moines, Iowa. He was licensed to practice podiatry in Iowa in 1987, and in Florida in 1995. Dr. Goldenberg's Florida license required a new round of testing that he completed in August 1995. (Tr. 1808-1809)

Dr. Goldenberg received his Doctor of Podiatric Medicine degree from the California College of Podiatric Medicine, San Francisco. From 1985 until 1987, Dr. Goldenberg did a two-year residency in podiatric surgery at St. Michael's Medical Center, Newark, New Jersey. During his final year, Dr. Goldenberg was the Chief Podiatric Resident. (Respondent's Exhibit [Resp. Ex.] A; Tr. 1809-1811)

From 1987 through 1989, Dr. Goldenberg was Assistant Professor at the College of Podiatric Medicine and Surgery at the University of Osteopathic Medicine and Health Sciences, Des Moines, Iowa. His responsibilities there were clinical as well as academic. In 1989, Dr. Goldenberg entered private practice with his wife, who is also a podiatrist. He became an Adjunct Associate Clinical Professor, and

rotates students through his office. Dr. Goldenberg testified that his practice is a general practice of podiatry with an emphasis on the surgical management of deformities. He is board certified by the American Board of Podiatric Surgery, and a fellow of the American College of Foot and Ankle Surgeons. He is also on the clinical faculty of Barry University, Miami, Florida. (Resp. Ex. A; Tr. 1812-1823, 1829-1830)

Dr. Goldenberg noted that he has been a member of the American Podiatric Medical Association twice. He left his state association approximately four years ago due to a personal dispute with the then-president of that organization. Dr. Goldenberg rejoined approximately one year ago. (Tr. 2294-2295)

- e. Lawrence Kobak, D.P.M., testified as an expert on behalf of Dr. Weiner. Dr. Kobak was licensed to practice podiatry in New York in 1976. He was also licensed in Florida in 1984 or 1985, and in New Jersey in 1986. Currently, he practices only in New York. (Resp. Ex. F; Tr. 2490-2491)

Dr. Kobak received his Doctor of Podiatric Medicine degree in 1976 from the New York College of Podiatric Medicine. Dr. Kobak did not complete an internship or residency in podiatric medicine. Rather, he served a one-year preceptorship with his brother, Dr. Martin Kobak. The preceptorship was a program under the auspices of the New York College of Podiatric Medicine. Following his preceptorship, Dr. Kobak opened his own office. (Tr. 2491-2492)

Dr. Kobak testified that he is a diplomate of the American Board of Podiatric Surgery, Ambulatory Division. Dr. Kobak stated that the American Board of Podiatric Surgery, Ambulatory Division, is recognized by the American Podiatric Medical Association, but membership in the American Podiatric Medical Association is not required. The American Board of Podiatric Surgery, Ambulatory Division, was created when, as a result of various lawsuits among certifying bodies, the American Board of Ambulatory Foot Surgery and the American Board of Podiatric Surgery merged. Dr. Kobak testified that the American Board of Podiatric Surgery, Ambulatory Division, is office-oriented; in order to qualify for membership, cases must be presented that are performed in an office setting or on an outpatient basis in a hospital or outpatient surgery center. (Tr. 2493-2495)

Dr. Kobak is also a diplomate of the American Institute of Foot Medicine. Dr. Kobak explained that when the American Board of Ambulatory Foot

Surgery became part of the American Board of Podiatric Surgery, the membership in the Ambulatory Division was frozen. The American Institute of Foot Medicine was formed to meet the needs of office-based or outpatient-hospital based surgeons. Its focus is primarily, but not exclusively, office-based. (Tr. 2495-2496)

Dr. Kobak is also a diplomate of the American Board of Quality Assurance and Utilization Review Physicians. Dr. Kobak said that this is an inter-disciplinary board geared toward health professionals who review charts for the efficacy of treatment. Dr. Kobak stated that he reviews insurance forms and charts for Chubb Insurance Company and Massachusetts Mutual. (Tr. 2496-2502) Dr. Kobak is also a diplomate of the American Academy of Pain Management, which he testified is another inter-disciplinary board. (Tr. 2502-2503)

Dr. Kobak testified that the American Academy of Pain Management, the American Board of Quality Assurance and Utilization Review Physicians, and the American Institute of Foot Medicine are all recognized and approved by the National Organization of Certifying Agencies [NOCA]. (Tr. 2503-2504)

Dr. Kobak is also a fellow of the Academy of Ambulatory Foot Surgery. He was elected to the presidency of that group in 1991, and re-elected President in 1992. Dr. Kobak said that the Academy of Ambulatory Foot Surgery was started in 1972 by podiatrists who mainly did office-based and outpatient surgery, largely minimal incision surgery. Dr. Kobak said that there are currently about 1000 members. Dr. Kobak said that the organization is also recognized by NOCA. Dr. Kobak stated that he originated the idea that the Academy of Ambulatory Foot Surgery should assemble guidelines and standards of care. He was very involved in the effort. The end product of this effort is the document entitled *Preferred Practice Guidelines* [Resp. Ex. G]. Dr. Kobak testified that the purpose of preparing the standards of care and guidelines was “[t]o give our members, the public, as well as the insurance companies and legal profession, the rules of the road for the type of work that our members do and did.” (Resp. Ex. F; Tr. 2504-2511)

Dr. Kobak testified that he is no longer a member of the American Podiatric Medical Association. He discontinued his membership in that organization in 1986 “due to political differences between that organization and [Dr. Kobak’s] own personal beliefs.” (Tr. 2690)

Dr. Kobak agreed that the Academy of Ambulatory Foot Surgery more accurately reflects his personal beliefs. (Tr. 2690)

Dr. Kobak testified that he is not affiliated with any hospitals, as he does all office-based surgery. (Tr. 2524, 2732) Dr. Kobak testified that he performed surgery in hospitals from 1976 to 1978. He held hospital privileges from 1976 to about 1980 or 1981, but has not held hospital privileges since that time. He said he has access to board-certified anesthesiologists, if needed, at all of his practice locations. (Tr. 2733-2735)

- f. Dr. Weiner testified as if on cross-examination by the State. He stated that he attended the Ohio College of Podiatric Medicine from 1959 to 1963. Dr. Weiner then completed a one-year general medical internship with podiatry overtones at St. Louis Hospital, Philadelphia, Pennsylvania. Dr. Weiner testified that he rotated through various departments, including radiology, and was continually involved in surgery. He testified that he was trained in foot surgery, but also assisted in thoracic surgery, open-heart surgery, and others. In 1964, Dr. Weiner opened a general and surgical podiatry practice in South Euclid, Ohio. He has practiced in many locations in northeast Ohio since that time, and has practiced with many different podiatrists. Presently, Dr. Weiner has three offices: two are in Akron and the other is in North Olmstead. (Tr. 1055-1057, 1062-1064, 3526-3537)

Dr. Weiner stated that he is not presently a member of any professional organizations. He is a former member of the American Podiatric Medical Association and the American Academy of Ambulatory Foot Surgery. Dr. Weiner could not recall what years he was a member of these organizations, but testified that he failed to renew his membership in the American Podiatric Medical Association sometime before 1980. He testified further that he had been a member of the American Academy of Ambulatory Foot Surgery since its inception around 1965, but could not recall, to the decade, when his membership discontinued. He testified that he discontinued his membership in the American Academy of Ambulatory Foot Surgery for “[n]o particular reason.” (Tr. 1057-1060)

Dr. Weiner stated that he does not hold any board certifications but believes that, by virtue of his hospital-based internship, he is board eligible. (Tr. 1060-1061)

Dr. Weiner testified that he does not presently hold any hospital privileges, nor did he hold any hospital privileges in the past. (Tr. 1061)

Dr. Weiner testified that he currently has no other podiatrists practicing with him. Now, Dr. Weiner has just one employee, Patricia Noga, who acts as Dr. Weiner's office manager and assistant. Both of them travel between Dr. Weiner's three offices. Calls from patients are forwarded to a central location at Dr. Weiner's Akron office. (Tr. 1063, 1067-1073)

GENERAL TESTIMONY CONCERNING THE STANDARD OF CARE

Dr. Van Enoo

Dr. Van Enoo testified that the standard of care for the podiatry profession has evolved over the years to the point where a global standard now exists within the United States. (Tr. 60-63)

Dr. Van Enoo did not agree with Dr. Kobak's assertion that there are multiple standards of care within the podiatric community. Dr. Van Enoo acknowledged that various hospitals and insurance carriers, for example, have different requirements. For instance, a particular hospital may have particular requirements or procedures concerning the submission of tissue to pathology. However, these requirements are not the same as standards of care. (Tr. 3856-3860)

Concerning schools of thought or organizations, however, Dr. Van Enoo testified that there are differences between residency-trained, board certified hospital-based practitioners versus non-hospital-based practitioners, and that the former are held to standards that are commensurate with their training. Nevertheless, some of the procedures performed by hospital-based practitioners would not be performed by office-based practitioners. However, Dr. Van Enoo added: "There's a certain set of standards that applies to everyone, however. Those are called basic standards, and it goes back to what would a reasonable and prudent podiatrist do for a given patient given certain symptoms and certain diagnoses." (Tr. 3860-3861)

Further, Dr. Van Enoo testified that podiatry is a medical specialty, and a patient who visits a podiatrist can expect a higher level of foot care than would be expected from a generalist, such as a family practice physician or general orthopedist. Moreover, the body of knowledge called podiatric medicine has developed certain criteria upon which its treatment plans should be based. (Tr. 3862-3863)

Dr. Van Enoo criticized the fifteen statements entitled “Standards of Care” contained in the inside front cover of the *Preferred Practice Guidelines* of the American Academy of Ambulatory Foot Surgery. He testified that a majority of those statements leave issues to the discretion of the doctor and, therefore, do not set standards of care. “If it’s left up to the individual doctor, it’s not a standard of care.” (St. Ex. G; Tr. 3855-3856)

Dr. Stewart

Dr. Stewart stated that the Preferred Practice Guidelines of the American College of Foot Surgeons concerning hammertoe syndrome set forth the standard of care in the podiatric community regarding the surgical and nonsurgical treatment of hammertoe syndrome. Dr. Stewart participated in the questionnaires and literature that formed the basis of these guidelines. (St. Ex. 93; Tr. 733-735)

Dr. Stewart testified that he is familiar with minimal incision surgery, and performs some minimal incision techniques himself. He uses minimal incision techniques to perform removal of exostosis of the toes, as well as tendon lengthening. In determining whether a particular surgery can appropriately be done via minimal incision surgery, the primary consideration is the accessibility of the area, and the ability to ascertain whether the work has been done correctly. This is a concern in minimal incision surgery, because such surgery is performed primarily by tactile sensation, and the surgeon is not able to directly visualize the area. (Tr. 705-707)

Dr. Kushner

Dr. Kushner testified that “[t]he standard of care for office-based surgery should be essentially the same as it is for any other surgery.” (Tr. 1635-1636)

Dr. Kushner stated that the American Board of Podiatric Surgery is the organization that provides board certification for podiatrists. Its divisions for certification are foot surgery, foot and ankle surgery, and ambulatory foot surgery. The division for ambulatory foot surgery resulted from a conflict that arose in the late 1970s. Dr. Kushner stated:

[A] group of people who were practicing what they referred to as minimal incision surgery felt that the American Board of Podiatric Surgery was unfair, interfering with the practice of their profession, in that in order to become board certified by the American Board of

Podiatric Surgery, you had to present [a] certain number of cases to this Board.

Those cases were cases that were done in a hospital. And because these people didn't—generally didn't practice in a hospital—they only did surgery in their offices—they were unable to meet the criteria for board certification.

They felt that was unfair, even though they had every opportunity to do cases in the hospital as well. So they filed a lawsuit against the American Board of Podiatric Surgery, which I remember well because I remember my dues got assessed at that point * * * [t]o pay the attorneys' fees for this tremendous lawsuit. The lawsuit went on for a while, and it was getting to the point where it was beginning to bankrupt the profession, really. And at that point, they settled the lawsuit. The settlement involved making a separate category for ambulatory foot surgeons.

(Tr. 1602-1603)

Dr. Kushner testified that he is familiar with the Academy of Ambulatory Foot Surgery. This is a separate organization from the American Board of Podiatric Surgery, Ambulatory Division. The Academy of Ambulatory Foot Surgery is made up of podiatrists and perhaps some non-podiatrists, "who have a similar interest in a particular technique of doing surgery through small incisions, and they represent a relatively small percentage of the overall podiatric profession. Their techniques, beliefs, whichever you prefer to call them, are not universally accepted throughout the profession." (Tr. 1600)

Dr. Kushner testified that he is not a member of the Academy, although he does utilize some minimal incision techniques in his practice. (Tr. 1600-1601)
The only procedures that Dr. Kushner performs via minimal incision techniques are partial osteotomies on the distal medial aspect of digits, usually fifth digits, and, under certain circumstances, tenotomies. (Tr. 1649-1650)

Dr. Kushner stated that there are approximately 4000 diplomates of the American Board of Podiatric Surgery, and about 200 - 230 diplomates in the ambulatory foot surgery division. (Tr. 1604) The latter includes only certified physicians. Dr. Kushner does not know how many members the American Academy of Ambulatory Foot Surgery has. (Tr. 1640-1641)

Dr. Kushner stated that “in general terms, after discussing podiatry in general with members of the podiatric community, which I do on a daily basis and have for years, that the general opinion of minimal incision surgery or the Academy of Ambulatory Foot Surgery, of all the people I’ve spoken to—and I think I represent a fairly representative sample of people during the course of a year or years—that the Academy of Ambulatory Foot Surgery is held in low esteem and is not being practiced by many people.” (Tr. 1642)

Dr. Kushner testified that the techniques practiced by the Academy of Ambulatory Foot Surgery that are not widely accepted by the profession include “[a]lmost any of their techniques; most of their bone surgery techniques, which encompasses a large part of minimal incision surgery.” Nevertheless, Dr. Kushner did not equate such acceptance or lack thereof as indicative of the standard of care. (Tr. 1644)

Dr. Goldenberg

Dr. Goldenberg testified that the standard of care is determined “by what is performed by a number of practitioners in a particular community and based on some year and some changes. They make changes from year to year.” Concerning whether the standard of care is established by academic institutions, Dr. Goldenberg said that the clinic at the College of Podiatry in Des Moines does not establish the standard of care for the community. Podiatric students are taught according to the book, which may or may not match what practitioners in the real world are doing. Moreover, some practitioners are unable to practice according to the standards of the clinic because of educational changes that have taken place. What the practitioner learned in school may not be what is being taught today in the college. (Tr. 1831-1832)

Dr. Goldenberg testified that different standards of care apply to podiatrists who graduated from podiatry school in 1960 from those who graduated in 1995. (Tr. 2351-2352) Dr. Goldenberg testified:

As far as I remember, the standard of care [for recordkeeping] is that of which each physician is taught while they’re in college and performs while they’re out of practice. If it varies from physician to physician, that’s because each physician is taught differently over the years from the time they attended college; therefore, the standard of care has a range. And as long as these physicians fall within that range of the standard of care, it’s within the standard of care.

(Tr. 2407-2408)

Dr. Goldenberg also stated that he is familiar with the school of thought that says if something is not mentioned in a patient's medical records then it didn't happen. However, Dr. Goldenberg said that it is not the standard of care for medical recordkeeping. (Tr. 1835-1836, 2329-2330) It is not appropriate to base an evaluation of the 62 patient records on the assumption that if something isn't written in the record it didn't happen. This was "[b]ecause you only record pertinent data or abnormal findings. To not record things that are not pertinent doesn't mean it did not happen." (Tr. 1836-1837)

Dr. Goldenberg testified that he is familiar with minimal incision surgery, although he practices it very rarely himself. Concerning the philosophy of minimal incision surgery, Dr. Goldenberg stated, "First, to keep the patient as ambulatory as possible. Some procedures are done through small incision in multiple stages or settings or serial fashions to provide less incapacity to that particular patient's health." (Tr. 1861-1862) The goal is not to minimize trauma to the toe. Some minimal incision procedures may cause less trauma to a toe than the corresponding open technique. Others may cause the same amount of trauma. But because there is a smaller incision, there may be less pain and discomfort. (Tr. 2411-2413)

Dr. Goldenberg disagreed with Dr. Stewart's testimony that the Preferred Practice Guidelines of the American College of Foot and Ankle Surgeons concerning hammer toe syndrome is the standard of care for the podiatric community. Dr. Goldenberg testified that membership in that organization requires that the applicant complete a surgical residency, which have only become available during the last few years, as well as board certification by the American Board of Podiatric Surgery. Dr. Goldenberg stated that there are approximately 12,000 practicing podiatrists of which only 2200 or 2300 are member of the College. Moreover, the Preferred Practice Guidelines of the American College of Foot and Ankle Surgeons concerning hammer toe syndrome was approved in 1991 and copyrighted in 1992. Therefore, it would be inappropriate to apply such guidelines as a standard for earlier cases. Finally, Dr. Goldenberg referred to a disclaimer in the Preferred Practice Guidelines of the American College of Foot and Ankle Surgeons concerning hammer toe syndrome which stated that they are only intended to provide guidance for general patterns of practice, and not to dictate the care given individual patients. (St. Ex. 93; Tr. 2082-2084)

Dr. Goldenberg testified that standards of care differ among podiatric colleges, college clinics, hospitals, and private offices. This is "[b]ecause of the level of training of physicians, podiatric physicians, over the years and the level of

training and experience changes for those groups of practitioners, depending on their practice location.” Dr. Goldenberg agreed that the same rationale would apply between hospital-based practices and office-based practices. (Tr. 2084-2087, 3241-3242)

Dr. Goldenberg was asked if the standard of care varied, for a given procedure, depending on whether the procedure is performed in a hospital or an office. Dr. Goldenberg stated, “If you look at the standard of care as being a range. There’s more than one way to do a procedure, and all those different ways fall within the standard of care. Now, that one procedure may be done one way in the hospital, but may be done another way in the office, but it’s still the same procedure falling within the same standard of care, but that is within a range.” (Tr. 3109-3110)

Dr. Goldenberg stated that Dr. Stewart could not properly opine concerning Dr. Weiner’s treatment of these patients on issues other than recordkeeping. This was because Dr. Stewart began his review of the patient records with the assumption that, if something is not noted in the records, then it did not occur. Dr. Goldenberg said:

[Dr. Stewart] constantly notes that the examination was not completed. Without having in his mind a complete examination, there’s no way he could determine whether the procedures performed or the quality of the procedures performed were appropriate for the indicated diagnostic impressions. My review of this, I find that the charts are complete, which allows me to give an opinion, based on the diagnostic findings, as well as the surgical performance, on these particular cases and files.

(Tr. 2087-2091) If Dr. Van Enoo or Dr. Kushner used the same assumption, Dr. Goldenberg stated that his answer would be the same concerning their testimony. (Tr. 2091-2092)

Dr. Kobak

Dr. Kobak testified that “the standard of care is what is considered minimally competent by the average podiatrist in the United States of America.” (Tr. 2601-2602) When asked if there are multiple standards of care in the podiatric profession, Dr. Kobak answered, “All the standards of care that I’m aware of aim at providing safe treatment for the patients. They may go about it slightly differently. The standards of care by the Academy of Ambulatory Foot Surgery are more specifically office-based. So that they were prepared

with the office or outpatient setting in mind, as opposed to more of an inpatient setting in mind.” (Tr. 2893) When asked if there are any global standards of care that apply to podiatrists, Dr. Kobak replied, “I don’t think you could take one and say that it’s universally accepted as it is by all podiatrists.” (Tr. 2894) Finally, Dr. Kobak added, “There’s a consensus standard of care amongst the Fellows of the Academy of the College of Ambulatory Foot Surgery.” (Tr. 2896-2897) (See discussion at Tr. 2691-2704)

Dr. Kobak testified that there are different standards of care between hospital-based and office-based podiatrists. Because there are so many individuals involved in a hospital setting, the recordkeeping requirements for hospital-based podiatrists is much more strict and demanding. (Tr. 2514-2516)

Dr. Kobak testified that the Preferred Practice Guidelines of the Academy of Ambulatory Foot Surgery was distributed to all members of that organization upon payment of their dues. It was not distributed to members of the American Podiatric Medical Association. It is available for purchase by anyone, and has been advertised several times in the *Journal of the Academy of Ambulatory Foot Surgery*, and in *Podiatry Management Magazine*. (Tr. 2713-2717)

Dr. Kobak testified that podiatrists who are not members of the American College of Foot and Ankle Surgery are not bound by the standards of that organization. Similarly, podiatrists who are not members or fellows of the Academy of Ambulatory Foot Surgery are not bound by the Preferred Practice Guidelines of that organization. They may use it as a guide. (Tr. 2863)

GENERAL TESTIMONY REGARDING THE BOARD’S ALLEGATIONS

1. “[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”

Dr. Van Enoo

Dr. Van Enoo testified that keeping a good patient record is very important, and is the standard of practice. “A patient is entitled to have access to a credible record. He or she may move to another town. Those records may need to be transferred to another doctor. That doctor needs to know what went on. * * * I think it’s incumbent upon us as physicians to give that patient

access to a record where he or she knows exactly what went on with his or her body.” (Tr. 93-94, 98)

Dr. Van Enoo further testified that medical recordkeeping is below the minimal standards of care if only abnormal findings are noted. (Tr. 439-446, 656-657) He stated that, in his review of Dr. Weiner’s records, “the narrative of what happened to the patient from the time that patient walked in the office until discharge is very, very inadequate. Whether it’s negative findings or positive findings, the total findings related to the patient are absolutely missing from these charts.” (Tr. 657-658) It can be useful in subsequent treatment to know that, at a particular time, that certain things were “normal.” (Tr. 658-659)

Dr. Van Enoo was asked if the standard of care for recordkeeping includes the maxim “if something is not stated in the record, it didn’t happen.” He replied, “if it’s not in the record, a subsequent treating physician or a consultant * * * can’t see what happened. So in his or her mind, it didn’t happen.” (Tr. 98-99) Concerning podiatric medical recordkeeping in general, Dr. Van Enoo testified that a podiatric patient’s chart is everything contained in the patient file. Dr. Van Enoo agreed that he was able to ascertain what took place from the four corners of the records that he reviewed. Nevertheless, Dr. Van Enoo characterized much of the information contained in Dr. Weiner’s medical records as meaningless. (Tr. 388-395, 401-404)

Concerning specific recordkeeping issues that are germane to a number of the patient records, Dr. Van Enoo testified as follows:

- “Neoplasm” is not the correct term for a podiatrist to use to describe a callus. (Tr. 433)
- Although patients often see a podiatrist because of pain in the feet, “pain” alone is not sufficient to record the patient’s chief complaint. (Tr. 433-434)
- The terms “hammertoe” and “exostosis” are sufficient as diagnostic impressions; however, Dr. Van Enoo’s stated that Dr. Weiner should have specifically noted where these problems were observed. (Tr. 434-435)
- Dr. Van Enoo said that the term “arthropathy” is meaningless and too generic for a diagnostic impression unless the podiatrist refers to the type of arthropathy and the location of the problem. (Tr. 436-437)
- Dr. Van Enoo testified that osteomas are not the same as exostoses. (Tr. 437-438)

Regarding the examination of specific systems, Dr. Van Enoo testified as follows:

- Concerning Dr. Weiner's performance of examinations for circulatory sufficiency in the 62 patient charts reviewed, Dr. Van Enoo testified that he assumed that if there was no reference to an observation that the same was not observed. Dr. Van Enoo testified that a good circulatory exam should include a notation of the quality of the pedal pulses, as well as the quality of the skin. He further explained that "normal" is not a useful term to describe the results of diagnostic circulation tests. (Tr. 402-406, 441-443)
- Dr. Van Enoo testified that a good podiatric neurological examination would include a number of factors, such as the presenting complaint, the age and history of the patient, a reflex exam, and, possibly, a vibratory exam and a Babinski exam. He added that "normal" is not an appropriate notation following a reflex test. The results must be graded. (Tr. 410-414) Moreover, Dr. Van Enoo stated that a more thorough neurological exam is necessary when the patient presents with neurological symptoms and the podiatrist anticipates appreciably altering the function of the foot. A consultation with a neurologist may also be necessary. (Tr. 649-654)
- Dr. Van Enoo testified that a good musculoskeletal exam would involve an observation of the foot, and an analysis of the patient's gait. The podiatrist should palpate the foot, check the arches, and examine the heel. The podiatrist may also perform a range of motion exam examination. (Tr. 417-425, 429-430)

Dr. Van Enoo testified that the primary reason for keeping medical records is to ensure continuity of care for the patient. Dr. Van Enoo mentioned circumstances in which a patient would need access to complete and accurate records of his or her medical care, including moving, a desire to change podiatrists, and the death of the treating podiatrist. A second reason for keeping medical records is to enhance the treating podiatrist's recall concerning his treatment of the patient. A third reason is to support the compensation received from third-party payers in the event of an audit. And a final reason is for the doctor's protection in the event of legal action concerning his or her treatment of a patient. (Tr. 3852-3854) He concluded that maintaining accurate and complete medical records is the "minimal standard[] of care in the medical community. Has nothing to do with what school you went to, how much

training you've had or what organization you belong to. That is basic, proper medical standard of care regarding recordkeeping." (Tr. 3854)

In response to the testimony of Respondent's experts, Dr. Van Enoo testified as follows:

- Dr. Van Enoo disagreed with the testimony of Dr. Goldenberg and Dr. Kobak that it is within the standard of care for a podiatrist to document only abnormal findings in the medical records. Dr. Van Enoo testified that some normal findings need to be included in the records, and one of the main reasons for doing so is simply to show that a complete examination was performed. (Tr. 3871-3873)
- Concerning Dr. Kobak's opinion that a chief complaint of "pain" is sufficient, Dr. Van Enoo agreed that "pain" should be recorded since that would be the subjective complaint from the patient. However, it would be logical to ask the patient where the pain is; is the skin painful, the toes, the nails? "Pain" alone is too general. (Tr. 3880-3881)
- Dr. Van Enoo disagreed with Dr. Goldenberg's and Dr. Kobak's assumption that Dr. Weiner did a complete physical examination in order to arrive at his diagnoses. (Tr. 4074-4075) Dr. Van Enoo referred to a passage from the *Legal Guide for Physicians* (Resp. Ex. H) that states: "When a subjective finding, such as a diagnosis, is included, the physician should ensure that the chart adequately reflects the objective data upon which the conclusions were made. If it does not, the doctor may be unable to substantiate these conclusions on a later occasion." (Resp. Ex. H; Tr. 3875-3876) Dr. Van Enoo stated that objective findings were generally not present in the 62 patient records in this case. (Tr. 3873)
- Dr. Van Enoo disagreed with Dr. Kobak's testimony that recording the dorsalis pedis and posterior tibial pulse rates were within the standard of care for the circulatory examination. Dr. Van Enoo testified that "[a] vascular exam, as practiced by the average prudent podiatrist, includes more than taking a pulse; as a matter of fact, taking the pulse at the ankle is not done by anybody I know." He added that, during the vascular exam, the podiatrist should check the quality of the pulse, as well as the skin color. (Tr. 3881-3882)
- Dr. Van Enoo disagreed with the opinions of Dr. Goldenberg and Dr. Kobak that recording general terms, such as arthropathy, contracted tendon, or osteomas, is sufficient for recording diagnostic impressions.

Dr. Van Enoo stated that they were too general, and not substantiated with objective findings by Dr. Weiner. (Tr. 3879-3880) Dr. Van Enoo testified that when a podiatrist makes a diagnosis such as arthropathy, the medical records should indicate where the arthropathy is and the basis for the diagnosis. (Tr. 3880)

- Dr. Van Enoo disagreed with Dr. Kobak's opinion that the standard of care does not require a podiatrist to specify in the medical records which toes are hammered or have contracted tendons. Dr. Van Enoo stated that the standard of care requires the physician to indicate which toe(s) he or she is dealing with. Dr. Van Enoo analogized it to a situation in which a dentist does not record which teeth have cavities. (Tr. 3876-3879)

Dr. Stewart

Dr. Stewart testified that a patient's initial visit begins with a general medical history and a history of the podiatric problem. The podiatrist and staff must review the history with the patient to ensure that all necessary information has been obtained. A preliminary exam is performed to ascertain the patient's circulatory and neurologic status. The condition of the skin must be assessed, as well as the biomechanical structure of the foot. Then the exam focuses on the chief complaint, and the podiatrist determines what diagnostic tools must be employed to carry this out. This medical examination must be documented in the medical records. Dr. Stewart advised that the podiatrist is "obligated to record every element of that examination." (Tr. 713-717)

Dr. Stewart stated that nonremarkable or normal characteristics should be noted as such in the chart. Such notations may be useful in determining the source of the pathology, and may also be valuable in evaluating treatment options. Concerning the latter issue, Dr. Stewart noted that some treatment options that may be available for a patient with normal circulation may not be feasible if the patient has abnormal circulation. (Tr. 717-720)

Moreover, Dr. Stewart testified that it is important for a subsequent treating podiatrist to be able to determine from the medical records what was done with a patient diagnostically. The subsequent treater can thereby avoid repeating evaluations that have already been performed, and a complete record can provide a basis for further evaluation of items that were not previously addressed. Dr. Stewart testified that it is below the minimal standards of care to note only abnormal findings in the medical records. (Tr. 717-720, 948) Dr. Stewart did state, however, that it is acceptable for a

podiatrist to simply note “normal” as his findings following a dermatologic or neurologic examination. (Tr. 914)

Regarding the phrase “benign neoplasms,” Dr. Stewart testified that it is below the minimal standards of care for a podiatrist to describe warts, corns, calluses, and proud flesh as such. Benign skin lesions should be described specifically as what they are. (Tr. 735-736)

In the opinion of Dr. Stewart, Dr. Weiner’s care and treatment of each of the 62 patients in this Matter fell below the minimal standards of care, in that:

- In all 62 patient records, Dr. Weiner failed to document an adequate patient history, or to document that Dr. Weiner had reviewed the history, and that any questions that were generated as a result of the patient history were asked and completed.
- In all 62 patient files, Dr. Weiner failed to specifically identify the anatomic structures affected by symptoms. Further, “There were no attempts to specify the location of a pathology in the patient’s foot, and there was no adequate differential diagnosis listed in the chart.”
- In all 62 patient files, the x-rays that were taken were not followed-up by a report of findings, either in the form of a separate report or in the progress notes. No connection was made in the record between the x-rays taken and presumptive diagnoses.

(Tr. 879-885; 1025-1026)

Dr. Kushner

Dr. Kushner testified concerning a patient’s initial visit. The podiatrist should get all of the information surrounding the patient’s chief complaint, as well as a history of the present complaint. Then, regardless of whether the patient filled out a medical history complaint, the podiatrist should review the patient’s medical history with the patient. (Tr. 1203-1204)

After discussion of the history, the podiatrist should proceed with the examination. Dr. Kushner said that it is necessary to get the patient’s vital signs, and to examine the vascular system, the neurologic system, the dermatologic system, and the musculoskeletal system. Often, based on the history and examination, the podiatrist will determine that further studies are needed. (Tr. 1204-1205)

Thereafter, on the basis of the patient's history, examination, and the results of any studies that were performed, the podiatrist makes a determination of what is causing the patient's problem, and the treatment options available. The treatment options should be discussed with the patient, and the podiatrist and patient should decide how the patient's care will proceed. All of this must be carefully documented in the chart. (Tr. 1205)

Dr. Kushner testified that the standard of care requires podiatrists to clearly document all abnormal findings, and, in most cases, normal findings. "If you just put down abnormal findings, how does anyone know what you did in terms of examination, whether you even did a complete examination?" (Tr. 1206-1207) Dr. Kushner gave an example of a patient with heel pain. Many things can cause heel pain. One of the more serious causes is a fractured calcaneus. In order to rule this out, the podiatrist squeezes the calcaneus from side to side, what Dr. Kushner termed "lateral compression." If the patient experiences significant pain, a fractured calcaneus is suspected. If the patient has no pain, the podiatrist can be more comfortable eliminating calcaneus fracture as a cause. (Tr. 1207-1208)

Dr. Kushner testified that it is not proper for a podiatrist to chart only abnormal findings. (Tr. 1727)

Dr. Kushner testified that this is the standard of care for a podiatric examination, and has not changed since before 1984. (1211-1212) Moreover, Dr. Kushner testified that the standard of care for recordkeeping is the same for office-based practices as it is for non-office-based practices. (Tr. 1653-1654)

Dr. Kushner testified that the medical records for the 62 patients at issue in this Matter "are grossly below the standard of care in terms of the history and physical examinations that were done and recorded." (Tr. 1227)

Concerning specific aspects of a podiatric physical examination, Dr. Kushner testified as follows:

- When documenting a palpation exam, it is below the minimal standards of care to fail to make reference to specific anatomic structures. (Tr. 1212-1213)
- Concerning the elements of a dermatological examination, the skin of the foot should be thoroughly examined, as well as the nails. Any lesion that

is observed should be documented, including its size, location, color, and other characteristics. (Tr. 1213-1214)

- Any basic vascular exam would consist of an assessment of the pedal pulses. First, the podiatrist should document that they are present, then the pulses should be graded. The grading scale could be a zero to four scale, or could be graded as absent, not palpable, barely palpable, weakly palpable or easily palpable. (Tr. 1214-1216) In addition to grading of pedal pulses, capillary fill time is usually measured. (Tr. 1217)

Regarding Dr. Weiner's assessment of pedal pulses, Dr. Kushner testified that he never before heard of pedal pulses being evaluated based on the heart rate. He further testified that to grade the pedal pulses by the heart rate is below the minimal standards of care. (Tr. 1216)

- A neurologic exam consists of sensory tests that test the patient's sense of sharp versus dull, vibration, and proprioception, which is the patient's ability to determine the position of a body part in space. Deep tendon reflexes of the achilles and patella tendons are tested. Usually, the podiatrist also tests for pathologic reflexes, such as for Babinski and for clonus. (Tr. 1218-1219)
- Dr. Kushner said that the musculoskeletal examination is the most difficult to discuss in terms of the standard of care. Such an exam generally consists of gross muscle testing, and testing the range of motion of major joints of the foot: the ankle, the subtalar, the mid-tarsal, and the metatarsophalangeal joints. A palpation exam may also be required depending on the patient's complaint. Abnormal findings may be an indication for further testing. (Tr. 1219-1220)

Dr. Kushner testified that it is necessary to document all findings made in connection with the aforementioned tests. (Tr. 1220)

In addition, Dr. Kushner testified that, based on his review of the records, Dr. Weiner did not attempt to localize patients' complaints to specific anatomic structures. He concluded that this is below the minimal standards of care. (Tr. 1228-1229)

Dr. Kushner testified that if something is not contained in a medical record, he assumes that it did not occur. Based upon that assumption, he concluded that Dr. Weiner did not perform appropriate histories and physical examinations on the patients in this case. Nevertheless, Dr. Kushner acknowledged that he

was not in the examining room at the times that Dr. Weiner examined these patients. (Tr. 1227, 1654-1680) Moreover, Dr. Kushner testified that he based his decision on the issue of whether x-rays were necessary for these patients on what was contained in Dr. Weiner's medical records for these patients. (Tr. 1674-1675)

Dr. Kushner further testified that there were no palpation examinations documented in Dr. Weiner's medical records. "The standard of care is to examine the patient with regard to their chief complaint, which includes a palpation exam and the documentation of that exam." Dr. Kushner concluded that the failure of Dr. Weiner to document a palpation examination fell below the minimal standards of care. (Tr. 1229-1231)

Dr. Goldenberg

Dr. Goldenberg testified that "[t]he standard of care [for record-keeping] is to record what each individual physician may feel is pertinent for each particular patient." This would involve "[a]n examination, notations of the examination, the results of the examination." It is within the standard of care to chart only pertinent abnormal findings. (Tr. 1832-1833, 2179.) Concerning, for example, circulatory findings, such as decreased color, or decreased hair growth, Dr. Goldenberg assumed that if such things were not recorded, then they were normal. (Tr. 2322-2323)

Alternatively, however, Dr. Goldenberg testified that medical recordkeeping may not be a standard of care issue at all, because "[c]harting varies from physician to physician based upon the year of training as well as their experience and when they went to school." (Tr. 3241-3242)

Dr. Goldenberg testified that the standard of care for podiatry in 1996 is different from what the standard of care was in 1985. One cannot judge with today's standards actions that took place in 1985. (Tr. 1999-2000)

Dr. Goldenberg testified that standards of care concerning recordkeeping evolve in the colleges, and students taught during a specific period will continue to use the same recordkeeping methods that they were taught. Dr. Goldenberg noted that very few CME courses teach recordkeeping. (Tr. 2000-2001)

Dr. Goldenberg stated that, as long as charting one way versus another does not impact the care or treatment of a patient, it is not a standard of care issue. Conversely, if it does impact the care and treatment of a patient, it becomes a standard of care issue. (Tr. 3241-3245)

Dr. Goldenberg testified that the question of what should be included in a medical record is purely in the discretion of the physician: (Tr. 2335)
Regarding that statement, the following interchange occurred:

Ms. Strait: So if what gets written in the chart is purely within the discretion of the treating physician, then there is no standard of care as to recordkeeping, correct?

Dr. Goldenberg: Not necessarily. Standard of care changes over the years from community to community. The podiatric community, writing abnormal findings, I feel, is the standard of care.

Ms. Strait: But, Doctor, if what's written in the records is up to the individual physician, then the standard of care could vary from physician to physician, so there is no general standard of care, right?

Dr. Goldenberg: Possibly.

Ms. Strait: I think that's a yes or no. What do you mean, "possibly"?

Dr. Goldenberg: I don't know.

Ms Strait: You don't know?

Dr. Goldenberg: No.

* * *

Ms. Strait: At any rate, Doctor, we can agree that it's your testimony that as far as recordkeeping is concerned, the standard of care and what needs to be included in a record can vary from physician to physician. That is your testimony, correct?

Dr. Goldenberg: No.

Ms. Strait: It is not?

Dr. Goldenberg: No. No. My feeling is the standard of care is that the doctor lists pertinent information that he feels is pertinent, and that is the standard of care.

Ms. Strait: Okay. And what each individual physician thinks is pertinent can change—can differ from physician to physician?

Dr. Goldenberg: What each individual physician may think is pertinent could vary from physician to physician, yes.

(Tr. 2335-2339)

Dr. Goldenberg disagreed with the statement that one of the purposes of a medical record is to allow a subsequent treater to determine what had been done with a patient. Dr. Goldenberg said he believed that the reason for keeping medical records was to allow the treating podiatrist to follow his course of care. When asked what happens if a treating podiatrist retires or moves away, Dr. Goldenberg stated that, if one of his patients changes podiatrists, he sends a copy of his office notes to the subsequent treater, and may also dictate a narrative summary of his findings. Then he was asked:

Ms. Strait: So it is important for a subsequent treating physician to be able to know from a medical record what happened, what the original podiatrist did with the patient, correct?

Dr. Goldenberg: It's—not necessarily.

Ms. Strait: Not necessarily. It's not necessarily important for a subsequent treating physician to know what the original podiatrist did, what procedures the original podiatrist performed with that patient?

Dr. Goldenberg: If the information is in the chart, I feel that's enough information for that.

Then Dr. Goldenberg stated that he felt that there was sufficient information contained in each of Dr. Weiner's 62 patient charts. Dr. Goldenberg said that he was able to follow exactly what was done, and it would then be up to him to examine the patient and form an opinion concerning what had taken place, using his own exam and the previous physician's chart. Dr. Goldenberg was then asked:

Ms. Strait: Getting back to my original question, Doctor, it is important for a subsequent treating physician to be able to ascertain what happened with the patient; isn't that correct?

Dr. Goldenberg: Sure.

(Tr. 2340-2341)

Concerning specific aspects of a podiatric physical examination, Dr. Goldenberg testified as follows:

- Dr. Goldenberg testified that it is not beneath the standard of care in the podiatric community to note in the circulatory examination the patient's pulses in beats per minute. "Because the fact that there's beats per minute indicates that there has to be circulation into the feet. So listing beats per minute indicates that the patient does have adequate circulation." (Tr. 1874) Moreover, Dr. Goldenberg stated that the circulation exam performed by a podiatrist can only show whether or not circulation is intact. It cannot be rated as to its quality or strength. (Tr. 3014-3015) In addition, Dr. Goldenberg testified that when you have several people using the same rating system on the same patient, they don't all rate the patient the same. Dr. Goldenberg stated that it is more important to note whether pulses are intact and present, and equal from one foot to the other. He testified that it is not below the minimal standards of care not to rate the pulses according to a scale. (Tr. 3292-3294)
- Dr. Goldenberg acknowledged that it is important to know, in the case of a diagnosis of exostosis toes, where the bone growth is on the toes, and which toes have the abnormal bone growth. (Tr. 2342-2343)
- Concerning, for example, a diagnostic impression of "contracted tendons," Dr. Goldenberg testified that it is not necessary for the podiatrist to note where the contraction is, and denied that it is important to know the location of a contraction. (Tr. 2332-2334)
- Dr. Goldenberg defined a benign neoplasm is any non-cancerous abnormal growth. The term includes calluses, warts, moles. It is not below the minimal standards of care to refer in the medical records to any such growth as a benign neoplasm. (Tr. 1864-1865, 2353-2355) Nevertheless, Dr. Goldenberg acknowledged that, in his own medical records, he calls a benign neoplasm by its specific name, such as corn, wart, or callus. (Tr. 2355-2356)
- Dr. Goldenberg defined "osteoma" as a benign enlargement of bone. The term is a general one, and encompasses such things as exostosis, tumor, cyst, or spur. Nevertheless, Dr. Goldenberg testified that it is not below

the minimal standards of care to simply diagnose something as an osteoma without being more specific. (Tr. 2402-2406)

- In Dr. Goldenberg's opinion, multiple tendon contractures of the toes "[v]ery, very, very rarely" occur as the result of a neurological problem. When such a situation does occur, there is usually further deformity of other portions of the foot as well as the lower leg. (Tr. 1868-1869)

Dr. Goldenberg testified that the "[s]tandard of care for recordkeeping is a range * * * [and concluded that] Dr. Weiner's notes and charts and records fall within the standard of care for recording enough information that someone with educational observation could look through the charts, the radiographs, the files, and based on that, determine that everything was performed appropriately or not appropriately." (Tr. 2984-2985)

Dr. Goldenberg further testified that "[Dr. Weiner] was able to perform and did perform an adequate examination, based on the records." (Tr. 1837)
Dr. Goldenberg stated that Dr. Weiner performed an adequate circulation examination, an adequate neurological examination, an adequate musculoskeletal examination, and appropriately diagnosed the patients' conditions. Moreover, Dr. Goldenberg testified that Dr. Weiner's recordkeeping for these patients was within the standard of care. (Tr. 1838-1840, 1979-1980)

Dr. Kobak

Dr. Kobak testified that the purpose of medical records is "[t]o give a chronological record of the diagnosis and the treatment that the doctor rendered." (Tr. 2533) Dr. Kobak stated that the chief complaint as charted in the medical record should contain, in the patient's own words, the reason why the patient came to the doctor. Dr. Kobak gave such examples as "pain in toes," "painful toenails," and "ingrown toenails." (Tr. 2533-2535) (See also Resp. Ex. H)

Dr. Kobak acknowledged that it is important to record a patient's treatment in such a manner that a subsequent treating podiatrist can see what was done and how the patient progressed. Nevertheless, Dr. Kobak stated that charting only abnormal findings is within the standard of care. (Tr. 2754-2755)

When asked on cross-examination if he only charted abnormal findings, Dr. Kobak stated, "Not exclusively." When asked to elaborate, Dr. Kobak said, "Very often, it depends, quite frankly, how much time I have in between patients to do my charting. At the very least, I want to make sure I have all

findings that may be abnormal. If I have some extra time, I may flower it out a little bit, as they say.” Dr. Kobak noted that when he knows that reports to insurance companies, attorneys, and the like will need to be made, he will include the information that they require, which may be abnormal findings along with additional information. (Tr. 2735-2738)

Concerning the rule that says if it’s not in the medical record it didn’t happen, Dr. Kobak testified that he is not aware of a rule like that, and does not believe that it reflects a standard of care. He noted, however, that some insurance companies have such a requirement. (Tr. 2765-2766)

Concerning podiatric examinations, Dr. Kobak testified as follows:

- Dr. Kobak testified that a circulatory examination, at the minimum, should include an examination of the dorsalis pedis and posterior tibial pulses. Dr. Kobak would also do a capillary return test on the tip of a toe or toes. Dr. Kobak said that a patient could conceivably have good pedal pulses and poor circulation to a toe. The color, texture and temperature of the skin of the feet should be examined, which then crosses over to the dermatologic examination. (Tr. 2536-2537)
- During the dermatologic examination, Dr. Kobak would look for breaks or ulcerations in the skin or any exudate. He would also look for neoplasms. Dr. Kobak defined skin neoplasm as any non-cancerous growth on the skin, which encompasses, for example, warts, corns, and proud flesh. Dr. Kobak would also examine the toenails and the hair growth on the feet. (Tr. 2537-2539)

There is no requirement that the podiatrist characterize conditions falling under the category of “neoplasms” as anything but neoplasms. He further testified that there is no standard of care that requires a podiatrist to send an excised neoplasm to pathology if the podiatrist reasonably believes that the neoplasm is benign. In fact, because of the increase in managed care, less testing is being done than in the past, and when such tests are performed the doctor or patient is sometimes not reimbursed for the expense. (Tr. 2538-2539)

- The musculoskeletal examination should include a visual inspection of the feet and the patient’s gait. The patient’s shoes can also be examined for any unusual wear patterns. The musculoskeletal exam includes the palpation examination, in which the podiatrist moves the toes and metatarsophalangeal joints, palpates around the heel, and generally

examines not just the symptomatic area(s) but the entire feet. As an example, Dr. Kobak said that if a patient comes in with an ingrown toenail, in addition to, or adjunctive to, addressing the patient's chief complaint, both feet should be examined, and any problems the podiatrist finds should be brought to the patient's attention. The reason for examining both of the patient's feet is to see if there are any underlying problems that have contributed to the chief complaint. (Tr. 2540-2544)

If during the musculoskeletal examination the podiatrist notes contracted tendons or hammer toes, the standard of care does not require that the podiatrist specify which tendons or toes are affected "[a]s long as it's somewhere in the chart that that particular condition is dealt with one way or another." Dr. Kobak agreed that an appropriate diagnosis could be just "hammer toes." (Tr. 2548-2549, 2584, 2590-2591) Similarly, if you wanted more information concerning the contracted tendons, you could look in the progress notes, or elsewhere in the chart, such as the consent form, the x-rays, or the billing records. (Tr. 2591-2592)

A diagnosis of contracted metatarsophalangeal joint, as well as a diagnosis of arthropathy, could appropriately be used in place of a diagnosis of hammer toes. (Tr. 2592) Moreover, although it is helpful to do so, it is not necessary according to the standard of care to specify in the medical records that a hammer toe is flexible, semi-rigid, or rigid. (Tr. 2802-2804)

Heel pain is an appropriate diagnosis. However, Dr. Kobak said that, in the diagnostic impressions, "[y]ou'd probably want to redefine it there as to what's causing the heel pain." (Tr. 2612-2613)

- Neurological problems can cause tendon contracture in the vast majority of cases. However, in the 62 patient medical records that he reviewed for this case, Dr. Kobak did not see any that were neurological in origin. He noted that the majority of these patients' problems were biomechanical in nature, which can be determined by normal findings on the achilles reflex and Babinski response tests. (Tr. 2622-2623) During a neurological examination, Dr. Kobak would also perform a vibratory test and a sharp/dull test. (Tr. 2640)

When asked how he knew that Dr. Weiner did a complete physical examination, Dr. Kobak replied, "That's like asking me, 'When did I stop beating my wife?' How do I prove that? He's a licensed podiatrist in the State of Ohio, so I would assume that he had competent training to know that this is

what is done on a patient.” (Tr. 2768) Dr. Kobak acknowledged that he did not know if Dr. Weiner actually did a complete physical examination, but that one can’t be 100 percent certain of anything, whether it’s contained in the chart or not. (Tr. 2768-2769)

Dr. Weiner

Dr. Weiner noted that in 1991 or 1992, he started doing typed diagnoses and treatment programs, such as appear on St. Ex. 62, pp. 31 and 32. Dr. Weiner also testified that he became more comprehensive concerning recording what he did. Additionally, Dr. Weiner stated that he started using a word processor to eliminate the “fill-in-the-blank” type operation reports. He stated that now he has progressed to doing computer operation reports. “With the new system, if we put in a code of 28008, it will always be consistent. The op report will be consistent with the coding. Everything becomes consistent. * * * So diagnosis is consistent with the treatment, which is consistent with the chart.” (St. Ex. 62, pp. 29, 31-32; Tr. 3655-3656)

- 2a. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint.”*

Dr. Van Enoo

Dr. Van Enoo testified that it was inappropriate to do a full set of x-rays on a patient whose chief complaint was ingrown toenails. Nevertheless, Dr. Van Enoo stated that if he suspected a patient’s problem was more than just an ingrown toenail, he would take an x-ray. (Tr. 204-205, 356-357)

Dr. Kushner

Dr. Kushner testified that the issue of whether or not radiographs should be taken depends upon the patient’s complaint. Dr. Kushner testified that it is below the minimal standards of care for a podiatrist to take bilateral x-rays on every patient because, in some cases, the patient will be needlessly irradiated. (Tr. 1222-1223)

Dr. Goldenberg

Dr. Goldenberg acknowledged that he did not know if Dr. Weiner’s radiographs were taken before or after Dr. Weiner examined patients’ feet. (Tr. 2326)

When asked if, for example, Dr. Weiner had x-rays taken before examining a patient's feet if the x-rays might not necessarily be justified, Dr. Goldenberg replied that it would depend on the patient's presenting complaint. (Tr. 2327-2328)

Dr. Goldenberg testified that it is never inappropriate to take bilateral x-rays, even if the patient's complaint concerned only one foot. (Tr. 1840-1842)

Dr. Kobak

Dr. Kobak stated that podiatrists have a responsibility to look at both of the patient's feet, even if the patient's complaint relates only to one of their feet. (Tr. 2800-2802, 2879-2880) If the patient's complaint relates only to one foot, very often an x-ray of the opposing foot is useful for comparative purposes. (Tr. 2556-2557, 2559) Moreover, Dr. Kobak testified that there are instances when it would be appropriate to obtain x-rays on a patient before the examination: if the podiatrist is occupied, a history is taken, and the patient complains of a bunion, or a painful heel. X-rays are necessary in such cases, and it may be better to go ahead and get them while the podiatrist is busy rather than having the patient wait around later to have them done. (Tr. 2553-2555)

Dr. Weiner

Dr. Weiner testified that x-rays are necessary for "clinical evaluation" and for "legal purposes." He added that it is also "to the betterment of the patient. They can see how diffuse the problem is as far as arthropathy, rotational problems." (Tr. 3697-3698)

When asked if he took a standard three x-rays on every new patient, Dr. Weiner answered that he took x-rays when x-rays were indicated, and took the number of x-rays that were indicated. (Tr. 1097-1099)

- 2b. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Stewart

Dr. Stewart testified that it is not always necessary to do preoperative blood testing on a patient before surgery. If the patient is a reasonably healthy

individual, and the procedure is minimally invasive with minimal disruption of tissue, there is no indication to do preoperative blood testing. In Dr. Stewart's opinion, it is below the minimal standards of care for a podiatrist to do preoperative blood testing on a reasonably healthy individual prior to minimal incision surgery other than minimal incision bone surgery. (Tr. 897-899, 935)

Dr. Kushner

Dr. Kushner testified that the standard of care concerning blood tests on a new patient is to do only those tests that are necessary. If the podiatrist is planning to do a surgical procedure, the issue of whether to do blood tests depends on both the surgery planned and the patient. If the procedure is minimally invasive, such as the removal of an ingrown toenail or a wart, and the patient is young and healthy, blood tests are not needed. (Tr. 1232-1235)

Dr. Kushner testified that, in his opinion, it is below the minimal standards of care to perform tendon surgery or bone surgery without first obtaining blood work. (Tr. 1633-1634, 1752-1753) Dr. Kushner further stated that, although blood work is appropriate prior to performing tendon surgery, a glucose and hemoglobin or CBC is usually adequate if the patient is healthy. He criticized Dr. Weiner for frequently ordering big SMA panels. (Tr. 1770-1771)

Dr. Goldenberg

Dr. Goldenberg testified that extensive blood testing should be considered before performing any kind of bone surgery. Prior to tendon surgery, "it would depend on the patient's health and whether or not the radiographs show the possibility of doing bone surgery right at that time." (Tr. 1842-1843) Further, Dr. Goldenberg testified that it is not below the minimal standards of care to do blood work before a patient has soft-tissue surgery. For some procedures such as treatment of an ingrown toenail, blood tests are not necessary. (Tr. 1843-1844)

Dr. Kobak

Dr. Kobak testified that it is within the standard of care to obtain blood tests in the treatment of heel spur syndrome. He further testified that blood tests should be considered prior to hammer toe syndrome repair depending on the patient's past and present medical conditions. (Resp. Ex. G; Tr. 2558-2559, 2615-2616)

Dr. Weiner

Dr. Weiner testified that if he felt that blood tests were necessary, he would do them. He stated that pain, deformity, or the potential for bone surgery were indications for blood tests, to assess how the patient's organ systems were functioning. Dr. Weiner further testified that if a patient elected to have surgery, he drew blood, and performed a bleeding time, a clotting time, and a blood sugar in the office. Dr. Weiner testified that bleeding time was done by pricking the patient's finger, dabbing the wound with filter paper, and measuring the amount of time it took for bleeding to stop. Clotting time was taken by pricking the patient's finger and placing a drop of blood on a slide. Dr. Weiner would then use the pricker to keep lifting the blood on the slide up, measuring the amount of time it took for strands of clot to form. Blood sugar was measured using paper test strips. Dr. Weiner testified that these three tests were sufficient prior to performing soft-tissue surgery. Dr. Weiner testified that the results of the bleeding time, clotting time, and blood sugar tests were recorded in the chart only when abnormal. (Tr. 1099-1104, 3712-3714)

3. *"[E]ven though [Dr. Weiner] routinely took x-rays, [his] records fail to reflect clinical notes or other reports regarding any radiological findings."*

Dr. Van Enoo

Dr. Van Enoo noted that he did not find an x-ray report in any of Dr. Weiner's medical records. Dr. Van Enoo said that some record of the podiatrist's radiological findings is necessary when a surgical or biomechanical procedure is to be performed. (Tr. 222-224)

Dr. Stewart

Dr. Stewart noted that the presence of x-ray films in the patient's chart does not obviate a need for the podiatrist to record his comments and findings concerning those x-rays. (Tr. 1038)

Dr. Stewart testified that, in all 62 patient files, the x-rays that were taken were not followed-up by a report of findings, either in the form of a separate report or in the progress notes. No connection was made in the record between the x-rays taken and presumptive diagnoses. (Tr. 879-885; 1025-1026)

Dr. Kushner

Dr. Kushner testified that the standard of care is to document the taking of x-rays, including the time, the views taken, and the findings. Dr. Kushner testified that he could find no x-ray findings in the medical records that he reviewed. Dr. Weiner's failure to document such x-ray findings was below the minimal standards of care. (Tr. 1235-1236, 1775-1776)

Dr. Goldenberg

Dr. Goldenberg testified that the standard of care does not require a podiatrist to make separate written radiological findings. "Usually the physician will review the x-rays and then use those to make a diagnosis and record the diagnosis." The radiological findings are included in the physician's diagnosis. (Tr. 1834) Dr. Goldenberg further testified that by virtue of the fact that Dr. Weiner wrote a diagnosis in the records, Dr. Goldenberg assumed that a physical exam as well as a review of the radiographs was performed. (Tr. 2325-2326)

Dr. Kobak

Dr. Kobak noted that the x-rays themselves are a part of the chart. Dr. Kobak testified that in his opinion there is no standard of care requirement that separate x-ray findings be included in the chart. Any licensed podiatrist should be able to read foot x-rays. (Tr. 2559-2560) In Dr. Kobak's opinion, the fact that Dr. Weiner kept the x-rays as part of the medical records comports with the standard of care. Further, Dr. Kobak stated that Dr. Weiner's radiographic findings were included in Dr. Weiner's diagnoses. Dr. Kobak said that he found no examples of Dr. Weiner's diagnosis contradicted by an x-ray. (Tr. 2672-2673)

Dr. Weiner

Dr. Weiner replied that he did not believe that separate and distinct radiological findings were necessary. Dr. Weiner stated that his diagnostic impressions reflected both clinical findings and radiological findings. Dr. Weiner also stated that the x-rays themselves were part of his medical records. (Tr. 3671)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

Dr. Van Enoo

Dr. Van Enoo testified that in his review of medical records, Dr. Weiner performed elective surgery prior to receiving the results of lab tests in the cases of Patients: 1-5, 7, 9-11, 13, 17, 21-24, 26, 36, 40, 44, 45, 57, and 60. (Tr. 205)

Dr. Kushner

Dr. Kushner testified that it is below the minimal standards of care for a podiatrist to take blood tests, and then perform surgery before receiving the results of the tests. If the podiatrist feels that blood tests are necessary, it makes no sense to perform surgery on the patient before reviewing the results of the tests. (Tr. 1232-1235)

Dr. Goldenberg

Dr. Goldenberg testified concerning blood tests that it is not necessary to wait for the results of blood tests prior to soft tissue surgery, such as tendon surgery, but that it is necessary to obtain the results of blood tests prior to doing bone surgery. Before cutting into bone, Dr. Goldenberg said, it helps to know if there will be any problem with bone healing. Tendon surgery, on the other hand, is “very superficial, just like an ingrown toenail.” Nevertheless, “it would be a good idea to have some type of evidence or some kind of notation of blood work to help determine the overall health of the patient for a long-term serial surgery.” It is not necessary, however, to have the results for the first surgery. (Tr. 2361-2365)

Dr. Kobak

Dr. Kobak testified that, since it is not a violation of the standard of care to perform tendon surgery without obtaining a blood test, neither is it a violation of the standard of care to perform tendon surgery prior to receiving the results of blood tests. (Tr. 2568)

Dr. Weiner

When asked why he sometimes performed surgery before receiving the results of the blood tests, Dr. Weiner stated that he never did bone surgery without a complete blood workup in his hands. (Tr. 1099-1101)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification”; and*
6. *The procedures referred to in allegation #5 “were frequently being performed upon the great toes and tendons were cut inappropriately.”*

[Please refer to the individual patient summaries, below.]

7. *“[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost.”*

Dr. Goldenberg

Dr. Goldenberg stated that serial surgery is not beneath the standard of care, and results in the patient experiencing less pain, and remaining more ambulatory. It may possibly result in more compensation for the doctor, depending on the insurance company involved. Nevertheless, serial surgery is not below the minimal standards of care. (Tr. 1858-1861) (See also 3010-3014)

Dr. Kobak

Dr. Kobak defined serial surgery as doing one or more surgical procedures at a time over a period of time. The purpose of serial surgery is to keep the patient as functional as possible. (Resp. Ex. G; Tr. 2639-2544)

Dr. Kobak acknowledged that Dr. Weiner did perform surgery in serial fashion, but that they were medically and clinically justified. Regarding the issue that serial surgery resulted in increased healing time, Dr. Kobak stated, “It’s irrelevant, or if anything, on the other end, because, for example, for a tendon to heal, a tendon has to heal. Now, it’s not going to heal any slower because you did one or two tendons, as opposed to eight, nine, or ten tendons. If anything, by doing more tendons at one time, you have some—I wouldn’t want to blanketly make that assertion. What I am saying is there’s no medical or podiatric evidence that I’ve seen that doing less increases the healing time. Generally doing more increases healing time. It’s not a logical statement.” (Tr. 2678-2680)

Dr. Weiner

Dr. Weiner stated that the advantage of doing multiple surgeries in serial fashion rather than in one sitting is to keep the patient ambulatory. (Tr. 1138-1141)

Dr. Weiner also acknowledged that a podiatrist received less reimbursement if multiple procedures were performed at one time rather than individually in serial fashion. (Tr. 1145-1148, 1151-1152)

8. *"[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures."*

Dr. Goldenberg

Dr. Goldenberg further testified that it is not necessary to chart the reason for using postoperative physical therapy. Dr. Goldenberg stated that if physical therapy was rendered postoperatively, he would just assume that the reason was for postoperative sequela. (Tr. 1846-1647, 2988-2989) Dr. Goldenberg stated that the majority of patients need physical therapy following surgery. This is true for minimal incision surgery patients as well as for open surgery patients. (Tr. 2989-2992)

Dr. Kobak

Dr. Kobak testified that physical therapy is appropriate for the postoperative treatment of digital deformities. Dr. Kobak based his opinion concerning physical therapy on the Preferred Practice Guidelines of the Academy of Ambulatory Foot Surgery, and on a publication entitled the *Olympic Book of Sports Medicine*. Dr. Kobak additionally stated that he knows from experience that podiatrists throughout the country use physical therapy postoperatively. (Resp. Ex. K; Tr. 2630-2634, 2852)

Dr. Weiner

Concerning the physical therapy modalities that would be used on his patients, Dr. Weiner testified that ultrasound is beneficial in relieving postsurgical inflammation, and aids the healing process. Dr. Weiner also had a trans-electrical neurostimulation unit (TENS unit) that would be used to rehabilitate

nerve damage following surgery. Dr. Weiner testified that a few of his patients that suffered from chronic pain purchased their own units. Dr. Weiner further testified that the whirlpool was used for all kinds of problems, from postsurgical inflammation to edema and tendinitis. (Tr. 1168-1171)

9. “[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” (a) “[Dr. Weiner] billed for performing a plantar fasciotomy when [his] records indicate that surgical incisions were done only at the toe level of the foot where there is no plantar fascia”; [and/or] (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”

Dr. Van Enoo

Dr. Van Enoo testified that CPT codes are utilized when practitioners bill insurance companies for reimbursement for procedures performed. Dr. Van Enoo said that “CPT codes are descriptions of certain procedures as they are performed on all parts of the body, and there are sections for each specialty or each section of the anatomy, and there’s a whole section on the foot, under musculoskeletal system.” (Tr. 281-282) He stated that occasionally a podiatrist will bill outside of the CPT code section that deals with feet, for example, skin procedures. Dr. Van Enoo stated that the standards for utilizing CPT codes are uniform throughout the podiatric profession, and that all insurance companies use these codes. (Tr. 179-282)

Dr. Van Enoo testified that if a podiatrist performs a procedure that is not listed in the CPT manual, he or she should use a report, and there is a code for that. Alternatively, the podiatrist could use the code that comes closest to the procedure that was actually performed. (Tr. 4229-4230)

Dr. Kobak

Dr. Kobak testified that he does not think of CPT coding as a standard of care issue, but as more of a clerical issue. He said that he has never seen it addressed as a standard of care issue. He testified that using CPT codes for podiatric care is sometimes like fitting a square peg into a round hole. Up until 1995, there were no podiatrists on the AMA coding committee that generates the CPT code book. Some podiatric procedures are poorly addressed or not addressed at all. It therefore falls to the practitioner to try to find the best fit. Dr. Kobak further testified that, in his experience as a reviewer for

insurance companies, he views coding problems as a clerical problem and not a standard of care issue. (Tr. 2549-2553)

- 9a. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” (a) “[Dr. Weiner] billed for performing a plantar fasciotomy when [his] records indicate that surgical incisions were done only at the toe level of the foot where there is no plantar fascia.”*

Dr. Van Enoo

Dr. Van Enoo testified that it is not possible to perform a plantar fasciotomy at the level of the toes because the fibers of the plantar fascia end approximately three-quarters of an inch proximal to the web of the toes. Dr. Van Enoo further testified that the operation reports and pictures that he saw in the patient records indicated the plantar fasciotomies were performed on the toes distal to the webbing. (Resp. Ex. C; Tr. 3891-3897)

Dr. Van Enoo disagreed with the testimony of Dr. Kobak and Dr. Goldenberg that cutting the plantar fascia at the level of the digits can be effective in treating heel pain. (Tr. 3922-3923)

Dr. Stewart

Dr. Stewart testified that there is no plantar fascia in the toes. “The plantar fascia has its insertion into the flexor brevis apparatus, which inserts at the base of the toe, the base of the proximal phalanx.” (St. Exs. 100 and 101; Tr. 725-729) A plantar fasciotomy cannot be performed on the toe, “[b]ecause the fascia extends only to the very base of the toe.” (Tr. 729) Dr. Stewart therefore disagreed with the CPT codes, which provide a code for a plantar fasciotomy in the toes. (Tr. 924-925)

Dr. Goldenberg

Dr. Goldenberg testified that the plantar fascia invests into the toes, and is therefore present in the toes. The term “plantar fascia” is synonymous with the term “plantar aponeurosis.” Dr. Goldenberg testified that plantar fascia release at the level of the toes can be performed as treatment for heel pain as well as for straightening the toes. (St. Ex. 101; Resp. Ex. C; Tr. 1851-1856)

Dr. Kobak

Dr. Kobak testified that the plantar fascia extends into the toes. (Tr. 2576)

Dr. Weiner

Dr. Weiner testified that the “[p]lantar fascia starts at the heel and divides and goes in between each metatarsal head and subdivides and goes into each toe and the medial and lateral areas of the toe to the middle of the proximal phalanx and divests itself into the rest of the toe. So basically, it thins out, but does run to the end of the toes. Very thick toward to the plantar surface of the proximal phalanx.” (Tr. 3469) Dr. Weiner testified that when he performs a plantar fasciotomy at the toe level it is usually performed “where the sulcus is, somewhere from the middle of the proximal phalanx backwards — or proximally to the metatarsal head.” (Tr. 3751)

- 9b. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” * * * (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”*

Dr. Stewart

Dr. Stewart testified that an arthrotomy is a more extensive procedure than a capsulotomy. He testified that a capsulotomy refers to the transection of a portion of the joint capsule in order to relax tightness in the joint capsule when the joint capsule is contracted or shortened. By comparison, an arthrotomy refers to the entire joint structure, and refers to a procedure to remove abnormal tissue within the joint. Dr. Stewart stated that arthrotomies generally cannot be done on a minimal incision basis, although it is now being done using arthroscopy techniques. It cannot be done without visual aid, however. (Tr. 722-725)

Dr. Goldenberg

Dr. Goldenberg testified that a capsulotomy involves making an incision into a joint to allow the joint to open up slightly. An arthrotomy involves opening the joint up completely. “A capsulotomy would be the initial incision and then if enough pressure is not relieved, then you might proceed with an arthrotomy.” (Tr. 1847)

Dr. Kobak

Dr. Kobak testified that arthrotomies are often performed after the surgeon has attempted to obtain correction with a capsulotomy. If insufficient correction is achieved with the capsulotomy, then the surgeon may proceed to an arthrotomy. The difference between capsulotomy and arthrotomy is one of degree. Dr. Kobak testified that the physician doing the surgery is in the best position to determine which procedure has been done. (Tr. 2572-2576)

Dr. Weiner

Dr. Weiner testified that he knew what surgery he performed, and recorded it appropriately. Dr. Weiner suggested that it was absurd that another person could pass judgment on what Dr. Weiner did when that person had not been present at the time of the surgery. (St. Ex. 63; Tr. 3679-3681)

10. *"[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated."*

Dr. Van Enoo

Dr. Van Enoo stated that the routine use of systemic steroids is below the minimal standards of care. (Tr. 459-465) Dr. Van Enoo testified that Dr. Weiner improperly prescribed systemic steroids to Patients: 1, 7, 9, 10, 12, 14, 20, 23, 25, 26, 28, 30, 33, 35, 37, 39, 40-42, 45-48, 50, 53-55, and 57-61. In each of these cases, Dr. Van Enoo could find no indication in the medical records for such medication. Nevertheless, Dr. Van Enoo further said that his criticism went beyond criticism of Dr. Weiner's failure to chart a reason for these prescriptions. "In looking at the symptoms, looking at the x-rays, looking at the information that was available to me in the chart, I made the determination that it was an inappropriate use of systemic steroids in every case." (Tr. 464-465)

Dr. Van Enoo acknowledged that systemic steroids are infrequently prescribed by podiatrists for certain conditions such as rheumatoid arthritis. These drugs have numerous undesirable side effects, and their use by Dr. Weiner without adequate indication was below the minimal standards of care. Dr. Van Enoo stated that it was not appropriate to use systemic steroids to control post-surgical inflammation and pain. (St. Ex. 96; Tr. 206-211, 217-222)

Dr. Van Enoo testified that he was not aware of any literature that supports the use of soluble steroids as being beneficial to the healing process. (Tr. 460)

Dr. Van Enoo testified that, in his opinion, Resp. Ex. L, which is an article entitled *The Effect of Locally Administered Corticosteroids, Soluble and Insoluble, on the Healing Times of Surgically-Induced wounds in Guinea Pigs*, does not support Dr. Kobak's testimony that the use of systemic steroids is appropriate for post-surgical inflammation. Dr. Van Enoo noted that the article discussed local injections of steroids, which are not the same as orally-ingested systemic steroids. (Resp. Ex. L; Tr. 3928-3931)

Dr. Van Enoo further testified that he disagreed with Dr. Kobak's testimony that the standard of care does not require a podiatrist to chart his reasons for prescribing systemic steroids if they are prescribed for post-surgical inflammation. A basis must be noted for prescribing oral systemic steroids. (Tr. 3931-3932)

Moreover, Dr. Van Enoo testified that there was no indication in any of the medical records that he reviewed that any risk/benefit analysis had been performed prior to Dr. Weiner prescribing systemic corticosteroids to his patients. (Tr. 4217)

Dr. Kushner

Dr. Kushner acknowledged that there are circumstances where the prescribing of steroids may be appropriate, but no such circumstances were documented in any of Dr. Weiner's patient records. Dr. Kushner testified that the standard of care for post-surgical inflammation is rest and elevation. It is not within the standard of care to prescribe systemic steroids for post-surgical inflammation. (Tr. 1758, 1776)

Dr. Goldenberg

Dr. Goldenberg testified that it is appropriate for a podiatrist to use corticosteroids such as Prednisone and Medrol for inflammation, including postoperative inflammation, and pain. Dr. Goldenberg testified further that the standard of care may not require that the podiatrist record the reason for prescribing such medication. "The diagnosis, I believe, will explain the patient's problem and the treatment could include steroid treatment." (Tr. 1845-1846) Dr. Goldenberg acknowledged that systemic steroids can be prescribed for various reasons. However, when asked if it was necessary to chart the reason for prescribing the drugs in a particular case, Dr. Goldenberg stated, "Not necessarily. Again, it's up to each individual doctor to decide what he or she would like to put into the medical records." (Tr. 2988) Dr. Goldenberg testified that he was aware that the *Physicians' Desk Reference*

[PDR] cites impaired wound healing as a possible adverse reaction to Medrol, a systemic steroid. Nevertheless, Dr. Goldenberg stated that he believed that it was acceptable for Dr. Weiner to prescription Medrol for postsurgical inflammation. (Tr. 2376)

Dr. Goldenberg said that the issue of whether to start a patient on a non-steroidal anti-inflammatory drug before proceeding to a steroid depends on the patient. Dr. Goldenberg said that some of his patients are in severe pain, so he prescribes steroids immediately. If a patient were not getting the desired response from a non-steroidal drug, then it would be appropriate to prescription a steroid. When Dr. Goldenberg was asked how someone reading the medical records would know the patient was not getting a response from the non-steroidal drug, Dr. Goldenberg replied that “[t]he fact that you change the patient from a nonsteroidal to steroidal would indicate that you need something stronger than a nonsteroidal anti-inflammatory.” (Tr. 3184)

Dr. Kobak

Dr. Kobak testified that prescribing steroids for postoperative healing is within the standard of care. He further testified that the standard of care does not require a podiatrist to list the reason for prescribing steroids for postoperative inflammation and healing. (Tr. 2637-2639, 2848-2849)

Dr. Weiner

Concerning his use of systemic steroids in his practice, Dr. Weiner stated that “Steroids reduce inflammation, aid in healing, reduces pain and that’s the primary goal, to reduce pain.” (Tr. 3416) Dr. Weiner stated that he believed that steroid were an excellent modality for reducing postoperative pain and inflammation. It enabled his patients to experience 50 percent less pain, and enhanced their mobility. Dr. Weiner testified that he did not agree with the opinions of the State’s experts that steroids impede wound healing. (Tr. 3417-3418) Dr. Weiner testified that steroids, given for short periods of time in decreasing dosages, are effective and are not dangerous. Dr. Weiner stated that he always prescribed small dosage levels. Moreover, none of his patients experienced problems as a result of the steroids. (Tr. 1122-1125, 3416-3417)

11. “[Dr. Weiner] performed elective podiatric surgery on known diabetics without first ascertaining whether their diabetes was controlled.”

Dr. Van Enoo

Dr. Van Enoo disagreed with Dr. Kobak's and Dr. Goldenberg's testimony that it is permissible to perform surgery on a diabetic whose blood sugar is elevated in the absence of other risk factors such as diminished circulation.

Dr. Van Enoo stated that hyperglycemic people have a higher risk factor for surgery, and that it exposes the patient to unnecessary risks to perform elective surgery on such a patient without full knowledge of the patient's diabetic status and blood sugar level. Dr. Van Enoo cited Resp. Ex. J as support, which is an excerpt from an article entitled *Management of Diabetic Foot Problems*. (Resp. Ex. J; Tr. 3924-3927)

Dr. Goldenberg

When asked if the standard of care required that blood tests be performed preoperatively on diabetic patients before each and every soft-tissue surgery, Dr. Goldenberg replied, "It depends on the patient's type of diabetes, whether it is insulin dependent or non-insulin dependent and what the overall control is. If they have it under control for a long period of time and the procedures are relatively close to each other, there is no need to repeat a blood sugar on each visit." (Tr. 1844-1845)

Dr. Kobak

Dr. Kobak testified that surgery on diabetic patients is permissible if the vascularity is adequate. Dr. Kobak quoted from an excerpt from *Management of Diabetic Foot Problems* (W.B. Saunders Co. 1995): "No evaluation of perioperative risk factors has ever conclusively documented hyperglycemia itself as a risk factor." (Resp. Ex. J; Tr. 2625-2626) Dr. Kobak interprets this to mean that surgery can be performed even if the patient's glucose level is elevated, in the absence of other risk factors, and as long as the circulation is undiminished. (Tr. 2626-2627)

12. "[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy'". (a) "Further, even when postoperative complications occurred, [Dr. Weiner] failed to document adequately the existence, development and treatment of such complications."

Concerning the twelfth allegation, Dr. Weiner testified as follows:

Different doctors chart different ways. I chart only abnormal findings. If something is abnormal, It's noted in the charts, as we have seen as we have gone through all these charts.

If somebody is doing well, they are doing well. I mean, there is nothing abnormal going on. Since there is nothing abnormal, I don't chart it.

(Tr. 3684)

Dr. Weiner testified further that when complications did occur, the problems were documented in his medical records. (Tr. 3684-3685)

Miscellaneous information

Dr. Weiner

Dr. Weiner testified that his billing is currently being handled by an outside billing service. Prior to 1993 or 1992, Dr. Weiner had his own central billing office. As many as nine employees staffed this office, with varied responsibilities. (Tr. 1073-1075)

Although most of the practice's paperwork was generated at the central office, patient records were kept at the individual practice locations. A courier traveled daily to each practice location, "wherever we were," and picked up the information needed to generate the paperwork. This information was then delivered to the central office. (Tr. 1075)

Concerning operation reports, Dr. Weiner testified that he used form operation reports. Dr. Weiner had a form for each of the more common procedures that he performed. Dr. Weiner would dictate a report and it would be transcribed from a tape, or would send a checklist. The tape or checklist would contain the procedure, diagnosis, and conditions. The operation reports were produced entirely from the dictation or checklists; the clerks never saw the progress notes. Dr. Weiner testified that the checklists were discarded after use. Dr. Weiner testified that he did not review the operation reports unless he found it necessary to do so. (Tr. 1076-1080)

Dr. Weiner did not know why certain medical records were missing operation reports. He speculated that they may have become misplaced during an office

move, or that they may have been removed to send to an insurance company. Dr. Weiner denied that operation reports were only prepared if an insurance company required them. However, the State's representative read excerpts of testimony given during a 1991 deposition concerning his practice during the time period 1984 to 1986, in which Dr. Weiner testified that he did not prepare an operation report unless an insurance company required that he do so. At the present hearing, Dr. Weiner denied recollection of such deposition testimony. (Tr. 1081-1088)

Dr. Weiner testified that he has independent recollection of several of the 62 patients involved in this Matter: Patients 6, 7, 8, 23, 34, 39, 46, 51, 56, 58, and 62. None are currently patients, however. Dr. Weiner stated that he currently sees approximately 100 patients. (Tr. 1089-1092)

Dr. Weiner testified that he has had many practice locations between the years 1984 and 1993. He had some difficulty recalling exactly how many and their locations. However, he testified that he had offices in Canton, Lorain, Akron, and Cleveland. There were times when, as now, Dr. Weiner had two or three active practice locations simultaneously. Dr. Weiner testified that his office staff, usually four to five people, traveled with him, as Ms. Noga does now. Dr. Weiner testified that his office staff did everything from clerical work to assisting Dr. Weiner in surgery. None of his staff members were nurses or otherwise-licensed allied medical professionals, except, perhaps, Ms. Noga. (Tr. 1092-1094)

Dr. Weiner indicated that the majority of his patients were surgery patients. He said that, perhaps, one out of five would have nothing done, but just be advised to change their footwear, or to rest their feet if it was a running problem. (Tr. 1106-1107)

Dr. Weiner testified that during the period 1984 to 1993, he primarily performed minimal incision surgery. He also did open surgery, but it was rare. As background, Dr. Weiner testified that he did open surgery from 1964 until about 1968. During this time, minimal incision surgery began to evolve. As it evolved, Dr. Weiner began doing more and more of it. He learned minimal incision techniques by going to seminars, bringing doctors who were familiar with the techniques into his office, or going to their offices, and watching and listening to them. It was a slow evolutionary process, he testified. (Tr. 1107-1110)

TESTIMONY OF EMPLOYEE OF DR. WEINER

Patricia J. Noga testified on behalf of Dr. Weiner. Ms. Noga has been employed by Dr. Weiner or one of his affiliated entities since approximately 1984. (Tr. 2903-2905) Ms. Noga testified that she was often in the examining room when Dr. Weiner examined patients. Ms. Noga described in detail Dr. Weiner's examination of patients. Among other things, Ms. Noga described a palpation exam; range-of-motion; gait; circulatory, including capillary refill; patella and achilles reflex tests; Babinski response; vibration; and sharp. (Tr. 2914-2924) Ms. Noga testified that while Dr. Weiner examined and questioned the patients, he would make notations by "mentally taking them, and then he would write them down" in the chart. (Tr. 2966) About 80 percent of the time Dr. Weiner orders x-rays. (Tr. 2917) Ms. Noga stated that Dr. Weiner's examination of the new patient takes at least 45 minutes. (Tr. 2922)

Ms. Noga stated that Dr. Weiner always scheduled 45 minutes for new patients, and at least 30 minutes for established patients. Ms. Noga said that these times include surgery time. (Tr. 2953-2954)

PATIENT INFORMATION

PATIENT 1

Patient 1, female, d.o.b. 6-22-49, first saw Dr. Weiner on 4-11-88. In Dr. Weiner's medical records for Patient 1, her chief complaint was noted as "Pain." In the section for dermatologic examination, it was noted, "DP PT 70/min. HM 4-5 R." In the section for circulatory examination, Dr. Weiner noted, "DPPT 70/mi." In the section for the neurologic exam, Dr. Weiner noted, "pat. ach norm =." In the musculoskeletal section, Dr. Weiner noted, "hammer toes." In his diagnostic impressions, Dr. Weiner wrote, "hammer toes osteomas arthropathy". Nothing is noted in the spaces labeled "Physical Exam" and "Structural/Gait Abnormalities." (St. Ex. 1, pp. 45-46)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Van Enoo

Dr. Van Enoo testified that he is familiar with the standard of care for performing and documenting patient histories and physical examinations. Dr. Van Enoo further testified that Dr. Weiner fell below these standards in his care and treatment of Patient 1, as well as in his care and treatment of the other 61 patients whose medical records Dr. Van Enoo reviewed. (Tr. 65-66) Specifically, concerning Patient 1, Dr. Van Enoo testified as follows:

- The chief complaint, as Dr. Weiner recorded, is “Pain.” Listing the chief complaint simply as “pain” does not give any information concerning the location of the pain or the properties of the pain (e.g., sharp, or shooting, or aching). “It’s just so general as to be, in my opinion, meaningless,” Dr. Van Enoo stated. (St. Ex. 1, p. 46; Tr. 68)
- For the dermatological examination, Dr. Weiner listed the dorsalis pedis pulse [DP], and the posterior tibial pulse [PT], which are usually recorded in the circulation category. A heloma molle [HM], or soft corn, was between the fourth and fifth toes. The abbreviation “HM 4-5” used by Dr. Weiner is commonly used to describe this condition. (St. Ex. 1, p. 46; Tr. 68-70) Dr. Van Enoo testified, however that in a proper dermatologic examination some observations of the skin should be noted, such as hair growth, temperature, and color. If there is a skin growth, it should be described. (St. Ex. 1, p. 46; Tr. 69-70)
- Dr. Weiner recorded the PT and DP pulses in the circulatory exam section as well as in the dermatological exam section. Dr. Van Enoo testified that the circulatory exam is important, because it determines how well the patient can heal after surgery. The feet are the parts of the human body that are farthest from the heart, and are therefore vulnerable to poor circulation in compromised patients such as diabetic, elderly, or disabled patients. The purpose of the circulatory exam is for the podiatrist to use his training and experience to measure the quality of blood flow at the feet, whether it is weak or strong. A scale of quality from 0 to +4 is employed to describe the quality of flow, +4 being a bounding (strong) pulse. Capillary fill time should also be measured. (St. Ex. 1, p. 46; Tr. 70-73)

In Patient 1’s case, Dr. Weiner took a pulse of 70 beats per minute. Dr. Van Enoo stated that merely counting heartbeats per minute is not appropriate. Dr. Van Enoo said that he had never seen this done before. (St. Ex. 1, p. 46; Tr. 72-73)

- In the neurological examination, Dr. Weiner noted that Patient 1's patella ("pat") and achilles ("ach") tendon reflexes were normal and equal. Dr. Van Enoo stated that, in all 62 patient records, either the "pat ach" was noted as normal or the neurological section was left entirely blank. Dr. Van Enoo testified that more information was needed. The standard of care requires a qualification or gradation of neurological status. Dr. Van Enoo further stated that Dr. Weiner performed many tenotomies and tendon lengthenings on major muscles and tendons on the foot. He explained that "[t]here's got to have been some neurological deficit in that foot to justify lengthening major tendons and muscles of the foot and ankle." (Tr. 79-81)

In cases involving foot deformities, a neurological problem is often the cause. A sensory exam and a detailed patient history regarding the problem should be recorded to justify corrective procedures. (Tr. 84-86)

- The musculoskeletal exam is interrelated with the neurological exam and with the observation of any structure or gait abnormalities. In the musculoskeletal examination, the podiatrist should note what he or she sees concerning the foot, for example, which toes are contracted, what tendons are tight, is there a bunion, are the muscles that govern the functions of the toes overcompensating, and is the extensor group of muscles more powerful than the flexor group. (Tr. 87)

Dr. Weiner's notation for the musculoskeletal exam in Patient 1's case said "hammer toes." A hammer toe is caused by a deformity in the joint between the proximal phalanx and the middle phalanx, called the proximal interphalangeal joint (PIPJ). When the condition first arises, the PIPJ joint can be flexed, but over time it can become rigid and painful.

Dr. Van Enoo stated that more detail was needed in the medical record, such as which toes were affected, and what type of hammer toe the patient had: flexible, semi-rigid or rigid. Further, a diagnosis of hammer toe syndrome can include either hammer toes, mallet toes, or claw toes. The type of hammer toe the podiatrist is presented with is determinative of the procedure used to correct it. Therefore, it is important to make the distinctions. (St. Ex. 1, p. 46; St. Ex. 93; Tr. 86-93)

- The section for structural/gait abnormalities for Patient 1 was left blank by Dr. Weiner. Dr. Van Enoo testified that it is important to note what the patient's gait looked like, as well as the appearance of the foot structurally, such as the severity of a toe's contracture. These are

particularly important to note if the podiatrist is going to be cutting important tendons. In Patient 1's case, numerous flexor and extensor tenotomies were eventually performed. (St. Ex. 1, p. 46; Tr. 87, 93-94)

- Dr. Weiner's diagnostic impressions in Patient 1's case say: "hammer toes osteomas arthropathy." Dr. Van Enoo characterized these diagnostic impressions as too vague. Concerning "hammer toes," Dr. Van Enoo noted that the diagnosis didn't say which toes, or even which feet. (St. Ex. 1, p. 46; Tr. 99)

Concerning Dr. Weiner's diagnostic impression "osteomas," (which are bone tumors), Dr. Van Enoo testified that, after a review of the records, including the x-rays, he could not find any evidence to support this diagnosis. "Nothing in the previous history, nothing in the findings, nothing in the x-rays indicate that there was an osteoma." (St. Ex. 1, p. 46; Tr. 99-100)

Concerning Dr. Weiner's diagnostic impression "arthropathy," (which refers to diseased joints), Dr. Van Enoo testified that there was nothing in the chart to support this diagnostic impression. Further, there are 26 bones in the foot, and each bone has at least two joints. "I'd want to know what joints are diseased and to what degree and what's the prognosis." (St. Ex. 1, p. 46; Tr. 100-101)

Dr. Van Enoo stated that Dr. Weiner's diagnoses were vague, inaccurate, and below the minimal standards of care. (Tr. 100)

In addition, Dr. Van Enoo criticized Dr. Weiner's operation report concerning the 4-11-88 surgery on Patient 1. Specifically, Dr. Weiner's pre-op diagnosis of "Deformed toes - Exostosis toes" did not identify the affected toes. Although the toes that Dr. Weiner worked on are listed in the body of the report, Dr. Van Enoo testified that the pre-operative diagnosis should still record which toes were deformed. (St. Ex. 1, p. 19; Tr. 104-106)

On rebuttal, Dr. Van Enoo disagreed with Dr. Goldenberg's testimony that there were osteomas on the plantar aspect of the head of the fifth metatarsal left, as well as the plantar medial aspect of the head of the fifth metatarsal right. Dr. Van Enoo testified that an x-ray shows normal metatarsals. The foot position is slightly varus; the outside of the foot is a little below the medial side. Therefore, the fifth metatarsal is rotated slightly, showing the plantar condyle of the fifth metatarsal heads right and left. Dr. Van Enoo testified

that it is not an osteoma, but a normal anatomical structure. (St. Ex. 1A; Tr. 3938-3940)

Dr. Goldenberg

Dr. Goldenberg testified that, in his opinion, Dr. Weiner's medical record for Patient 1 concerning the patient's chief complaint, physical examination, and diagnosis is within acceptable standards in the podiatric community. (Tr. 1877-1878)

Dr. Goldenberg testified concerning the pathologies he gleaned from his review of the x-ray, a bilateral anteroposterior [AP] view:

There is hammer toe contractions of digits 2, 3, 4, and 5, as evidenced by the rotation of the digits on the x-ray, as well as the phalanxes of the toe bones. There is some spurring noted on the lateral intermediate and distal phalanx, fifth toe. Also some spurring on the distal phalanx of the large toe of the right foot. These are all right foot. The fifth metatarsal shows an enlargement with a spur or exostosis on the * * * medial—turning of the head of the metatarsal of the medial plantar aspect of the head of the fifth metatarsal.

* * *

On the left foot, there is also hammer toe contractions of 2, 3, 4, and 5. There is also an enlargement of the fifth metatarsal head on the medial aspect of the head, and there's also some spurring on the large toe.

(St. Ex. 1A; Tr. 1879-1880)

Dr. Goldenberg testified that Dr. Weiner's diagnoses were supported by the x-ray. "Hammer toes are evidenced, osteomas would be the spurring, as well as the enlargement. Arthropathy is the contraction that you would see at the joints with hammer toe." (St. Ex. 1, p. 46; St. Ex. 1A; Tr. 1880)

Dr. Goldenberg stated that, based upon his review of the medical record, he determined that the reference to osteomas in Dr. Weiner's diagnostic impressions related to problems that Patient 1 was having in her metatarsophalangeal joints, metatarsal heads, and some of her digits. The reference to arthropathy related to problems in Patient 1's metatarsophalangeal joints. (Tr. 3023-3024)

Dr. Goldenberg testified that an operation report dated 4-18-88 described the excision of two benign neoplasms from the right foot. Nevertheless, after reviewing the consent forms and patient history form, Dr. Goldenberg was unable to determine where on the right foot the two neoplasms were located, or what kind of benign neoplasms they were. (St. Ex. 1, p. 33; Tr. 3024-3025)

Dr. Goldenberg testified, however, that it was not below the minimal standards of care for Dr. Weiner to fail to identify the type of benign neoplasm excised if it was a corn or a wart. (Tr. 1893-1894, 3298-3299)

Dr. Kobak

Dr. Kobak testified that “pain” alone is sufficient as a chief complaint. When asked if there was anything in Patient 1’s medical record that described the pain more specifically, such as its location, onset, acute or chronic, or whether it was sharp or dull, Dr. Kobak referred to the dermatological entry which recorded an HM 4-5. Dr. Kobak stated that an HM 4-5 usually causes pain. (Tr. 2770-2771)

Dr. Kobak stated that diagnoses of hammer toes, osteomas, and arthropathy were sufficient, “as long as they are considered part of the rest of the entire chart.” (Tr. 2771) Dr. Kobak stated that the term “osteoma” is a diagnosis that was emphasized to physicians trained in the 1950s and 1960s, more than it was for podiatrists trained later. Dr. Kobak can tell, from a review of the entire patient record, where the osteomas were, because on 4-18-88 Dr. Weiner recorded doing an osteotripsy on the fifth toe and fourth and fifth metatarsals, right. Also, the consent form for that date indicated that Dr. Weiner would “file bone spur.” Dr. Kobak said that the terms “bone spur” and “osteoma” are synonymous. (St. Ex. 1, p. 31; Tr. 2772-2773)

When Dr. Kobak was asked if he knew what Patient 1’s problems were by the surgery that was performed, Dr. Kobak answered in the affirmative, but added that there was more to it than that. He noted that there were also consent forms and x-rays. And although x-rays can’t show a corn, they can show the enlargement of bone in the location of the corn. (Tr. 2774-2775)

Dr. Kobak said that recording the DP and PT pulses in beats per minute was within the standard of care. Dr. Kobak stated that it is within the standard of care to measure the quality of the pulse by measuring the rate of the pulse, because if you can palpate the rate of the pulse that means that there must be a palpable pulse that is measurable. (Tr. 2778-2779)

Dr. Kobak testified that he palpates the DP and PT pulses with his fingers, and uses “the Plus 1 to a Plus 4 system.” Dr. Kobak said that, nevertheless, Dr. Weiner, by giving the pulses in terms of beats per minute was saying something about the quality of the pulses, “He was also telling you that at 70 beats per minute, there was a normal rate of pulse.” When asked if this meant that the patient’s heart is beating in a normal fashion, Dr. Kobak replied, “Yes and no, because if someone had arterial sclerosis of glands or some other vascular disorder that prevented palpation of a pulse, the heart could be beating in normal order, and you still won’t get 70 beats per minute or anything else, you’ll get zero because there won’t be anything.” (Tr. 2778-2779)

Dr. Kobak said that other important factors in a circulatory examination are the microcirculation; skin color, temperature, and texture; and capillary return. Dr. Kobak acknowledged that no such findings are noted in Dr. Weiner’s medical records for Patient 1. Dr. Kobak assumed that this meant these factors were all normal. (Tr. 2780)

Dr. Kobak acknowledged that “arthropathy,” by itself, is a general term. However, Dr. Weiner, in his diagnostic impressions, also diagnosed hammer toes and osteomas. Hammer toe implies a bend in the joint. Osteomas can cause joint problems if the enlarged bone is at the joint. When asked how he knew that the osteomas affected the joints, Dr. Kobak replied, “I would hope to think that the doctor examined the patient with his hands and with his eyes and at least * * * took a look at what was going on with the patient’s toes.” Ms. Strait then asked Dr. Kobak if he was hoping that Dr. Weiner did an exam; Dr. Kobak replied, “Well, I’m assuming the doctor did an exam.” (Tr. 2782-2784)

Dr. Kobak testified that the word “stiff” is not a medical term. He testified that a toe can be resistant to motion without being rigid. When Dr. Kobak was asked if he had any way of knowing from Dr. Weiner’s records if Patient 1’s hammer toes were flexible, semi-rigid, or rigid, Dr. Kobak stated that the x-rays are helpful. If there’s a bony block visible on x-ray, the toe will be non-reducible. If there is no bony block, the toe is generally semi-rigid or flexible. When Dr. Kobak was asked how one would know that from an x-ray, Dr. Kobak replied, “From the x-ray specifically, I would want to coordinate that with my examination findings.” (Tr. 2785-2787)

Dr. Kobak was asked to determine from the medical records for Patient 1 if

Patient 1 needed surgery to correct her hammer toes. Dr. Kobak said:

According to the patient's records, the doctor's diagnostic impression [is] multiple hammer toes. The patient's chief complaint is pain, which is an indication for surgery. The patient signs on the consent form her reason for the surgery, that she has painful, stiff, bent toes and painful feet. She correlated that the surgery was explained to her in detail. That's pretty comprehensive, as far as I'm concerned, other than I would like to have a videotape of the session, but it's not available.

(Tr. 2790-2791) Dr. Kobak was asked if he based that statement on an assumption that Dr. Weiner performed a physical examination. Dr. Kobak replied, "Yes, I have to assume that. If you don't assume that then there's a problem." (Tr. 2791)

Dr. Kobak testified that it is within the standard of care to refer to warts or calluses as benign neoplasms in the medical records. Dr. Kobak stated, however, that in his own practice he generally uses the terms "warts" or "plantar keratosis." (Tr. 2793-2794)

Dr. Weiner

Dr. Weiner stated that when a patient first comes into his office, he or she fills out an information sheet. The patient lists the problems that they want to bring to Dr. Weiner's attention. That sheet is given to the person at the front desk. The person at the front desk puts a caution sticker on the chart regarding anything special that Dr. Weiner should note. (Tr. 3333)

Dr. Weiner likes to greet the patient and bring them back to the treatment room himself. This helps reduce the patient's apprehension, and it gives Dr. Weiner a chance to observe the patient's gait. (Tr. 3334-3335)

Dr. Weiner said that the first thing that he does in the treatment room is look at the patient's posture, weight, and general appearance. Dr. Weiner then discusses the information sheet with the patient, whether the patient checked anything off or not. He also asks the patient if there is anything he or she wants to let Dr. Weiner know that was not included on the form. Dr. Weiner also reviews a few additional things with the patient, such as whether he or she is currently being treated by a physician, is currently taking any medication, has allergies to medication, or has a history of major illnesses. (Tr. 3335-3336)

Dr. Weiner said that he next asks the patient “what’s wrong.” He said that he was trained to record the patient’s complaint in the patient’s own words. (Tr. 3336-3337)

Dr. Weiner testified that the physical examination starts with the dermatologic examination. He examines the nails for any abnormalities. He checks the elasticity of the skin, and said that if the skin is not elastic there could be healing problems. Dr. Weiner said that he looks at the hair growth on the toes. If it is lacking, there could be circulatory problems. He checks the nail beds to see if they are pink. (Tr. 3337-3338)

Dr. Weiner stated that he then proceeds to do the circulatory examination. Dr. Weiner stated that he was taught to grade pulses based on a “70 per minute.” Dr. Weiner said that by judging the pulses, he can tell if the patient has tachycardia, which is a rapid pulse, or bradycardia, which is a slow pulse, or an arrhythmia. “Secondly, by feeling the pulse at that level, I know there [are] no complications in the arterial tree such as arterial sclerosis, thrombophlebitis, that’s thrombus, aneurysm. If there was a differential of 70 on one side and zero on the other side, there could be an aneurysm. There could be a blood clot. So it’s quite measurable.” Dr. Weiner stated that he ensures that the pulses are there, that they are rhythmic, and that they are equal. (Tr. 3338-3340)

In addition to examining pulses, Dr. Weiner’s circulatory exam includes feeling the skin temperature of the feet and toes. Hair growth and nail beds are observed, as is skin turgor. Dr. Weiner stated that he also does a capillary refill test at the ends of the toes. (Tr. 3340-3341)

Next, Dr. Weiner testified that he performs a neurological examination. Dr. Weiner stated that he was taught to grade whether the patella and achilles reflexes are normal and assessed whether each is equal to its contralateral reflex. It is not so important whether the reflexes are plus 4 or plus 2 on the grading scale, so long as they are equal. Dr. Weiner stated that he also does a Babinski test, “but I don’t consider that in any more light than the others. If the patella and achilles are normal, the Babinski is a confirmatory test versus diagnostic. It’s impossible in my knowledge to have a positive Babinski and have negative patella or achilles.” Dr. Weiner stated that he also tests for sharp and dull sensations, for vibratory sensations, and for tactile sensation. (Tr. 3341-3345)

Dr. Weiner said that he also observes the patient’s gait for abnormalities such as drop-foot or ataxic gait. This may be done when the patient walks back for x-rays. (Tr. 3345-3346)

Dr. Weiner also said that he performs a palpation examination. The purpose is to determine where the patient's pain is, and whether the pain is diffuse or local. (Tr. 3346-3347)

Dr. Weiner was asked for a reason why there were no notations concerning palpation examination, nail condition, hair growth, skin turgor or temperature, or Babinski, on Patient 1's physical examination sheet. Dr. Weiner did not agree that it meant that he did not perform those facets of the examination. Dr. Weiner said that, because he used to see 40 or 50 patients a day, he only charted abnormal findings. He stated that he performed the examination that he just described on every patient, including Patient 1. (Tr. 3349-3350)

Concerning his diagnostic impressions for Patient 1, Dr. Weiner testified that under the dermatologic exam he noted HM 4-5, which means soft corn or heloma molle. This indicated that there was some sort of abnormality, such as an exostosis on a bone or an alignment deformity causing the bone of one toe to rub against the bone of the other toe. The corn arises when the body pads the site of the irritation. Similarly, a plantar callus is formed when metatarsals are dropped out of alignment or enlarged. (St. Ex. 1, p. 46; Tr. 3354-3355)

Dr. Weiner testified that Patient 1 had hammer toes of all toes bilaterally. She also had multiple osteomas or bone spurs on the large toes and the little toes. Dr. Weiner said he and some other doctors "don't designate where the osteomas are, if they are multiple in location, I would be writing 20 or 30 different areas where the osteomas are. * * * Osteomas themselves may be a broad diagnosis, but this is a broad-sweeping condition." Patient 1 also suffered from arthropathy. Dr. Weiner said, "Osteomas are arthritis. Osteomas are exostosis. Exostosis is arthritis. So it's all interrelated." (Tr. 3355-3357)

Dr. Weiner described Patient 1's problems as evidenced on the x-rays. He stated that there was a large spur on the medial surface of the left hallux, distal phalanx. There were contractures at the proximal interphalangeal and distal interphalangeal joints. There were contractures of the metatarsophalangeal joints, and the 2, 3, and 4 metatarsal heads were abutting each other rather than being spaced. (St. Ex. 1A; Tr. 3366-3367)

2. "[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood

count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”

Dr. Van Enoo

Dr. Van Enoo acknowledged that it was appropriate for Dr. Weiner to order blood tests for Patient 1. Dr. Van Enoo also said that blood tests are generally a good idea prior to surgery. (Tr. 113-115)

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to take bilateral x-rays to compare the patient's feet. Blood tests were also appropriate. Dr. Goldenberg noted that blood tests and x-rays were done which could help the podiatrist determine what was causing the patient's arthropathy. Concerning the blood tests, for example, Dr. Goldenberg testified that alkaline phosphatase was normal; alkaline phosphatase can tell the podiatrist about systemic bone abnormalities. Protein was normal; phosphorus and serum calcium were also normal. The x-rays showed hammer toes and osteomas. (St. Ex. 1, p. 116; Tr. 1883-1884, 2467-2472)

Dr. Weiner

Dr. Weiner testified that his criteria for determining whether a patient needed x-rays was the presence of pain not due to infection. Dr. Weiner gave as examples of conditions not requiring x-rays to be skin problems, warts without other symptoms, ingrown toenails not caused by tendon deformity, and infections. He said that list is exhaustive, except possibly for one or two other conditions that he could not recall at the time. Conditions that would require x-rays are pain or deformity. The number of x-rays taken depended on the problem. (Tr. 3348-3352)

Dr. Weiner testified concerning the criteria that he used for determining whether or not a patient needed blood tests. He stated that if the patient was to be put on medication for palliative care, he would want a blood test:

Different problems arise with different medications. There is no medication that is really problem free. For example, nonsteroids, and I use them, can cause—in less than 1 percent of the patients, more than one in a thousand, less than 1 percent, could cause a

spontaneous rupture of the stomach. There are risks inherent with every medication. I want to know the patient's general health.

(Tr. 3362-3363) Other patients who require blood tests are those who would be undergoing surgery on a long-term basis, including "long-term tendon surgery or long-term bone surgery[.]" Dr. Weiner testified that not everyone who came into his office received a blood test. (Tr. 3363)

3. *"[E]ven though [Dr. Weiner] routinely took x-rays, [his] records fail to reflect clinical notes or other reports regarding any radiological findings."*

Dr. Weiner

Dr. Weiner testified that his diagnostic impressions are a combination of his x-ray determination, visual inspection, and palpation examination, including the patient's complaints and responses to the palpation exam. (Tr. 3352-3354)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

Dr. Van Enoo

Dr. Van Enoo criticized Dr. Weiner for performing surgery on Patient 1 on 4-11-88 without waiting for the results of the blood tests. Dr. Van Enoo stated that it was appropriate to order blood work for Patient 1, and that blood work is generally a good idea prior to performing surgery, but if blood tests are ordered, the surgeon should wait for the results. (Tr. 113-115)

Dr. Goldenberg

Dr. Goldenberg stated that, because the procedures performed during the first visit were soft-tissue procedures, it was acceptable for Dr. Weiner to perform those procedures prior to receiving the results of the blood tests. (Tr. 1883-1884)

Dr. Weiner

Dr. Weiner was asked, if the blood tests were important, why he performed surgical procedures before the results of the tests came back. Dr. Weiner replied that he did certain tests in-office, namely bleed time, clotting time, and blood sugar. If a patient came in with a painful deformity and wanted correction on the first visit, had adequate circulation, and if the procedure was

a relatively non-invasive soft-tissue procedure, Dr. Weiner would do it. (Tr. 3363-3364) On 4-11-88, Patient 1's bleeding time tested as 4 minutes, 17 seconds; clotting time tested as 9 minutes, 48 seconds; and blood sugar tested as negative. (St. Ex. 1, p. 46; Tr. 3368-3369)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

[Note: Testimony was presented concerning the subjects of surgical technique, and the preparation of operation reports. To the extent that the testimony addressed whether the surgery was performed with or without indication, the testimony is relevant. However, to the extent that the testimony simply addressed a surgical technique or potential complications of a surgical technique, or postoperative recordkeeping, it is irrelevant and will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

Dr. Van Enoo

Concerning the 4-11-88 surgery:

- The type of surgery described in the 4-11-88 operation report was a capsulotomy performed on the metatarsophalangeal joint [MPJ] (the joint between the metatarsal and the proximal phalanx) of the second toe of Patient 1's left foot, and repeated for the MPJs of the third, fourth, and fifth toes of the left foot. Dr. Van Enoo described a capsulotomy as cutting into the joint capsule. Dr. Van Enoo testified that such a procedure, by itself, is not indicated for hammer toes. (St. Ex. 1, p. 19; St. Ex. 94; Tr. 107-111)
- Dr. Van Enoo acknowledged that there were some mild contractions of the toes, mostly at the distal phalanges. Dr. Van Enoo noted that the metatarsophalangeal joints were all straight and the proximal interphalangeal joints were fairly straight. Nevertheless, Dr. Van Enoo testified, within a reasonable degree of medical certainty, that they were not hammer toe contractions. (St. Ex. 1A; Tr. 3933-3934)
- Dr. Van Enoo disagreed with Dr. Goldenberg's testimony that the capsulotomies or arthrotomies on 2 through 5 left that Dr. Weiner performed on 4-11-88 were indicated for hammer toe contractions. Dr. Van Enoo acknowledged that there were some mild contractions of the

toes, mostly at the distal phalanges, but stated that there were no contractures at the metatarsophalangeal joint level. As support for his opinion, Dr. Van Enoo compared a preoperative x-ray dated 4-11-88 with a postoperative x-ray dated 9-24-89, and testified that all of the tenotomies and capsulotomies that Dr. Weiner performed had no effect. The toes looked the same in both x-rays. (St. Exs. 1A and 1D; Tr. 3934-3936)

- Although there is a progress note for 4-11-88 that an ETL, extensor tendon lengthening, was performed, Dr. Van Enoo stated that he could not tell from the record on which tendons or on which toes this procedure was performed. Moreover, Dr. Van Enoo could not tell at what level the tendons were lengthened. (Tr. 476-481)

Concerning the 4-18-88 surgery:

- The surgery described in one of the operation reports for 4-18-88, which described an osteotripsy on the fourth and fifth proximal phalanges of the right foot, was appropriate for the diagnosis of “Exostosis toes, Deformity of metatarsal head” that appears on that page. Dr. Van Enoo said that it would have been appropriate to remove bone at the head of the fifth proximal phalanx, and possibly the base of the fourth proximal phalanx as well, which appears to be what Dr. Weiner described in the operation report. (St. Ex. 1, p. 34; Tr. 130-132)
- However, the postoperative x-ray revealed a different result, Dr. Van Enoo testified, from what the operation report described. The medial side of the fifth metatarsal head was damaged. There was a channel cut into the fourth metatarsal, and the lateral aspect of the fourth metatarsal head was removed. (St. Exs. 1B and 1C; Tr. 132-136)
- The areas which were worked on were not the areas that are appropriate to the HM problem. The appropriate areas would have been the base of the fourth proximal phalanx and the head of the fifth proximal phalanx. Instead, Dr. Weiner worked on normal metatarsal heads. (Tr. 142-143)
- Moreover, Dr. Van Enoo testified that minimal incision surgery is appropriate for removing bone which is close to the skin, but not right at a joint. Minimal incision surgery is not appropriate for mid-foot procedures, ankle procedures, and certain soft-tissue procedures such as those used to treat neuromas. (Tr. 144-145)

Dr. Goldenberg

Concerning the 4-11-88 procedures, Dr. Goldenberg testified that it is appropriate to perform both arthrotomies and tendon procedures in order to reduce contraction. Dr. Goldenberg stated that both procedures were indicated by what he saw on the x-rays. (St. Ex. 1, pp. 17-19, 46; St. Ex. 1A; Tr. 1880-1883)

Dr. Goldenberg testified that he was able to tell that metatarsals were operated on from the diagnosis of enlarged metatarsal heads. Therefore, it did not need to be mentioned in the operation report. Dr. Goldenberg testified that he was able to tell, from a review of the x-rays and the chart, the nature of the procedure performed. (Tr. 1890)

Concerning Dr. Weiner's 4-18-88 surgery on Patient 1, Dr. Goldenberg testified that the consent form properly refers "to bone procedures on the toes or phalanges, as well as the metatarsals." (St. Ex. 1, p. 31; Tr. 1883-1884) Dr. Goldenberg testified that the procedures that were performed can be determined from the medical record, and that the procedures performed were appropriate for the diagnoses. (Tr. 1886-1887)

Dr. Weiner

Dr. Weiner stated that on Patient 1's first visit he performed a nerve block, extensor tendon lengthenings and arthrotomies on toes 2 through 5, left, and applied a flexible cast. The purpose of the procedures was to correct painful, stiff, bent toes caused by reducible hammer toes. Dr. Weiner said that the surgery was done in stages: first, the tendon lengthenings, then capsulotomy, and finally arthrotomy. Dr. Weiner said that these procedures were intended to reduce the pressure of having the toes flexed up, which pushed the metatarsal heads down and together. Dr. Weiner had hoped to gain some correction of the hammer toe deformity, as well as reducing impingement of the metatarsal heads. (Tr. 3365-3368)

Concerning the 4-18-88 procedures, Dr. Weiner testified that he performed an osteotripsy on the fourth and fifth metatarsal heads of the right foot. The reason was to alleviate the cause of the soft corn by minimizing the convexities of bone. (St. Ex. 1C; Tr. 3372-3375)

When asked on cross-examination to show where on the x-rays it was shown that Patient 1 had arthropathy, Dr. Weiner replied, "Arthropathy is joint disease, and it's shown on the x-rays at the IPJs. There's no joint space, or the

joints are enlarged, the fifth head of the proximal phalanx, the lateral; fourth toe, lateral intermediate phalanx; third toe, intermediate phalanx lateral; distal end of the distal phalanx of the second toe; and the large toe on, the distal phalanx medially.” (St. Ex. 1A; Tr. 3711-3712)

8. “[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures.”

Dr. Weiner

Dr. Weiner testified that, on 4-22-88, Patient 1 was given electrical stimulation and ultrasound. Dr. Weiner acknowledged that he did not chart the purpose for which this physical therapy was given, but testified that the purpose was to alleviate postoperative swelling. Dr. Weiner said that he did not chart the purpose for the physical therapy because he only charted problems, and “there was no real problem. It’s normal healing. It speaks for itself.” (Tr. 3377-3378)

- 9b. “[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” * * * (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”

Dr. Van Enoo

Dr. Van Enoo defined an arthrotomy as something more than cutting into a joint. There must be a purpose for opening the capsule, such as aspiration or removal of foreign bodies. (Tr. 3936-3938)

Dr. Goldenberg

Dr. Goldenberg noted that the procedure described in an operation report dated 4-11-88 described either a capsulotomy or an arthrotomy. The reason he could not tell for certain was that the operation report does not specify how much of the joint was incised. (St. Ex. 1, p. 19; Tr. 3006-3007)

Dr. Weiner

Dr. Weiner testified that the consent forms and progress notes for 4-11-88 indicated that arthrotomies had been performed on toes 2 through 5 left. The consent form for 4-29-88 also indicated that Dr. Weiner performed arthrotomies on toes 2 through 5 left. Restricted to merely the operation reports, consent forms, and the progress notes, Dr. Weiner acknowledged that it would appear that the surgery was repeated. (Tr. 3723-3725) Dr. Weiner testified, however, that he did not repeat surgeries. He indicated that, from the photographs he could tell that on 4-11-88 the right foot was treated, and on 4-29-88 the left foot was treated. [Dr. Weiner took Polaroid photographs of his surgeries, and had the patient sign and date each picture. Copies of the photographs of Patient 1's surgeries appear at State's Exhibit 1, pp. 9-12] (St. Ex. 1, pp. 10, 12, 17, 36, 46; Tr. 3719-3720)

12. *"[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy.'"*

Dr. Van Enoo

Dr. Van Enoo testified that Dr. Weiner's progress notes for Patient 1 do not fall within the standard of care. It is difficult to determine from Dr. Weiner's progress notes what occurred during a particular visit. As an example, Dr. Van Enoo noted that Patient 1 had surgery on her 4-11-88 visit. Nevertheless, there is nothing recorded in the progress notes concerning the Patient 1's condition, sutures, draining, or healing. (St. Ex. 1, p. 46; Tr. 101-104)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, or 10.]*

PATIENT 2

Patient 2, female, d.o.b. 11-21-60, first visited Dr. Weiner's office on 3-10-88. (St. Ex. 2, pp. 4, 5)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients*

in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”

Dr. Stewart

Dr. Stewart made the following statements concerning Dr. Weiner’s physical exam of Patient 2:

- Dr. Stewart testified that the chief complaint was “feet hurt, heels hurt.” Dr. Stewart said, “There’s no reference as to how long that’s gone on, whether there’s been any previous care, the nature of the pain, etcetera.”
- It was noted in the physical exam section that there was pain on palpation in the “left foot. Heel, arch, metatarsal area.” However, the nature of the pain is again not described, and the specific anatomic area is not noted.
- The circulatory exam measured the DP and PT pulses as 68. Dr. Stewart said, “I have to assume that that refers to beats per minute, which is not the traditional method of circulatory evaluation in the foot. That’s simply a measure of the heart rate. Circulatory evaluation of the foot would include different descriptors of the circulation.”
- Noting that the neurologic section said “patella, achilles normal,” Dr. Stewart stated, “There’s no reference to coarse and fine sensitivity, vibratory sense, or any other neurologic evaluation.”
- The sections for dermatologic, musculoskeletal, and structural and gait examinations were left blank.
- Dr. Weiner’s diagnostic impressions were to rule out bone spur; arthralgia, osteopathy, and metatarsalgia. Dr. Stewart noted that the record does not give any insight as to Dr. Weiner’s thought processes in arriving at these diagnoses.

(St. Ex. 2, p. 5; Tr. 737-738)

Dr. Stewart testified that, at Patient 2’s first visit, three x-rays were taken, although the record does not state which views or which feet. Dr. Stewart acknowledged, however, that one could tell from the x-rays themselves which

views were taken and which feet were x-rayed. There are also references to a plantar fasciotomy being performed on the left heel, and a flexor tendon lengthening on toes 2-5 on the left foot. Dr. Stewart explained that it would not be appropriate to do a plantar fasciotomy in order to diagnosis heel spur; plantar fasciotomy is a treatment, not a diagnostic method. Plantar fasciotomy is, however, one treatment for heel spur syndrome. Dr. Stewart stated that the appropriate way to rule out a heel spur is to do an x-ray. (St. Ex. 2, pp. 5, 17; Tr. 739-740, 950)

Dr. Goldenberg

Dr. Goldenberg discussed his review of the x-rays, physical examination, history, and diagnostic impressions concerning Patient 2. Concerning the circulatory exam, Dr. Goldenberg testified that if the exam results were recorded in a format of beats-per-minute, then that means that the patient had adequate circulation in the feet. Dr. Goldenberg further testified that his review of the x-rays confirms Dr. Weiner's diagnosis of metatarsalgia. The metatarsal heads of the left foot are hypertrophic compared to the right foot. In addition, the metatarsal heads of the second and third metatarsals are in very close apposition to each other. In Dr. Goldenberg's opinion, Dr. Weiner's medical records for Patient 2 are within the standard of care. (St. Ex. 2A; Tr. 2092-2097)

Dr. Weiner

Dr. Weiner testified that he did not have an independent recollection of Patient 2. (Tr. 3385) Nevertheless, concerning Patient 2, as well as with all 62 patients that were the subject of this hearing, Dr. Weiner testified that he performed the complete examination that he described in connection with Patient 1. Dr. Weiner further testified that he charted only abnormal findings in each of the 62 cases as well. (Tr. 3382-3383)

Dr. Weiner testified that Patient 2 suffered from a heel spur on her right foot. She had arthralgia, which was disseminated joint pain; osteopathy, which included the heel spur; contracted joints; and exostosis. She had metatarsalgia bilaterally. Her chief complaints were that her feet and heels hurt. (Tr. 3383-3384)

Concerning his examination, Dr. Weiner said "if you palpate the heel, which we did, it definitely shows a heel spur on her right foot. * * * She had pain on palpation on her left foot, the heel and the arch and the metatarsal area, so both heels hurt her. The x-rays show the heel spur on the right, small heel

spur starting on the left.” Dr. Weiner noted that the heel spurs were caused by tight plantar fascias pulling on the heel bones. Dr. Weiner indicated that he reviewed the x-rays with the patient. (Tr. 3384-3385)

Dr. Weiner could not say without looking at the x-rays whether or not Patient 2 had hammer toes. However, he stated that she had osteopathy and metatarsalgia. Dr. Weiner testified that metatarsalgia is an indication for tendon surgery, because it is caused by contracted toes. Dr. Weiner acknowledged that the initial visit record and progress notes do not mention contracted tendons, contracted toes, or hammer toes, but said “[i]t implies it, though.” (Tr. 3731-3732)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”*

Dr. Goldenberg

Dr. Goldenberg testified that it was within the standard of care for Dr. Weiner to obtain x-rays and blood tests for this patient. The x-rays were justified by the patient’s complaints of joint pain, metatarsalgia, and heel pain. Blood tests were justified by the heel pain, which can result from systemic problems, and because bone surgery may become necessary. (Tr. 2095-2096)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical record for Patient 2 indicates that on 3-10-88, Dr. Weiner drew blood for a blood test. Also on that date, Dr. Weiner performed a plantar fasciotomy on the left heel, and flexor tendon lengthenings on toes 2 through 4 left. However, the results of the blood tests are dated 3-14-88. (St. Ex. 2, pp. 5, 20)

Dr. Weiner

Dr. Weiner testified that he knows that he took a bleeding time, clotting time, and blood sugar test on Patient 2 “[b]ecause whenever I * * * do surgery, I always — for a first visit, I’ve been trained to do bleeding time, clotting time, and blood

sugar.” Nevertheless, Dr. Weiner acknowledged that he did not document these tests in Patient 2’s medical record. (St. Ex. 2, p. 5; Tr. 3726-3728)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Stewart

Dr. Stewart said that he could find no reason in the medical records why a plantar fasciotomy needed to be performed at Patient 2’s first visit. Moreover, Dr. Stewart could not explain why a flexor tendon lengthening was performed, because there is no specific reference to a problem with Patient 2’s toes. He said that such a procedure may be appropriate for a stage one flexible hammer toe. (St. Ex. 2, pp. 5, 17; Tr. 740-741) Dr. Stewart testified that it was below the standard of care for Dr. Weiner to perform the aforementioned procedures without first specifying in the medical record which anatomical areas were affected by the conditions that Dr. Weiner diagnosed. (Tr. 742)

Dr. Stewart testified that on 3-17-88 another surgical procedure was performed on Patient 2. It was listed in the progress notes as “arth,” which Dr. Stewart said could be interpreted as an arthroplasty, arthrotomy, or arthrocentesis. However, there was no operation report in the medical records concerning this procedure. Dr. Stewart testified that an arthrotomy or arthroplasty could possibly be appropriate for a diagnosis of metatarsalgia, which simply refers to pain in the metatarsal region of the foot. Dr. Stewart said, “Conceivably, an arthrotomy of the metatarsophalangeal joints might be performed for the diagnosis. But the descriptor does not reference whether it’s the metatarsophalangeal joints or any other area.” Further, Dr. Stewart stated that it was below the minimal standards of care to perform an invasive procedure without producing an operation report. (St. Ex. 2, p. 5; Tr. 743-745)

Dr. Goldenberg

Dr. Goldenberg noted that the x-ray revealed a large heel spur on the right heel, as well as some “pointing” on the plantar aspect of the left heel. “Pointing” is indicative of the plantar fascia pulling on its attachment to the heel, and is indicative of heel spur syndrome. (St. Ex. 2B; Tr. 2098, 3113-3114, 3239) The heel spur is the result of the heel bone adapting to the tension of the plantar fascia. The tension of the plantar fascia on the heel bone causes

new bone to form at the attachment of the plantar fascia to the calcaneus, and the new bone is visible on x-ray as a heel spur. (Tr. 2098-2100)

On 3-10-88, Dr. Weiner performed a plantar fasciotomy on the left heel and flexor tendon lengthenings of toes 2 through 5, left. Dr. Goldenberg testified that the plantar fasciotomy was appropriate to relieve the tension of the plantar fascia that was causing the heel spur. Dr. Goldenberg stated that this is the standard of care for treating heel pain. (Tr. 2098-2104, 3240)

On 3-17-88, Dr. Weiner performed arthrotomies on 2 through 5, left, and extensor tendon tenotomies on 2 through 5, left. Dr. Goldenberg testified that “these are done to release the deforming forces in the level of the toes that can cause also heel pain or contractions of the digits.” In addition, Dr. Goldenberg said that “by releasing the contraction of the digits, you’re reducing the deforming forces of the toes sitting on top of the metatarsals, and that will also reduce some of the discomfort of the metatarsalgia.” (Tr. 2104)

Dr. Weiner

Dr. Weiner said that his treatment plan for Patient 2 was to perform plantar fasciotomies on both heels, and reduce the contracture of her toes to relieve metatarsalgia. Dr. Weiner stated that on Patient 2’s first visit, he performed a plantar fasciotomy on the left heel, and flexor tendon lengthenings of 2 through 5, left. Dr. Weiner said that because Patient 2’s plantar fascia was very tight, he wanted to address it both at the heel level and at the toe level. (Tr. 3386-3387) Dr. Weiner stated that on 3-17-88 Dr. Weiner performed extensor tendon lengthenings and arthrotomies of 2 through 5, left. The purpose was to release the pressure placed on the metatarsal heads by the toes being contracted up, and to release stress on the plantar fascia. (Tr. 3389-3390)

On cross-examination, Dr. Weiner stated that he was able to characterize this patient’s condition of an “extremely tight plantar fascia” because he rarely did plantar fasciotomies at the heel level. Whenever he addresses the plantar fascia at the heel, he automatically knows that the plantar fascia was extremely tight. Dr. Weiner refused to characterize this as an assumption. He knows from his past history that he only addresses the plantar fascia at the heel if the plantar fascia is extremely tight. (Tr. 3728-3730)

Patient testimony

Patient 2 testified at hearing. She indicated that she originally went to see Dr. Weiner because of pain in both of her heels, but that the left hurt more.

Patient 2 testified that, on her first visit, she was advised that surgery was the only option to relieve the pain caused by a heel spur. When Patient 2 expressed uncertainty about having the surgery done, she testified that “[Dr. Weiner] said that I was acting childish and I should grow up, and that it wasn’t going to heal it any quicker or get rid of the pain any faster to prolong it, just to go ahead and have it done today. The sooner we take care of it, the sooner it’ll be—the pain will be gone.” (Tr. 1436-1437, 1464-1465)

Dr. Weiner denied that he had chided Patient 2 into having surgery. (Tr. 3385-3386) Dr. Weiner testified that he never coerced patients into any particular mode of treatment. He testified that he always gave his patients choices. (Tr. 3629-3630)

Patient 2 testified that after seeing Dr. Weiner, her problems worsened to the point that her husband had to carry her, and she needed a wheelchair. Patient 2 recalled at hearing that approximately three months after seeing Dr. Weiner she went to see another podiatrist, Dr. Yarnevich. Patient 2 testified that Dr. Yarnevich disputed Dr. Weiner’s finding of heel spur, and placed Patient 2 on conservative therapy. Patient 2 stated that she still suffers from pain in her toes, which she did not have prior to seeing Dr. Weiner. (Tr. 1439-1444)

Concerning Patient 2’s testimony that Dr. Yarnevich disputed Dr. Weiner’s finding of heel spur, however, Dr. Yarnevich’s medical record noted on 6-28-88 that “At this time I informed the pt. that she infact [sic] had an inferior calcaneal exostosis of the right foot but she stated that it was symptomatic and not painful at all.” Patient 2 testified that she never heard the words “inferior calcaneal exostosis.” She further stated that she could not answer with a yes or no to the question “Is it your testimony that Dr. Yarnevich never told you that you had a calcaneal exostosis or a heel spur?” (St. Ex. 2, p. 48; Tr. 1453-1458) She later testified, however, that Dr. Yarnevich told her she had calcium deposits on her heels. (Tr. 1466-1467)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, or 12.]*

PATIENT 3

Patient 3, male, d.o.b. 9-13-56, first visited Dr. Weiner’s office on 4-18-85. (St. Ex. 3, pp. 41, 43)

1. *“[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”*

Dr. Stewart

Dr. Stewart noted that on 4-18-85 Patient 3 presented to Dr. Weiner’s office with a chief complaint of painful calluses and toes. In his dermatologic exam, Dr. Weiner found clavi (corns) on the 3-5 toes on the right foot, and on the 2-4 toes on the left foot. In his musculoskeletal exam, Dr. Weiner found pes cavus, which refers to a high-arch foot structure. In the circulatory exam, Dr. Weiner noted 80 beats per minute, which refers to a heart rate rather than the circulation in the foot. In his diagnostic impressions, Dr. Weiner noted “hy” metatarsal heads, hammer toes, bursitis, and myositis feet. (St. Ex. 3, p. 43; Tr. 745-747)

Dr. Stewart testified that Dr. Weiner performed surgery on Patient 3 during Patient 3’s first visit. It was listed as “arth” performed on the “third, fourth and fifth” on the right foot. Dr. Stewart noted that the progress note didn’t reference whether the number referred to toes, metatarsals, or MPJs. Dr. Stewart testified that it was below the standard of care to not specifically reference in the medical records the anatomy that was addressed by the surgery. (St. Ex. 3, p. 43; Tr. 747)

Also concerning Patient 3’s initial visit with Dr. Weiner, Dr. Stewart testified that the records indicate that Dr. Weiner performed a chemocautery debridement of one neoplasm on Patient 3’s right foot. The record does not describe what the neoplasm was, where it was located, or what type of chemocautery was employed. Such information should have been noted in detail in the records. It was below the minimal standards of care for Dr. Weiner to fail to do so. (St. Ex. 3, p. 43; Tr. 752)

Dr. Weiner

Dr. Weiner testified that Patient 3 presented to his office with chief complaints of “painful calluses and toes, dermatologic clavus, which is benign neoplasm, 3, 4, 5 metatarsal heads right. On the left, it was on 2, 3, 4, plantar surface metatarsal heads.” Dr. Weiner said that his diagnostic impressions were hypertrophic metatarsal heads, particularly 3, 4, and 5, right, and 2, 3, and 4,

left. They were enlarged in two planes: dorsally/plantarly and laterally/medially. Dr. Weiner also diagnosed hammer toes, which aggravated the metatarsal heads, bursitis, and myositis feet and toes. Dr. Weiner further noted that the fifth metatarsals were splayed laterally, putting additional pressure on the other metatarsals. (St. Exs. 3A and 3B; Tr. 3394-3397)

Dr. Weiner testified that his treatment plan was to do tendon surgery to release the hammer toe deformities and relieve the pressure on the metatarsal heads, which were hypertrophic and causing the calluses on the plantar surface. (Tr. 3397-3398)

Dr. Weiner testified that the neoplasm that he debrided on 6-3-85 was on the left foot. Dr. Weiner acknowledged that the record doesn't say that it was the one on the left, but that since his dermatologic examination listed one on the left, that would have been the only one remaining. (St. Ex. 3, p. 43; Tr. 3734-3735)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to obtain x-rays because of the enlarged metatarsal heads and hammer toes, and blood tests prior to bone surgery. (St. Ex. 3, pp. 41, 43; Tr. 2106-2108)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Stewart

Dr. Stewart speculated at length concerning situations in which an "arth" and an extensor tendon cutting or lengthening may have been appropriate given the very generalized diagnoses; however, Dr. Stewart stated that "I cannot determine from the records that I'm looking at here as to specifically what procedure was done * * *." Without knowing what procedures were performed,

Dr. Stewart could not tell whether or not they were indicated. (St. Ex. 3, pp. 24-25, 43; Tr. 748-752)

On 4-29-85, an “arth” was performed on 1 and 2, right. There were also diagnoses of exostosis toes and contracted tendon. Concerning the procedure, for which an operation report was available, Dr. Stewart testified that he would interpret the procedure performed to have been a capsulotomy. Dr. Stewart testified that this procedure was not appropriate for a diagnosis of exostosis of the toes, but speculated that it could have been appropriate for calluses, if the calluses were located at the MPJ level. Unfortunately, the record does not disclose the location of the calluses. (St. Ex. 3, p. 43; Tr. 754-757)

Dr. Goldenberg

Dr. Goldenberg testified that the procedures performed by Dr. Weiner on 4-18-85 were appropriate for a condition of painful calluses. (St. Ex. 3, pp. 24, 43; Tr. 2108-2109, 3119) He concluded that no further identification or explanation concerning the nature of the neoplasm is required. (Tr. 3232)

Concerning the surgery of 4-29-85, Dr. Goldenberg testified that the soft-tissue procedures performed were appropriate for a diagnosis of stiff, painful hammer toes. Dr. Goldenberg equated the word stiff, as it was used on the consent form, as meaning reducible. It was also an appropriate first step toward treating exostosis toes; if the toe is straightened, it may help reduce pressure on the exostosis. (St. Ex. 3, pp. 21, 23; Tr. 2109-2111) Dr. Goldenberg stated that the surgery that was performed was a capsulotomy, or arthrotomy as based on the progress note. Dr. Goldenberg acknowledged that the consent form made no reference to cutting into joints, and based his opinion on the progress notes and the operation report. Dr. Goldenberg also acknowledged that neither the operation report or the progress note mentioned cutting tendons. (Tr. 3120-3122) Nevertheless, he testified that the consent form, the progress note, and the operation report were not in conflict; the consent form was purposely written in laymen’s terms, and reflects an understanding that if cutting tendons does not provide sufficient release, then capsulotomy or arthrotomy may be performed. Dr. Goldenberg testified that arthrotomy was an appropriate procedure for a diagnosis of hammer toes. (Tr. 3233-3234)

Concerning the surgery of 5-20-85, Dr. Goldenberg testified that a plantar fasciotomy of 2, 3, and 4 of the right foot would reduce the deforming forces causing contraction of the digits. Moreover, concerning the surgery of 6-10-85, Dr. Goldenberg testified that a plantar fasciotomy of 1 and 5 of the left foot was appropriate. (Tr. 2111-2113)

6. *The procedures referred to in allegation #5 “were frequently being performed upon the great toes and tendons were cut inappropriately.”*

Dr. Stewart

Dr. Stewart stated that the operative report for a procedure that occurred on 6-10-85 indicates that the bottom tendons of the first and fifth toes were cut. Dr. Stewart testified that cutting a tendon on the first toe is rarely indicated; it is only done in cases of severe neuromuscular problems, such as cerebral palsy or polio. Dr. Stewart explained that the first toe plays an important role in the gait cycle, and cutting a tendon in that toe would severely disrupt a person’s gait pattern. (It should be noted that the reference to cutting the tendon of the first toe was in the consent form for 6-10-85. The operation report refers to an incision being made in the plantar fascia.) (St. Ex. 3, pp. 29, 33; Tr. 769-771) Dr. Stewart acknowledged that his reading of the word “cut,” as it was used in the consent forms, meant a tenotomy was performed as opposed to a tendon lengthening. (Tr. 972-973)

Dr. Goldenberg

Dr. Goldenberg disagreed with Dr. Stewart’s assertion that tendon surgery on the great toes of Patient 3 was inappropriate. Tendon lengthenings and tenolysis can reduce deforming forces on the great toes. Further, Dr. Goldenberg stated that there is a risk that if soft-tissue procedures are not performed in the early stage of a hammer toe, then the hammer toe may progress into a rigid state that would require bone surgery. (Tr. 2114-2115)

Dr. Weiner

Dr. Weiner testified that he performed tendon surgery on the great toes in order to help reduce contracture of the great toe. In Dr. Weiner’s opinion, there were no inordinate risks in this type of surgery. (Tr. 3404)

7. *“[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost.”*

Dr. Stewart

Dr. Stewart acknowledged that it appeared that Dr. Weiner had performed surgical procedures on Patient 3 in serial fashion. He explained that serial procedures are acceptable in medicine, and referred to procedures “staged in a sequence for medical reasons, to be done separate times, separate dates, and separate surgical settings.” Dr. Stewart stated that he could think of two instances where it would be appropriate for surgical procedures to be performed in serial fashion: first, procedures involving extensive surgical trauma to the tissues; and, second, when the patient is medically compromised and likely to experience impaired healing. (Tr. 759–764)

Dr. Stewart testified that he could not find in Patient 3’s medical record any need for doing the procedures performed in serial fashion. (Tr. 765)

Dr. Stewart testified that performing surgery on a serial basis may have an effect on reimbursement. Dr. Stewart noted first that third-party payors reimbursed podiatrists for multiple procedures in a more or less standard fashion. There is a reduction in reimbursement for each subsequent procedure performed on the same surgical date. The second, and sometimes the third, procedure is typically paid at the 50% level; subsequent procedures are paid at the 25% level. Therefore, there may be a financial incentive to schedule procedures in a serial fashion. (Tr. 765-768)

Dr. Goldenberg

Dr. Goldenberg disagreed with Dr. Stewart’s assertion that there was no reason to do staged surgery in this case. One of the tenets of minimal incision surgery is to keep the patient as ambulatory as possible. Staging the procedures subjects the patient to less pain, and reduces the amount of time that is lost to perform normal activities. The treating podiatrist, through consultation with the patient, is the person in the best position to determine whether surgery should be staged. (Tr. 2113-2114)

Dr. Weiner

Dr. Weiner testified that it would not have been possible to perform all of these surgeries in one sitting if Patient 3 wanted to remain ambulatory. Dr. Weiner discussed his feelings concerning serial surgery:

With all patients, once they elect to have surgery performed, we give them the option of what amount to have done at one sitting, and I

prefer no more than five. * * * I want a safe haven for these patients. I want them to be able to put their feet in an area where they will have some areas of their foot that won't have pain. I find that after 30 years of experience, we have had—I have a good idea of what will cause pain and what won't. And my preference is to do about three at a time, if possible. This is explained to the patient that I can do five at a time, three at a time, one at a time. Most of the time, the patients ask me what I feel. I give my answer that three is an appropriate amount, but the final decision is theirs, not mine.

(Tr. 3402-3403) Dr. Weiner added that some patients who had four or five procedures performed in one sitting had problems. (Tr. 3398-3403) Dr. Weiner further added that the prospect of obtaining greater reimbursement from insurance companies was not a factor in his decision to perform serial surgery. (Tr. 3404-3408)

10. *"[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated."*

Dr. Weiner

Dr. Weiner testified that prescribing steroids for postsurgical pain and swelling gives the patient 50 percent greater mobility and 50 percent less pain. He testified that he based those figures on his own clinical experience. (Tr. 3737-3738)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, or 12.]*

PATIENT 4

Patient 4, female, d.o.b. 6-27-63, first visited Dr. Weiner's office on 11-13-87. (St. Ex. 4, pp. 38, 41)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Stewart

Dr. Stewart testified that, similar to the other patient records, the history and examination of Patient 4 were not properly documented. Problems encountered, such as ingrown toenails, painful bones, and arthropathy are not described with enough specificity concerning their location and severity. Further, a neoplasm was excised, but there was no description of the neoplasm, and no reference to a biopsy. (St. Ex. 4, pp. 38 [and reverse], and 41; Tr. 771-785)

Dr. Goldenberg

Dr. Goldenberg discussed his review of the patient's chief complaint, the physical examination, and diagnostic impressions. He noted that the x-rays were of diagnostic quality. He further stated that the recordkeeping in this case was within the standard of care. (St. Ex. 4, pp. 38, 41; St. Exs. 4A, 4B, and 4C; Tr. 2115-2117) Dr. Goldenberg testified that it was not inappropriate to use the term "arthropathy" as a diagnosis, and that it was not too vague of a term. The use of that term as a diagnostic impression is within the standard of care in the podiatric community. (Tr. 2124-2125, 3228-3229)

Dr. Goldenberg disagreed with Dr. Stewart's testimony that Dr. Weiner failed to properly identify a neoplasm that was excised, and further failed to have the neoplasm biopsied. It was not below the minimal standards of care not to specify the type of neoplasm. Further, "[a]ny time you feel you need to do the biopsy, you do it. If you don't feel you need to have the biopsy because you can make an [educated] guess of what the lesion is, then there's no need to do the biopsy." (Tr. 2125-2126)

Dr. Weiner

Dr. Weiner testified that Patient 4's chief complaints were ingrown toenails and painful bones in toes and feet. Dr. Weiner's diagnostic impressions were enlarged navicular in patient's right foot, "[t]hat was painful bones in her foot, ingrown toenails, arthropathy toes and tarsals. Arthropathy is joint diseases. She had enlarged naviculars on both feet. She had a bipartite or split sesamoid on her left foot. She has hammer toe deformities, impingement of the metatarsal heads the R 2 and 3 bilateral and arthropathy or arthritis of the toes." (St. Ex. 4, p. 38; Tr. 3408-3409) Dr. Weiner also noted from the x-rays that Patient 4 had decreased joint spaces and some ridging of bones. (St. Exs. 4A, 4B, and 4C; Tr. 3409)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”*

Dr. Goldenberg

Dr. Goldenberg testified that x-rays and blood tests were appropriate in this patient’s case. (Tr. 2119-2120)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical records for Patient 4 indicate that on 11-13-87, Patient 4’s first visit, a blood sample was drawn. On that same date, Dr. Weiner performed arthrotomies on 2 through 5 and radical nail procedures on 1 and 2 left. However, the blood test results are dated 11-14-87. (St. Ex. 4, pp. 38, 39)

Dr. Stewart

Dr. Stewart testified that surgical procedures were performed at Patient 4’s first visit. (St. Ex. 4, pp. 38 [and reverse], and 41; Tr. 771-785)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Stewart

Dr. Stewart testified that surgical procedures, namely arthrotomies and tendon lengthenings, were performed on Patient 4 that were not indicated by the diagnoses. (St. Ex. 4, pp. 38 [and reverse], and 41; Tr. 771-785)

Dr. Goldenberg

Dr. Goldenberg testified that the procedures that Dr. Weiner performed on 11-13-87 and 11-23-87 were appropriate. Dr. Goldenberg stated that soft-tissue procedures may be appropriate for reducible deformities in a pes cavus

foot. Such procedures can delay or prevent the need for bone surgery at a later date. (Tr. 2120-2122) Dr. Goldenberg further testified that arthrotomies and tendon procedures were specific to the diagnosis of arthropathy in this case. (Tr. 2124)

Dr. Weiner

Dr. Weiner testified that he performed arthrotomies on Patient 4's first visit, 11-13-87, for painful toes, and arthropathy of the toes. (Tr. 3739) Concerning surgical procedures that he performed, Dr. Weiner testified as follows:

- 11-13-87: Arthrotomies and extensor tendon lengthenings were performed on 2 through 5, left, to reduce dorsal contraction of the hammer toe deformities. In addition, radical nail procedures were performed on 1 and 2, left, to correct ingrown toenails. (Tr. 3409-3410)
- 11-16-87: Arthrotomies and extensor tendon lengthenings were performed on 2 through 5, right. (Tr. 3411) Dr. Weiner noted that he billed only for the major procedure, the arthrotomies. (St. Ex. 4, p. 59; Tr. 3414)
- 11-23-87: Ostectomy of the right navicular and flexor tendon lengthenings were performed on 2 through 5, left. (Tr. 3410-3411)

Dr. Weiner read an entry from the progress notes written by Patient 4 which indicated that Patient 4 was pleased with the results of Dr. Weiner's work. (St. Ex. 4, p. 38 [reverse]; Tr. 3415)

7. *"[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost."*

Dr. Stewart

Dr. Stewart testified that surgery was performed on a piecemeal basis, and spread out over several visits. (St. Ex. 4, pp. 38 [and reverse], and 41; Tr. 771-785)

8. *"[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and*

massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures.”

Dr. Weiner

Dr. Weiner testified that the physical therapy given Patient 4 was for the purpose of postoperative care. (Tr. 3414-3415)

9. “[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” * * * (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”

Dr. Stewart

Dr. Stewart testified that Dr. Weiner’s claim forms for services rendered on 11-13-87 and 11-16-87, which were sent to Northwestern National Insurance Company, used CPT code 28022. Dr. Stewart stated, “The procedure, as described in the operative report, was a capsulotomy, which is a different CPT code from 28022, which is the code for an arthrotomy of an MP joint.”

Dr. Stewart testified that the appropriate code would have been 28270, which refers to a capsulotomy on a metatarsophalangeal joint. Dr. Stewart testified that the code that Dr. Weiner used is reimbursed at a higher level. (St. Ex. 4, pp. 15, 20, 46, 59; St. Ex. 97, pp. Surgery 127, Surgery 129; Tr. 785-792)

Dr. Weiner

Dr. Weiner testified that he always performed tendon procedures in conjunction with arthrotomies and capsulotomies. He noted that some of his consent forms did not refer to cutting into joints even though arthrotomies were performed. In those cases, Dr. Weiner testified, he did not originally anticipate having to go beyond tendon procedures, but during surgery insufficient relief was obtained from the tendon procedure alone. Dr. Weiner noted that the consent forms gave him the authority to go beyond the originally-planned surgery if necessary to achieve the desired level of correction. (Tr. 3412-3414)

12. “[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative

visits, [Dr. Weiner] either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy.'"

Dr. Stewart

Dr. Stewart testified that there was no reference to the postoperative course of Patient 4 in the medical record. (St. Ex. 4, pp. 38 [and reverse], and 41; Tr. 771-785)

Dr. Goldenberg

Dr. Goldenberg disagreed with Dr. Stewart's testimony that it was below the minimal standards of care for Dr. Weiner not to reference the postoperative condition of Patient 4's surgical wounds on each visit, unless the findings were abnormal. (Tr. 2125)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, or 8.]*

PATIENT 5

Patient 5, female, d.o.b. 2-23-47, first visited Dr. Weiner's office on 4-11-87. (St. Ex. 5, pp. 21, 25)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

Dr. Goldenberg testified that, in his opinion, the recordkeeping concerning Patient 5's medical records was within the standard of care of the podiatric community. (Tr. 1895-1896)

Dr. Goldenberg stated that he could see from an x-ray dated 4-11-85 that Patient 5 suffered from hammer toes on 2, 3, 4, and 5, right, as well as a bunion deformity and hallux abducto valgus [HAV] on the first metatarsal, right. Metatarsal heads on both feet were close together, particularly on 2 and

3, which could cause the Morton's neuroma that Dr. Weiner diagnosed. (St. Ex. 5, p. 21; St. Ex. 5A; Tr. 1895-1898)

Dr. Weiner

Dr. Weiner testified that Patient 5 had written on the back of the patient questionnaire, "pain bunion right foot ball swollen and painful toes hurt." (St. Ex. 5, pp. 5 [reverse], 6; Tr. 3423) Dr. Weiner said that her chief complaint to him was "painful bottom of feet." (Tr. 3424) Dr. Weiner's diagnostic impressions were "Morton's neuroma bilateral, HAV right, * * * ingrown toenails, bunion and bursitis toes, hammer toes right and left." (St. Ex. 5, p. 21; Tr. 3424) Dr. Weiner noted that the bunion deformity on Patient 5's right foot is visible on x-ray. (St. Ex. 5A) Dr. Weiner stated that HAV, hallux abducto valgus, refers to the hallux being shifted laterally. (Tr. 3424-3426)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

Dr. Goldenberg

Dr. Goldenberg noted that arthrotomies were performed on the MP joints of toes 2, 3, 4, and 5, right during Patient 5's first visit on 4-11-85. Dr. Goldenberg noted further that these arthrotomies were performed before the results of Patient 5's blood tests came in, but that this was not below the minimal standards of care. (St. Ex. 5, pp. 21, 23; Tr. 1898-1900)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

[Note: Testimony was presented concerning surgical technique, the documenting of the intermetatarsal angle, and the documenting of the angle of cut of an osteotomy. To the extent that the testimony addressed whether surgery was performed with or without indication, the testimony is relevant. However, to the extent that the testimony simply addressed a surgical technique or potential complications of a surgical technique, or postoperative recordkeeping, it is irrelevant and will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

Dr. Van Enoo

Dr. Van Enoo testified that on 6-10-85 Dr. Weiner performed surgery on Patient 5. The preoperative diagnosis was bilateral hallux valgus. A preoperative x-ray dated 4-11-85 shows an enlarged metatarsal and a hallux valgus. Dr. Van Enoo testified, based upon the preoperative x-ray, that this was an appropriate diagnosis. An osteotomy of the first proximal phalanx, called an Akin osteotomy, was performed to correct the lateral deviation of the hallux. Dr. Weiner also removed the medial eminence on the head of the first metatarsal. Both of these procedures were indicated. However, Dr. Weiner also performed an osteotomy on the neck of the first metatarsal, which Dr. Van Enoo said was unjustified. (St. Ex. 5, pp. 22, 39; St. Exs. 5A - 5C; Tr. 225-227, 496-507)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, 8, 9a, 9b, or 12.]*

PATIENT 6

Patient 6, male, d.o.b. 6-24-40, first visited Dr. Weiner's office on 11-8-84. (St. Ex. 6, pp. 41, 43)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that Dr. Weiner performed capsulotomies on 3 through 5 right on 11-8-84. On that same date, a blood sample was taken. The Hearing Examiner could find no blood test results in the patient record. (St. Ex. 6)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 8, 9a, 9b, or 12.]*

PATIENT 7

Patient 7, male, d.o.b. 7-12-41, first visited Dr. Weiner's office on 11-27-84. (St. Ex. 7, pp. 2, 19)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical record indicated that a blood sample was taken on 11-27-84. On that same day, Dr. Weiner performed an excision of neoplasms from the palm of Patient 7's left hand, and from Patient 7's right foot. The results of the blood tests are dated 11-28-84. (St. Ex. 7, pp. 12, 19)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 10, or 12.]*

PATIENT 8

Patient 8, female, d.o.b. 3-14-48, first visited Dr. Weiner's office on 6-11-92. (St. Ex. 8, pp. 31, 33)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 6-11-92. Dr. Weiner performed a nail procedure that same date. The blood test results are dated 6-12-92. (St. Ex. 8, pp. 33, 36)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2b, 5, 7, 9b, or 12.]*

PATIENT 9

Patient 9, female, d.o.b. 12-2-29, first visited Dr. Weiner's office on 3-9-87. (St. Ex. 9, pp. 26, 54)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

Dr. Goldenberg noted that it appeared to him that Dr. Weiner performed an acceptable physical examination of Patient 9. (St. Ex. 9, p. 26; Tr. 1910-1911)

Dr. Weiner

Dr. Weiner testified that he first saw Patient 9 on 3-9-87. Her chief complaints were painful heels, calluses, and bunions. Dr. Weiner's diagnostic impressions were heel spurs, hammer toes, bunion, and exostosis toes.

Dr. Weiner referred to an x-ray dated 3-9-87 that shows heel spurs. (St. Ex. 9G; Tr. 3434) Dr. Weiner also referred to an x-ray in which hammer toes and contracted metatarsophalangeal joints are visible. Dr. Weiner noted that there was medial enlargement of the metatarsal heads, and that the great toes were deviated laterally, which was crowding the lesser toes. Thus, the bunion deformities had caused, over the years, the hammer toe deformities. (St. Ex. 9, p. 26; St. Ex. 9C; Tr. 3434-3438)

- 2b. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" * * * (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Kushner

Dr. Kushner testified that the blood work for Patient 9 was appropriate. (Tr. 1749-1752)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 3-9-87. On that same date, Dr. Weiner performed flexor tendon lengthenings on 2 through 5 right. The results of the blood tests are dated 3-10-87. (St. Ex. 9, pp. 26, 55)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

[Note: Testimony was offered concerning surgical technique and its possible complications. To the extent that the testimony addressed whether surgery was performed with or without indication, the testimony is relevant. However, to the extent that the testimony simply addressed a surgical technique or

potential complications of a surgical technique, it is irrelevant and will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

Dr. Van Enoo

An operation report dated 6-14-87 or 6-19-87, indicates a diagnosis of “exostosis toes.” The operation report further states that a ¼” incision was made on the dorsal surface of the fifth toe, right foot, and a 44 Shannon bur used to resect the fifth right phalanx. Dr. Van Enoo stated that this would be an appropriate procedure for the diagnosis. However, a postoperative x-ray shows a right fifth proximal phalanx that has been cut clear through, or nearly through, rather than merely having an exostosis removed. Moreover, a postoperative x-ray dated 6-26-87, shows the same toe in which the distal end of the right fifth proximal phalanx is separated from the proximal end of the right fifth proximal phalanx. Dr. Van Enoo testified that an osteotomy occurred, which is a complete cutting of bone, rather than an ostectomy, which is removal of a portion of bone. The bur, instead of merely removing an exostosis, went into the bone and partially or completely fractured it. (St. Ex. 9, pp. 20 and 27; St. Exs. 9A–9D; Tr. 182-188; 668-669)

On State’s rebuttal, Dr. Van Enoo testified that Dr. Weiner did not perform a de-rotational osteotomy of the fifth proximal phalanx. Dr. Van Enoo testified that if one compares the preoperative with the postoperative x-rays, the fifth toe right is still curled under, in the same position it was prior to the surgery. There was no de-rotation. (St. Exs. 9B, 9C, 9D; Tr. 3947-3953)

Dr. Goldenberg

Dr. Goldenberg noted that on 6-19-87 Dr. Weiner performed an ostectomy or osteotripsy of the fifth toe, right, as well as an osteotomy of the fifth toe. Dr. Goldenberg testified that such treatment was appropriate. The purpose of the derotation osteotomy would be to straighten the fifth toe, to relieve pressure on the bone, and to prevent recurrence of the corn. Dr. Goldenberg concluded that such treatment was within the standard of care for the podiatric community. (St. Ex. 9, pp. 26, 20-22; Tr. 1911-1914)

Dr. Kobak

Dr. Kobak testified that he could not conclude from looking at the x-ray dated 6-26-87, that the osteotomy was performed by accident. Dr. Kobak testified that if Dr. Weiner did not obtain sufficient relief from an exostosis from the ostectomy, that rather than take out the entire joint, Dr. Weiner could perform a phalangeal

osteotomy, similar to a diaphysectomy. Such a cut would be angled in order to move the toe medially so that the lateral exostosis is less prominent. Dr. Kobak stated that it would be within the standard of care to perform such an additional procedure. (St. Ex. 9D; Tr. 2657-2659)

Dr. Weiner

Dr. Weiner testified that on 6-19-87 he performed an osteotomy of the 5th toe right. This was done to remove an exostosis. Dr. Weiner stated that he did not obtain the desired amount of relief from that procedure alone, so he performed a derotation osteotomy. Dr. Weiner testified that the derotational osteotomy is shown on x-ray. (St. Ex. 9B; Tr. 3442-3444)

[D]erotational osteotomy is a procedure where you make an angled cut across the fifth toe, and it's quite obvious what you're trying to do is slide the toe in and away from the outside of the shoe. This is an accepted procedure. It's not a mistake. It just wasn't charted.
* * * Makes sense to do this. If you look at the x-ray you can see the bone would slide down and away from the outside of the shoe. The cut is perfectly placed. The only problem is I didn't chart it.

(St. Ex. 9B; Tr. 3444-3445) Dr. Weiner stated that his failure to chart the derotational osteotomy had no effect on the patient's care. (Tr. 3445)

7. “[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost.”

Dr. Weiner

Dr. Weiner testified that he did not perform all of the procedures described in the preceding two paragraphs on the same day because the patient wanted to remain ambulatory. (Tr. 3441-3442)

8. “[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures.”

Dr. Goldenberg

Dr. Goldenberg acknowledged that there was no reason listed in the progress notes for the physical therapy rendered to Patient 9 during the first four months of 1988. Nevertheless, Dr. Goldenberg testified that it was for postoperative healing for the surgery that she had in 1987. (Tr. 3040-3042) Dr. Goldenberg further testified that the physical therapy was appropriate, and that it was not beneath the standard of care for Dr. Weiner not to chart the reason for the physical therapy. (Tr. 3286-3287)

Dr. Weiner

Dr. Weiner testified that Patient 9's visits for physical therapy between 1-20-88 and 4-20-88 were for postoperative physical therapy. (Tr. 3452)

12. *"[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy'". (a) "Further, even when postoperative complications occurred, [Dr. Weiner] failed to document adequately the existence, development and treatment of such complications."*

Dr. Van Enoo

Dr. Van Enoo testified that Dr. Weiner's progress notes for Patient 9 were four pages long, and record 46 visits from Patient 9. Over the course of Dr. Weiner's treatment of Patient 1 there were numerous surgical procedures performed. Notations concerning the postoperative condition of Patient 9 are scarce. Several entries say "healing well." One entry, dated 3-13-87, states "Right foot is feeling relief from most pain and pressure." Another entry, dated 12-18-87, indicates that Patient 9 was referred to a vascular surgeon (and contains the notation "↓ color"). Dr. Weiner failed to note, however, that Patient 9 had impending gangrene in a toe, which eventually had to be amputated. (St. Ex. 9, pp. 26-29; Tr. 178-180) Dr. Van Enoo further testified that Dr. Weiner saw Patient 9 again on 12-21-87 — the day before she was seen by the vascular surgeon — and there is no mention in Dr. Weiner's medical records for Patient 9 that her toe was gangrenous. Dr. Van Enoo noted that on 12-22-87 the vascular surgeon found "an obvious gangrenous right toe with a large vesicle on the end." Dr. Van Enoo testified that a toe could not become gangrenous overnight. Dr. Van Enoo testified that it is "[a]bsolutely" below the minimal standards of

care for a podiatrist not to record the presence of a developing gangrenous toe.” (St. Ex. 9, p. 29, 61; Tr. 192-194)

On cross-examination, Dr. Van Enoo acknowledged that the written report from Dr. Sharp, the vascular surgeon, refers to the amputation of the toe, and is a part of Dr. Weiner’s medical record for Patient 9. (St. Ex. 9, pp. 60; Tr. 516-517)

Dr. Van Enoo testified that it was necessary for him to examine and interpret Patient 9’s x-rays, rather than by looking at Dr. Weiner’s medical records, in order to reconstruct the postoperative course of Patient 9. (Tr. 180-182)

Dr. Goldenberg

Concerning Patient 9’s postoperative problems, Dr. Goldenberg stated that Dr. Weiner noted the poor color in his progress note for 12-18-87, and appropriately referred the patient to a vascular surgeon. (St. Ex. 9, pp. 28-29, 60; Tr. 1921-1925) Dr. Goldenberg testified that it was not below the minimal standards of care for Dr. Weiner not to note the amputation of Patient 9’s fifth toe. (Tr. 3284-3285) Although Dr. Weiner did not chart the progress of Patient 9’s recovery following the amputation of her right fifth toe by the vascular surgeon, Dr. Goldenberg testified that Dr. Weiner noted in the progress notes on 1-7-88 that there was no evidence of infection. There are also letters from the vascular surgeon. Further, once the patient was referred to the vascular surgeon, it was no longer Dr. Weiner’s responsibility to follow up with it. (Tr. 3035-3040)

Dr. Weiner

Dr. Weiner testified that Patient 9 went back to work following her surgery. She visited Dr. Weiner’s office on 12-14-87, and Dr. Weiner testified that everything looked okay at that time. She received physical therapy during that visit. Dr. Weiner testified that Patient 9 next returned to his office on 12-18-87, when he noticed a “marked color change in the toe.” Dr. Weiner said that he immediately referred her to a vascular specialist. Dr. Weiner acknowledged that Patient 9 eventually had the toe amputated. He further acknowledged that the amputation is not noted in his progress notes, but that it is reflected in his chart, in x-rays and in correspondence from the vascular specialist. (Tr. 3448-3452)

Patient testimony

Patient 9 testified that she had a history of foot problems, aggravated by the fact that her job in a laundry required her to be on her feet. She went to see Dr. Weiner after receiving a mailer advertising a free foot exam, and on the recommendation of a co-worker who had been to see Dr. Weiner. (Tr. 1557-1561)

Patient 9 testified that, in December 1987, Dr. Weiner removed a callus on her little toe, “and it black and blued.” On direct examination, she testified that she went back to see Dr. Weiner after the surgery, and he told her that the toe was doing all right. Patient 9 testified that the toe continued turning black, although there was no pain or drainage. She went back to Dr. Weiner, and he gave her antibiotics and told her to return in a couple days. When she returned, Dr. Weiner sent her to Dr. Sharp, a vascular surgeon. Dr. Sharp eventually amputated the toe. (Tr. 1563-1567)

Patient 9 testified that, aside from the problem with her fifth toe, she had no other problems with Dr. Weiner’s care. (Tr. 1578-1580) Nevertheless, Patient 9 testified that she had not continued to treat with Dr. Weiner following the amputation of her toe. “I was scared to. I don’t know why, but I was frightened.” She could not recall if she went back for office visits and therapy. (Tr. 1567)

Approximately three weeks prior to her 2-21-96 testimony at the present hearing, Patient 9 was contacted by Dr. Weiner’s office. “[Dr. Weiner’s assistant] asked me to come in for free x-rays; his lawyer wanted him to get the x-rays.” Patient 9 testified that, while she was there, Dr. Weiner and his assistant asked Patient 9 to sign a paper. Patient 9 wrote a statement on the paper in her own hand which said “[t]hat [Patient 9] didn’t know who to blame for the amputation, and he said it might have been from the work, the heat of the laundry.” She was not given a copy of the written statement. (Tr. 1567-1572)

During Dr. Weiner’s cross-examination of Patient 9 on this issue, Dr. Weiner produced a type-written document dated January 18, 1996, that appeared to bear the signatures of Patient 9 and two witnesses. Patient 9 acknowledged that the signature was hers, but denied that the statement that is typed on the paper was her statement. She said that, on the statement that she signed, there was nothing typed; only her handwritten statement was on the paper. (St. Ex. 104; Tr. 1573-1575)

On re-direct examination, Patient 9 testified that when she signed the statement, her daughter was in Dr. Weiner’s waiting room. Patient 9 testified that some of

the statements contained in the typed statement were statements she had written, but others were not. Patient 9 denied that she injured her toe at work following surgery. (Tr. 1580-1584) Patient 9 testified, on re-direct and re-cross examination, that she did not recall signing a typed copy of her statement. She acknowledged that the signature on the typed statement was hers, but testified that she did not sign a typed copy of the document, and that she does not know how her signature appeared on the document. (St. Ex. 104; Tr. 1580-1589)

Sandra Samuels, the adult daughter of Patient 9, testified that when Patient 9 and she arrived at Dr. Weiner's office, Patient 9 was taken straight back to Dr. Weiner's exam area to have the x-rays done. She was back there for approximately one-half hour to 40 or 45 minutes. Ms. Samuels does not know what went on back there. However, Ms. Samuels was present when her mother was asked to prepare a statement. Ms. Samuels testified that Ms. Noga assisted Patient 9 in writing the statement. (Tr. 1590-1598)

Since her January 1996 visit to Dr. Weiner's office, but prior to her testimony, Patient 9 heard again from Dr. Weiner's office. She testified that, the same day that she heard from the Medical Board, she received a call from Ms. Noga, who "[j]ust wanted to say that Dr. Weiner wanted to apologize to have me subpoenaed to Columbus." (Tr. 1569-1570, 1572)

Testimony of Dr. Weiner's employee

Ms. Noga recalled seeing Patient 9 in Dr. Weiner's office on 1-18-96. She also recalled the circumstances of Patient 9's visit. Ms. Noga was told that Patient 9 needed an x-ray, so Ms. Noga called Patient 9 and Patient 9 agreed to come in. When Patient 9 came in on 1-18-96, Ms. Noga took the x-ray. Ms. Noga testified that the x-ray was fine. Dr. Weiner put the x-ray up and asked Patient 9 a couple questions. While Ms. Noga took Patient 9 up to the front desk, Ms. Noga asked Patient 9 if Patient 9 could "write down if you're having discomfort? Are you unhappy? Are you happy? What happened? Whatever is in your mind" concerning Dr. Weiner's treatment. (Tr. 2924-2926) Patient 9 agreed. (Tr. 2926)

Patient 9 wrote out her statement at Ms. Noga's station. Ms. Noga testified that her station is out of the view of the waiting room. Patient 9 signed the statement, and gave it to Ms. Noga. Ms. Noga took the statement to Ms. Wolford, who works for a billing service, and does billing work for Dr. Weiner. Ms. Wolford typed Patient 9's statement. Ms. Noga took the typed statement to Patient 9 and read it to her. Ms. Noga asked Patient 9, "Do you have any questions about this? Is this what you meant?" (Tr. 2926-2929)

Patient 9 said she had no questions. She signed the typed statement, which was witnessed by Ms. Noga and Ms. Wolford. Ms. Noga identified St. Ex. 104 as the typed statement that Patient 9 signed. (Tr. 2929-2930)

Ms. Noga testified that she had Ms. Wolford type Patient 9's statement because her handwritten statement was difficult to read. Ms. Noga stated that when she read back the typed statement to Patient 9, and had Patient 9 read it over and make sure it was correct, Patient 9's daughter was in the waiting room. She was not with Ms. Wolford, Patient 9, and Ms. Noga, who were at Ms. Noga's station. (Tr. 2964) Ms. Noga stated that Patient 9's original, handwritten statement was discarded by Ms. Noga. She saw no reason to keep it. (Tr. 2970-2971)

When asked why she contacted Patient 9 the week before Patient 9 was to testify, Ms. Noga stated that it was just to tell her that they were sorry for Patient 9's inconvenience, and that Dr. Weiner would see her at the hearing. (Tr. 2965)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, 8, or 10.]*

PATIENT 10

Patient 10, female, d.o.b. 7-28-63, first visited Dr. Weiner's office on 1-28-85. (St. Ex. 10, pp. 30, 34)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Stewart

In reviewing several visits and surgeries performed by Dr. Weiner, Dr. Stewart noted, among other things, that:

- Dr. Weiner gave Patient 10 a " cursory" examination of her feet.
- On 2-4-85 three arthrotomies were performed. The diagnoses for that date listed neuromas, bursitis, metatarsus abductus, but nothing specific

for arthrotomies. The original diagnoses referenced tendon contracture, but were not specific concerning the location of such contractures. Dr. Stewart said “Standard of care would be that the specific anatomic contractures be identified and that those match the surgical sites listed.”

(St. Ex. 10, pp. 34-36; Tr. 792-797; 987-988)

Dr. Goldenberg

Dr. Goldenberg discussed his review of the physical examination, history, and diagnostic impressions. Dr. Goldenberg testified that he believed that Dr. Weiner performed a complete examination in order to arrive at the diagnostic impressions that Dr. Weiner did. In Dr. Goldenberg’s opinion, the recordkeeping in this case was within the minimal standards of care. (Tr. 2130-2132)

Dr. Weiner

Dr. Weiner testified that he first saw Patient 20 in January 1985. Her chief complaints were pain in toes and pain in feet. Dr. Weiner’s diagnostic impressions were metatarsal abductus; structural alignment deformity causing metatarsal head impingement in 2, 3, and 4, bilaterally; neuromas; tendon contractures of 2 through 5 bilaterally; and sesamoiditis. (Tr. 3453-3455) Dr. Weiner noted that the diagnoses that appear in his entry dated 2-4-85 were additional diagnoses. The procedures performed that day were for both the original diagnostic impressions and for the additional diagnoses. (Tr. 3461)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”*

Dr. Goldenberg testified that it was within the standards of care for Dr. Weiner to obtain x-rays and blood tests of this patient. (Tr. 2130-2132)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical records indicate that a blood sample was taken on 1-28-85. That same day, Dr. Weiner performed extensor tendon lengthenings on 2 through 4

right. The results of the blood tests are dated 1-31-85 and 2-1-85. (St. Ex. 10, pp. 32, 34)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Goldenberg

Dr. Goldenberg testified that arthrotomies on 2, 3, and 4, left, performed on 2-4-85, were appropriate for the diagnoses. (Tr. 2133-2134)

Dr. Weiner

Dr. Weiner testified that on 1-28-85 he performed extensor tendon lengthenings of toes 2, 3, and 4, right, in order to relieve the pressure on the plantar side of the metatarsals. Dr. Weiner said it could also help the bursitis, and it could help the patient’s neuromas by reducing the impingement of the metatarsal heads. (Tr. 3455-3456)

Dr. Weiner testified that on 2-4-85 arthrotomies and extensor tendon lengthenings were performed on toes 2, 3, and 4, left. The purpose was the same as for the previous surgery. Dr. Weiner further testified that on 2-11-85 he performed arthrotomies and tendon lengthenings on the first and fifth toes left. Surgery on the first toe was for sesamoiditis, by taking the pressure off the plantar side of the metatarsal head. (Tr. 3457-3458)

Dr. Weiner testified that on 2-18-85 he performed a plantar fasciotomy on 2, 3, and 4, right. On 2-25-85 he performed a plantar fasciotomy on 2, 3, and 4, left. These were performed to relieve pressure on the plantar side of the metatarsal heads. In addition, they were for tendon contractures, neuromas, bursitis in the toes and metatarsals, and metatarsal impingement. Dr. Weiner noted that it was not definitive treatment for the neuromas, but that it could have helped that problem. Dr. Weiner stated that on 3-4-85 he performed plantar fasciotomies on 1 and 4 right [actually it was 1 and 5 right (St. Ex. 10, p. 35); possibly a transcribing error]. These procedures were performed for the same reasons as the surgery on 2-18-85. (Tr. 3458-3459)

7. *“[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased*

healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost.”

Dr. Stewart

Dr. Stewart testified that he could find no medical indication in the record for Dr. Weiner to perform the procedures on Patient 10 in serial fashion. She was healthy, and the procedures were performed via minimal incision techniques. (Tr. 802-803)

8. *“[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures.”*

Dr. Stewart

Dr. Stewart testified that there was no medical indication in the record for the physical therapy that was performed on Patient 10 by Dr. Weiner’s office. (Tr. 803-804)

9. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” (a) “[Dr. Weiner] billed for performing a plantar fasciotomy when [his] records indicate that surgical incisions were done only at the toe level of the foot where there is no plantar fascia”; [and/or] (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”*

Dr. Stewart

Dr. Stewart criticized Dr. Weiner concerning the following billings pertaining to Patient 10:

- Concerning an insurance form sent to Aetna for services rendered on 2-25-85, the procedure listed is plantar fasciotomy on the toe. Dr. Stewart previously testified that there is no plantar fascia in the toe.
- Concerning an insurance form for services rendered on 3-11-85, the procedure listed on the form was an arthrotomy of the first and fifth MPJ, when the procedure noted elsewhere in the medical record was a tendon

procedure. Further, CPT code 21213 was used, which is a nonexistent code. Dr. Stewart also noted that it was inappropriate for Dr. Weiner to charge for an office visit on the day of surgery, unless services were performed during the office visit for a diagnosis that was unrelated to the diagnosis that occasioned the surgery. Further, it was inappropriate for Dr. Weiner to charge for a nerve block unless the nerve block was performed by a separate physician; reimbursement for such anesthesia is included in the reimbursement rate for such procedures. Nevertheless, Dr. Stewart did acknowledge that it was clearly indicated on the claim forms that the nerve blocks and office visits occurred on the same date as the surgeries.

[It is worth noting that the progress note indicated that arthrotomies were performed. The operation report for that date indicated the type of procedure that has previously been described as a capsulotomy.]

(St. Ex. 10, pp. 35, 47, 49, 51, 52; Tr. 797-802, 988-989)

Dr. Goldenberg

Dr. Goldenberg testified that the plantar fascia does extend into the toes, and that the plantar fasciotomy on 2, 3, and 4, right, performed on 2-18-85 were indicated. (Tr. 2134)

Dr. Weiner

Dr. Weiner testified that he never intentionally used non-existent CPT codes in billing for a patient. Dr. Weiner further testified that he never intentionally used the wrong billing code in billing for Patient 10 or any other patient he ever treated. (Tr. 3463-3464)

12. *“[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient’s postoperative course, or recorded generalized statements such as ‘healing well’ or ‘patient happy.’”*

Dr. Stewart

Concerning Patient 10’s medical record, Dr. Stewart stated that, although there is a reference to improvement and the patient being happy, he “would

expect to see commentary about the previous surgical sites, how well they're healing, if there's any complications. I don't see any reference to the previous areas that were dealt with." (St. Ex. 10, pp. 34-36; Tr. 792-797; 987-988)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 9a, or 10.]*

PATIENT 11

Patient 11, female, d.o.b. 8-9-48, first visited Dr. Weiner's office on 12-21-89. (St. Ex. 11, pp. 20, 22)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 8, or 12.]*

PATIENT 12

Patient 12, male, d.o.b. 11-3-51, first visited Dr. Weiner's office on 1-10-85. (St. Ex. 12, pp. 46, 49)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Stewart

Dr. Stewart noted that the patient's chief complaints were pain in the heels, and the bottoms of the feet and toes. The physical exam noted tight plantar fascia and pes cavus. Dr. Stewart acknowledged that the circulatory exam notes of DP and PT pulse rates indicated that a pulse was palpable at those points, however, he refused to acknowledge that this note indicated that a circulatory exam had been performed. For musculoskeletal, Dr. Weiner noted pes cavus, contracted plantar fascia, and hammer toes. In the section for structural and gait abnormalities, Dr. Weiner noted pes cavus and all weight on the heels and balls of feet, which Dr. Stewart noted is common for patients with a pes cavus structure. Under diagnostic impressions, Dr. Weiner noted myositis, bursitis, fasciitis, hammer toes, and Morton's neuroma. (St. Ex. 12, p. 49; Tr. 989-994)

Dr. Stewart testified that the locations of the diagnoses made by Dr. Weiner were not anatomically specified. A diagnosis of hammer toes did not specify which toes, or the degree of hammer toe deformity. A treatment plan that included tendon lengthening did not specify which tendons were to be lengthened. (St. Ex. 12, pp. 49-53; Tr. 810-814)

Dr. Weiner

Dr. Weiner stated that he gave Patient 12 and all of his patients the extensive examination that he described at the beginning of his testimony concerning Patient 1. Dr. Weiner stated that Patient 12's chief complaints were painful heels and painful bottom of feet and toes. Dr. Weiner's diagnostic impressions were myositis, bursitis of the heels and the bottom of the feet and toes, fasciitis, hammer toes, and Morton's neuroma left and right. (Tr. 3465-3466)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg discussed his review of the physical examination and diagnostic impressions. He stated that x-rays were appropriate in this case because of hammer toes and Morton's neuroma. Blood tests were appropriate in case bone surgery would be indicated. (St. Ex. 12, p. 49; Tr. 2137-2139)

Dr. Weiner

Dr. Weiner testified that the 1-10-85 visit was for consultation and to review the treatment option with the patient. Patient 12 had arthrocentesis of each ankle to see if there was any fluid there. Dr. Weiner also took x-rays and blood tests. (Tr. 3466-3468)

3. *"[E]ven though [Dr. Weiner] routinely took x-rays, [his] records fail to reflect clinical notes or other reports regarding any radiological findings."*

Dr. Stewart testified that an x-ray was taken on 8-29-85 to rule out a fracture. The reason was pain, metatarsals. The record does not indicate the outcome of

the x-rays, or if any treatment was rendered for the problem. (St. Ex. 12, pp. 49-53; Tr. 810-814)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical records indicate that a blood sample was drawn on 1-10-85. That same day, Dr. Weiner performed an arthrocentesis on the left and right ankles. The results of the blood chemistry tests are not dated, but the hematology results are dated 1-14-85. (St. Ex. 12, pp. 47-48, 49)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Stewart

Dr. Stewart noted that on 2-18-85 a flexor tendon lengthening and plantar fasciotomy were referenced in the progress notes. The operation report gave a diagnostic indicator of hypertrophic metatarsal heads. Dr. Stewart stated that this is not an appropriate diagnostic indicator for a flexor tendon lengthening. Further, the technique used to lengthen the tendon was not described in the operation report. The report stated that a ¼" incision was made, which led Dr. Stewart to think that it was either a stab-type tenotomy or a slide type technique, which could conceivably, but not easily, have been done through such a small incision. Dr. Stewart stated that such a fill-in-the-blank operation report may have been considered acceptable at the time it was made, during the advent of word-processors, but met the “very minimal standard.” Moreover, the operation report should be signed by the physician who performed the procedure. (St. Ex. 12, 50, 75; Tr. 817-824)

Dr. Stewart testified that procedures performed at the toe level to treat heel pain are not indicated. Although such an idea has circulated via word of mouth and some seminars, Dr. Stewart stated that there has never been any scientifically credible evidence that such a technique is effective. (Tr. 829-830)

Dr. Weiner

Dr. Weiner testified that on 1-14-85 he performed plantar fasciotomy on toes 2, 3, and 4, right. Dr. Weiner testified that the patient “evidently had fasciitis

from the heel to the toe.” The purpose was to help alleviate the hammer toe deformity and for fasciitis. Dr. Weiner testified that on 1-21-85 he performed a plantar fasciotomy on the patient’s other foot. The reasons for the surgery were the same as described in the preceding paragraph. (Tr. 3468-3470)

Dr. Weiner further testified that on 2-18-85 he performed flexor tendon lengthenings and plantar fasciotomy on the great toes bilaterally and fifth toe right. Dr. Weiner stated that the plantar fasciotomy alone would not give as much release as the patient needed. (Tr. 3471-3472)

8. *“[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures.”*

Dr. Stewart

Concerning the physical therapy issue, Dr. Stewart said:

The standard of care would dictate that when physical therapy is initiated and on each subsequent use of physical therapy, that the diagnosis be listed that the physical therapy is directed toward. Some of the diagnostic impressions would be potential indicators for physical therapy, depending on whether it’s an acute or chronic, for instance, myositis, bursitis, fasciitis.

We have a number of “itis” conditions listed here. Depending whether those are acute or chronic conditions, those might be indications for the physical therapy. But from the records here, we can’t tell that.

(Tr. 814-815)

Dr. Stewart stated further that if physical therapy was intended to treat previous surgical areas, the records should have reflected that there were continuing problems, such as inflammation or contracture. (Tr. 815-817)

Dr. Goldenberg

Dr. Goldenberg disagreed with Dr. Stewart’s testimony that it was inappropriate for Dr. Weiner to prescribe physical therapy for Patient 12

without specifying a reason for physical therapy. Dr. Goldenberg said that physical therapy is routinely used to aid in the healing process after surgery. (Tr. 2143-2144)

10. *"[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated."*

Dr. Stewart

Dr. Stewart testified that Dr. Weiner prescribed systemic corticosteroids to Patient 12, specifically, Prednisone and Medrol. Both of these are powerful medications with numerous potential side effects, and are usually reserved for advanced cases or inflammatory disease. In the podiatric arena, such medications may be used for acute cases of tenosynovitis and myofasciitis. Dr. Stewart acknowledged that there may have been valid indications for systemic steroids present, but they were not noted in the records. If, for example, the patient suffered from acute bursitis, rather than just bursitis as it was recorded in the diagnostic impressions, then the use of systemic steroids may have been appropriate. If such conditions were present in the case of Patient 12, they should have been documented, but were not. Dr. Stewart concluded that Dr. Weiner's use of systemic corticosteroids in the absence of appropriate diagnostic indicators was below the minimal standards of care. (St. Ex. 12, p. 2; Tr. 824-827, 994-996)

Dr. Goldenberg

Dr. Goldenberg indicated that systemic steroids were used in appropriate fashion and in appropriate dosages. Dr. Goldenberg further testified that "Prednisone could be used for any inflammatory process, the myositis, fasciitis; it can be used to reduce inflammation around the nerve in the Morton's neuroma." (Tr. 2140-2142, 2144-2146)

12. *"[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy.'"*

Dr. Stewart

Dr. Stewart testified, concerning the 4-1-85 visit, that there was a note that the patient had “30% discomfort - surgical areas”. There was no record of the appearance of the affected areas or if there were any complications. (St. Ex. 12, pp. 49-53; Tr. 810-814)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, 9a, or 9b.]*

PATIENT 13

Patient 13, female, d.o.b. 11-8-50, first visited Dr. Weiner’s office on 10-20-88. (St. Ex. 13, pp. 18, 19)

1. *“[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”*

Dr. Stewart

Dr. Stewart testified that Patient 13’s chief complaint was recorded as “Pain.” No further details were recorded, including the location or type of pain. Very cursory notes were recorded concerning the physical exam; calluses were noted, and plantar pain on palpation. A structural alignment deformity was noted, although the type of deformity or location were not. Dr. Weiner’s diagnostic impressions were exostosis toes, contracted tendons, myositis, osteitis, and arthritis. Concerning whether the diagnostic impressions were supported by the findings on the physical exam, Dr. Stewart testified, “It’s conceivable that contracted tendons, perhaps contracted extensor tendons, could lead to a declination problem in the metatarsal and lead to the kind of calluses and plantar pain that’s described here.” (St. Ex. 13, p. 19; Tr. 830-832)

Dr. Stewart testified that Dr. Weiner noted in the neurological exam section that the patella and achilles reflexes were normal and equal. Dr. Stewart testified that he could not tell from this record whether the achilles and patella reflexes were equal bilaterally or equal to each other. He stated that the better way is to grade the reflexes and note if they are equal bilaterally. (Tr. 998-1000)

Dr. Weiner

Dr. Weiner testified that he first saw Patient 13 in October 1988. Her chief complaint was “pain.” (Tr. 3473) Dr. Weiner said that she had calluses on the medial side of each great toe at the proximal interphalangeal joint. She also had calluses “on the second and third plantar,” noted on palpation. (Tr. 3473) Dr. Weiner stated that his diagnostic impressions were exostosis toes, hammer toes, metatarsal adductus, osteitis and arthritis. (Tr. 3473-3474)

Dr. Weiner further stated that the x-rays shows contractures, and an accessory bone on the plantar side of the interphalangeal joint of the right great toe forcing the toe up. Dr. Weiner also stated that the metatarsals are down and shifted in. Additionally, the proximal phalanx of the third toe is gouging into the second metatarsal head, which was causing osteitis. (St. Exs. 13A and 13C; Tr. 3474-3475)

Dr. Weiner disputed Dr. Stewart’s criticism that Dr. Weiner had failed to describe the nature of the pain, and failed to describe the location of the pain. Concerning the nature of the pain, Dr. Weiner testified, “Pain is always sharp. There is no such thing as dull pain. Pain that hurts. There is burning pain. She didn’t have burning pain. * * * She had pain. So pain is pain.” (Tr. 3475-3476)

Concerning the location of the pain, Dr. Weiner testified, “Well, location of the pain is exostosis—pain on palpation, calluses first and second toes right and left and second and third plantar. That would be the metatarsal phalangeal heads because the second and third refers to metatarsals, and you can only have, basically, calluses on the metatarsal heads. That’s where they are rubbing against the floor. You can’t have calluses against the base. That’s in the arch. The only place you have calluses is at the head. When it says plantar second and third metatarsal heads, that is what most podiatrists would know.” (Tr. 3476)

2. “[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”

Dr. Goldenberg

Dr. Goldenberg testified that the x-rays were appropriate in order to rule out structural or bony deformities causing calluses and pain. And the blood tests were indicated “because of the possibilities of doing bone surgery at some point.” (St. Ex. 13, pp. 10, 11; Tr. 2156-2158)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical records indicate that a blood sample was taken on 10-20-88. That same day, Dr. Weiner performed arthrotomies and tenotomies on 1 through 5 left. The blood test results are dated 10-23-88. (St. Ex. 13, pp. 19, 20)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Stewart

On the same day as the initial visit, Dr. Weiner performed a surgical procedure on Patient 13’s left foot. The progress note indicated that an arthrotomy and a tenotomy were performed on toes 1 through 5. Dr. Stewart testified that the operation report indicated only that extensor tenotomies on toes 1 through 5, left, were performed. [It is worth noting, however, that the operation report also indicated that the MP joints 1 through 5, left, were incised.] (St. Ex. 13, pp. 19, 39; Tr. 832-834)

Dr. Goldenberg

Dr. Goldenberg testified that the arthrotomies and tenotomies rendered by Dr. Weiner were appropriate for Patient 13’s conditions. (Tr. 2158-2159) When asked why the patient had those procedures, Dr. Goldenberg testified that the reasons on the consent form were painful calluses and painful big toes. When asked for the medical reasons, Dr. Goldenberg answered “[c]ontracted tendons, plantar calluses, pain on palpation.” (Tr. 3136-3137) Dr. Goldenberg testified that the procedures performed on the lesser toes could treat a callus on the medial aspect of the hallux. (Tr. 3137)

Dr. Weiner

Dr. Weiner testified that on 10-20-88 he performed arthrotomies and tenotomies on 1 through 5 right. They were performed for the contractures, exostosis toes, and osteitis by relieving pressure from the impinging bones. (Tr. 3475)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 8, 9b, or 10.]*

PATIENT 14

Patient 14, female, d.o.b. 8-24-25, first visited Dr. Weiner's office on 11-21-85. Her medical records indicate that she was diabetic. (St. Ex. 14, pp. 22, 27)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that it was within the standard of care for Dr. Weiner to take blood tests and x-rays of this patient. (Tr. 1932-1933)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 11-21-85. That date, it appears that Dr. Weiner performed a nail procedure. The blood test results are dated 11-22-85 and 11-23-85. (St. Ex. 14, pp. 22, 30; St. Ex. 14A)

11. *"[Dr. Weiner] performed elective podiatric surgery on known diabetics without first ascertaining whether their diabetes was controlled."*

Dr. Van Enoo

Dr. Van Enoo testified that diabetics are considered to be high-risk patients for surgical foot treatment. Diabetics can heal poorly after foot surgery because of

poor circulation and excessive blood sugar. Because diabetics are high-risk candidates for foot surgery, Dr. Van Enoo testified, it is important that the podiatrist know the patient's status prior to surgery. Dr. Van Enoo testified that the standard procedure is to take a fasting blood sugar level. Dr. Van Enoo noted that a blood sugar level of 154 was reported for Patient 14 on 2-21-86, which is within the safe range of 100 - 200. However, that was not a fasting level, thus its accuracy is questionable. (St. Ex. 14, p. 28; Tr. 264-267)

Although many of Patient 14's procedures were performed by Dr. Erkard, a colleague of Dr. Weiner's, Dr. Van Enoo noted that Dr. Weiner operated on Patient 14 on 4-24-86 and 5-5-86. Both of these procedures were elective. Dr. Van Enoo testified that a diabetic patient's blood sugar should be checked before each elective surgery, or else the podiatrist should collaborate with the physician who is treating the diabetes. Nevertheless, there is no record that Patient 14's blood glucose level was checked prior to either of those surgeries. Dr. Van Enoo testified that performing those elective surgeries without first checking Patient 14's blood glucose level fell below the minimal standards of care. (St. Ex. 14, pp. 15, 17; Tr. 267-269, 532-535)

Dr. Goldenberg

Dr. Goldenberg noted that the original patient chart was yellow, and there was a bright orange-red sticker on it that said "Caution, diabetic." On 11-21-87, the date of Patient 14's first visit, her non-fasting blood sugar was 113. On that date, Dr. Weiner performed surgery on Patient 14 for her mycotic nails, which Dr. Goldenberg testified was appropriate. (St. Ex. 14, 22-23, 27; St. Ex. 14A; Tr. 1926-1931)

Dr. Goldenberg stated that, at times, diabetes can be an indication, rather than a contraindication, for surgery, as surgery might "alleviate the problems before they become a more severe problem later on." (Tr. 1931-1932)

Dr. Weiner

Dr. Weiner testified that all blood sugar tests performed by the lab were non-fasting. (Tr. 3484)

Dr. Weiner acknowledged that he performed flexor tendon lengthenings on the second and third right toes on 5-5-86. Dr. Weiner stated that he was comfortable performing those procedures on this diabetic patient because her vascular status was good; because she had previously had surgery of various types performed by Dr. Erkard, an associate of Dr. Weiner's, without difficulty; and in Dr. Weiner's

opinion Patient 14's diabetes was under control. In addition, Dr. Weiner testified that tendon surgery is relatively non-invasive. (Tr. 3484-3486)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2b, 5, 7, 8, 10, or 12.]*

PATIENT 15

Patient 15, female, d.o.b. 3-23-26, first visited Dr. Weiner's office on 11-29-84. (St. Ex. 15, pp. 23, 24)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 9a, 9b, or 12.]*

PATIENT 16

Patient 16, male, d.o.b. 2-17-31, first visited Dr. Weiner's office on 11-14-91. (St. Ex. 16, pp. 15, 17)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Stewart

Dr. Stewart testified that the progress notes indicated that the patient's chief complaint was "pain." No record was made of the type of pain, or its location. The only records made of the physical exam indicated that the patient's neurological condition was "normal," and the patient's musculoskeletal condition was "hammer toes." No reference is made concerning Patient 16's circulation, dermatologic condition, or to the overall foot structure.

Dr. Weiner's diagnostic impressions were recorded as "Bunions and hammer toes." (St. Ex. 16, p. 15; Tr. 835)

Dr. Goldenberg

Dr. Goldenberg discussed his review of the x-rays, physical examination, history, and diagnostic impressions. He noted, in addition to other conditions, that the x-rays showed evidence of previous surgery, which appeared to be a

bunionectomy and Akin osteotomy on the right foot. In addition, there appeared to have been arthroplasty performed on the second and fifth toes. (St. Ex. 16, pp. 15, 17; Tr. 2159-2162)

Dr. Goldenberg was asked if, in the case of a patient who has had previous foot surgery by another physician, is it necessary for a podiatrist to note that fact anywhere in the record. Dr. Goldenberg replied that it is the podiatrist's choice; if he feels that it should be noted, he will note it. If the previous surgery is on the x-rays, and the podiatrist can determine that, then it's noted. Dr. Goldenberg acknowledged that the previous surgery may be a contributing factor to the patient's current complaints. (Tr. 3148-3150) Dr. Goldenberg testified that information concerning the care that the patient received from the preceding foot specialist is on the x-rays. (Tr. 3220-3223) Dr. Goldenberg testified that it was not necessary to note what the previous foot specialist did because the x-rays show what was performed and the x-rays are part of the chart. (Tr. 3225-3226)

Dr. Weiner

Dr. Weiner testified that Patient 16's chief complaint was pain. Dr. Weiner's diagnostic impressions were hammer toes and bunions. He disagreed with the State's expert's criticism that there was almost nothing in Dr. Weiner's chart for this patient relating to the physical examination. Dr. Weiner testified that he only charted abnormal findings. The fact that there were no entries under certain headings did not mean that he did not perform the exam. Dr. Weiner stated that it just meant that there were no abnormal findings. (Tr. 3486-3487)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 11-14-91. Although the blood test results were not available until 11-15-91, it appears that the only procedure that Dr. Weiner performed prior to receiving those results was the debridement of four neoplasms. (St. Ex. 16, pp. 15, 18)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Stewart

On 11-21-91, Dr. Weiner performed what was recorded in the progress notes as an extensor tendon lengthening of the 3, 4, and 5 toes, right foot. The operation report for that date indicated that the extensor tendons were incised in four places through a ¼" to ½" incision, which left Dr. Stewart uncertain as to how that could physically be done. A sliding z-plasty tendon lengthening was performed on each of the aforementioned toes. Dr. Stewart testified that it would be difficult to make the four cuts in the tendons through such a small incision, since the cuts are typically spaced about one-half centimeter apart. Dr. Stewart testified that tendon lengthening could be appropriate for a stage one flexible hammer toe deformity. Nevertheless, Dr. Stewart stated that the consent form for the procedure indicated that the patient's toes were stiff, which Dr. Stewart interpreted as meaning that there was at least some rigidity in the joint, which lessens any value that a tenotomy might have had. (St. Ex. 16, pp. 11-12, 13, 15; St. Ex. 100; Tr. 835-841)

On 12-5-91, Dr. Weiner performed what was recorded in the progress notes as an arthrotomy, 3, 4, and 5, left foot. Dr. Stewart testified that the operation report indicated that an extensor tenotomy was performed, and did not reference a joint procedure. However, on cross-examination, Dr. Stewart acknowledged that the operation report did actually refer to the MP joint being incised. As for the 11-21-91 procedure, the consent form indicated that the patient had stiff toes, which would imply that there is some rigidity in the joint. Dr. Stewart testified that a tenotomy is of no value if the toe was semi-rigid. (St. Ex. 16, pp. 8-9, 10, 15; Tr. 835, 841-842, 1002-1003)

Dr. Goldenberg

Dr. Goldenberg disagreed with Dr. Stewart's testimony that a z-plasty could not have been performed as described. (Tr. 2162-2163)

Dr. Weiner

Dr. Weiner testified that on 11-21-91 he performed extensor tendon lengthenings of 3, 4, and 5 left. [The progress notes, consent forms, and operation report all indicate that these were performed on the right foot, however. (St. Ex. 16, pp. 11-12, 13, 15)] These were to correct the hammer toe contractions of the joints. Dr. Weiner testified that he could indeed do a z-plasty tendon lengthening through an approximately one-quarter inch incision using minimal incision techniques, and disputed the State's expert's testimony that it was not possible. (Tr. 3487-3488)

Dr. Weiner testified that he performed extensor tendon lengthenings and arthrotomies on 3, 4, and 5 left on 12-5-91. Dr. Weiner noted that, although the consent form does not refer to joint procedures, it gave Dr. Weiner permission to extend the surgery if he felt it necessary. Dr. Weiner testified that additional release was required. (St. Ex. 16, pp. 8-9; Tr. 3488-3489)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, or 12.]*

PATIENT 17

Patient 17, female, d.o.b. 9-25-22, first visited Dr. Weiner's office on 2-27-87. Dr. Weiner's medical records for this patient indicated that Patient 17 was diabetic. Dr. Van Enoo acknowledged that an iridescent red "Caution" sticker was affixed to the cover of the patient record indicating that Patient 17 suffered from diabetes, arthritis, heart disease, and high blood pressure. The same sticker also appeared on the first page of the progress notes. (St. Ex. 17, pp. 2, 44, 46; Tr. 539-542)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Van Enoo

Dr. Van Enoo testified that Patient 17 suffered from diabetes and heart disease. There was nothing recorded in Dr. Weiner's medical records for Patient 17 indicating that Patient 17 had good circulation. (Tr. 273, 543-544, 669-671)

Dr. Goldenberg

Dr. Goldenberg noted that the original chart was contained in a purple binder, to which was attached a bright, florescent red-orange sticker that said: "Caution, diabetes, high blood pressure, heart disease, arthritis." (St. Ex. 17; Tr. 1933-1934)

Dr. Goldenberg noted that Patient 17's first visit to Dr. Weiner was 2-27-87. Her chief complaint was painful toenails and toes. Dr. Goldenberg testified that the chief complaint, as well as Dr. Weiner's physical exam and diagnosis, complied with the standard of care. (St. Ex. 17, pp. 44, 46-47; Tr. 1934-1935) Dr. Goldenberg noted that x-ray St. Ex. 17A was an off-weight-bearing AP view. It showed hammer toe deformities as well as some bunion deformity bilaterally. The deformities are of a nature that could cause exostoses or nail deformities to form due to the position of the digits. (St. Ex. 17A; Tr. 1936-1938)

Dr. Goldenberg disagreed with Dr. Van Enoo's assertion that Dr. Weiner should have obtained a circulation report on Patient 17 prior to performing surgery. Dr. Goldenberg stated that "[a]ccording to the examination, which showed good circulation, color of the foot was within normal standards, there are no signs that indicate the patient had any circulation problems. Based on the examination to routinely refer every diabetic patient out for a vascular exam is overutilization." (Tr. 1943) Nevertheless, Dr. Goldenberg acknowledged that his testimony concerning the color of the foot was based on his assumption that Dr. Weiner recorded only abnormal findings. Dr. Weiner did not note that the color was abnormal; therefore, it must have been normal. (Tr. 3047-3048)

Dr. Weiner

Dr. Weiner testified that Patient 17 came to his office with painful toenails and toes. Dr. Weiner noted that pain for a diabetic can actually be a good sign. It demonstrates that blood supply is getting to the nerves. Pain is a sign that things are relatively normal. (Tr. 3490)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to obtain x-rays on this patient. (Tr. 1943)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results";*

and/or:

11. *“[Dr. Weiner] performed elective podiatric surgery on known diabetics without first ascertaining whether their diabetes was controlled * * *. In fact, [Dr. Weiner’s] record for Patient (17) indicates ‘BS +2’ for the day of surgery; her glucose test result, which was completed three days later, was 294 mg%.”*

Dr. Van Enoo

Dr. Van Enoo testified that, during Patient 17’s first visit on 2-27-87, a blood sample was taken. In addition, Dr. Weiner performed a nail procedure and a capsulotomy on Patient 17’s second and third toes, right. Dr. Van Enoo stated that these procedures were elective. The results of the blood test, which were reported the following day, indicated that Patient 17 had an elevated fasting blood glucose level of 294. (St. Ex. 17, pp. 17, 46, 48; Tr. 272-273)

Dr. Van Enoo testified that it was below the minimal standards of care for Dr. Weiner to perform surgery on Patient 17 before getting the results of the lab tests. Further, Dr. Van Enoo testified that it was below the minimal standards of care for Dr. Weiner to perform elective foot surgery on a patient whose fasting blood glucose level was 294. Dr. Van Enoo testified that it is not safe for a podiatrist to assume that a diabetic patient knows if his or her condition is under control. (Tr. 272-273, 544, 672)

Dr. Van Enoo agreed that an infection as the result of a nail problem would be an indication for a diabetic to receive prompt treatment. However, Dr. Van Enoo referred to a note in the patient record that indicated no infection was present. (St. Ex. 17, p. 46; Tr. 545)

Dr. Van Enoo testified that he “absolutely” did not agree that capsulotomies were necessary to prevent a recurrence of the ingrown nail. The second toe left is straight, except for a slight distal contracture, and the hallux is straight. (St. Ex. 17A; Tr. 3961-3963)

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to perform the nail procedure and capsulotomies at Patient 17’s first visit, without waiting for the results of the laboratory blood tests. The patient had some redness which could have progressed to an infection later on if not addressed. Further, the capsulotomies on 2 and 3 helped to relieve pressure on the big toe, as well as

possible ulcerations on the distal tips of the toes. Moreover, Dr. Goldenberg testified that a photograph dated 2-27-87 indicated that Patient 17's circulation was good, due to the visible presence of bright red blood. [Dr. Goldenberg viewed the original photograph at hearing.] (St. Ex. 17, p. 8; Tr. 1940-1942)

Dr. Goldenberg stated that the in-office blood sugar test result of "+2" noted in the 2-27-87 entry in the progress notes indicated that Patient 17's blood sugar was elevated. However, without knowing which company's test it was, it is impossible to tell how elevated it was. (Tr. 3043-3044)

Dr. Goldenberg testified that it was appropriate to proceed with the total simple nail procedure and capsulotomies on 2-27-87. It was soft tissue surgery, and it is between the doctor and the patient to decide when to do such procedures. "All diabetic patients have elevated blood sugars most of the time. * * * At this time, the blood sugars that were here were not abnormally high enough that I would consider canceling any surgery." (Tr. 3045) The capsulotomies performed on 2-27-87 were also necessary, in Dr. Goldenberg's opinion. The contractions of the second and third toes were contributing to the ingrown toenail on the great toe. (Tr. 3282-3283)

Dr. Kobak

Dr. Kobak stated that diabetes can be an indication for surgery rather than a contraindication. The most important consideration in performing surgery on a diabetic patient is the vascularity of the foot. Dr. Kobak testified that, in a situation such as Patient 17's, it was appropriate for Dr. Weiner to perform the soft tissue procedures on the second and third toes at the same time that the nail procedure was done. "It's important to get to the etiology of the problem; otherwise, you'll be dealing with it again and again and again." (Tr. 2627-2630)

Dr. Kobak testified that the fact that the 2-27-87 procedures were performed on the right foot, while the records indicate that the ingrown toenail was on the left foot, was the result of a clerical error. This was true even though the clerical errors appeared to be in Dr. Weiner's own handwriting. (Tr. 2843-2848)

Dr. Weiner

Dr. Weiner testified that he performed the procedures before knowing the results of the blood test because "[d]iabetes, in my opinion, is an indication for surgery if there is a problem. We had a problem that could escalate to tremendous proportions here." Dr. Weiner stated that the tissue around the

nail could have become infected. (Tr. 3491-3492) Moreover, Dr. Weiner testified that he performed the capsulotomies because the second toe was pressing on the first toe and overriding the third. Dr. Weiner reasoned that, since the patient was already anesthetized, and since these procedures needed to be done, and the procedures were minimally invasive, it was best to just fix the problem then and there. He did not want to leave a condition that would cause future problems. (Tr. 3491-3493)

Dr. Weiner testified that he would not have performed the aforementioned procedures if the patient's circulation was impaired. Dr. Weiner said, if that were the case, the patient would have required hospitalization. (Tr. 3494-3495)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, or 12.]*

PATIENT 18

Patient 18, male, d.o.b. 8-2-57, first visited Dr. Weiner's office on 1-17-85. (St. Ex. 18, pp. 35, 38)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Stewart

After reviewing Dr. Weiner's findings of the physical exam, Dr. Stewart testified that the diagnostic impressions of HAV and hammer toes do not reference the findings of heel pain or tightness in the arch, but only address the forefoot. (St. Ex. 18, p. 38; Tr. 843-844)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg stated that it was appropriate to obtain blood tests and x-rays in this patient's case. (St. Ex. 18, pp. 35, 38-39; St. Exs. 18A and 18B; Tr. 2164-2166, 3217)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 1-17-85. That day, Dr. Weiner performed a plantar fasciotomy on 2, 3, and 4 right. The results of the blood tests were not completed until 1-18-85, however. (St. Ex. 18, pp. 37, 38)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Stewart

The progress notes indicated that on 1-17-85 Dr. Weiner performed a plantar fasciotomy on 2, 3, and 4 of Patient 18's right foot. The diagnosis on the operation report stated that Patient 18 suffered from hypertrophic metatarsal heads. The operation report indicated that the plantar fascia of these toes was incised. Dr. Stewart testified, however, that there is no plantar fascia in the toes. In any case, Dr. Stewart testified that a soft tissue procedure would not address a diagnosis of hypertrophic metatarsal heads. (St. Ex. 18, pp. 38, 60; Tr. 844-846) Although plantar fasciotomy is indicated for heel pain, Dr. Stewart noted that such a procedure at the toe level is not. (1045-1046)

Dr. Stewart further testified that the diagnostic impressions listed in the initial visit record did not mention hypertrophic metatarsal heads. The only reference to such a malady would have been HAV, which implies a dorsal and medial enlargement of the first metatarsal head. Dr. Stewart testified that HAV is a common form of bunion. (St. Ex. 18, p. 38; Tr. 846-847)

Dr. Goldenberg

Although Dr. Goldenberg noted that he was unable to confirm a diagnosis of hypertrophied metatarsal heads from the radiological evidence, he noted that

the diagnosis can also be made by palpation during the physical examination. (Tr. 2166-2167) Nevertheless, in later testimony, Dr. Goldenberg indicated that he could see from an x-ray that metatarsal heads 2 through 5 bilaterally were hypertrophied. (St. Ex. 18A; Tr. 3153-3155) He also stated that not only the metatarsals heads, but the metatarsal shafts of 2, 3, and 4, right appear to be hypertrophied. (St. Ex. 18, pp. 38, 45-46, 60; St. Ex. 18A; Tr. 3216-3217)

Dr. Goldenberg testified that the procedures performed by Dr. Weiner on 1-17-85 were appropriate for a diagnosis of hypertrophic metatarsal heads. (Tr. 3218-3219)

Dr. Weiner

Dr. Weiner testified that on 1-17-85 he performed a plantar fasciotomy on 2, 3, and 4 right. This was performed for an added diagnosis of exostosis toes and the hammer toes, as well as heel pain. Dr. Weiner testified that on 1-28-85 he performed a plantar fasciotomy on the second and third left for the contractures of the hammer toes and foot pain, as well as heel pain.

Dr. Weiner stated that on 2-14-85 he performed plantar fasciotomy on the first and fifth toes left. (St. Ex. 18, p. 15; Tr. 3498-3500)

Dr. Weiner testified that the plantar fasciotomies were performed to release the plantar fascia for hammer toes. When asked why the operation reports for 2-4-85 and 3-7-85 indicated that the preoperative diagnosis was “hypertrophic metatarsal heads,” Dr. Weiner replied that he made the additional diagnosis during surgery. Dr. Weiner acknowledged, however, that a diagnosis of hypertrophic metatarsal heads does not appear in the progress notes. (St. Ex. 18, pp. 67, 69; Tr. 3757)

7. *“[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost.”*

Dr. Stewart

Dr. Stewart testified further that over the next eight visits, Dr. Weiner performed a series of “plantar fasciotomies” and arthrotomies on different toes. Dr. Stewart testified that there was no indication in the record to support doing the procedures in serial fashion. “This is a healthy individual, and these are minimal incision techniques that could well be performed at one sitting.”

“[W]ithin the boundaries of one individual foot, there’s no particular advantage

to doing any limited number of minimal incision techniques.” (St. Ex. 18, p. 38; Tr. 847-849; 1005-1008) In Dr. Stewart’s opinion, it is beneath the standard of care for a podiatrist to schedule surgeries over more than one visit if there is no medical reason to do so. (Tr. 1008-1009)

Dr. Goldenberg

Concerning the issue of serial surgery, Dr. Goldenberg testified that “[b]y doing multiple procedures, you’re going to increase the amount of pain and discomfort the patient’s going to have, which means ambulation is going to be reduced for a greater period of time.” (Tr. 2168-2169)

Dr. Weiner

Dr. Weiner testified that all of the procedures performed between 1-17-85 and 4-11-85 were performed in serial fashion, rather than in one sitting, because the patient wanted to remain ambulatory. A treatment plan was discussed with the patient. Dr. Weiner stated that he would not have performed all of these procedures in one sitting unless the patient wanted to take some time off work. (Tr. 3501-3502)

Dr. Weiner disputed the State’s expert’s opinion concerning the amount of disability that the patient would have suffered if all of the procedures had been performed in one sitting. Dr. Weiner said that there would have been a great reduction of ambulation, and that the patient would have had to take more than two days off work or off of his feet. (Tr. 3502-3503)

9. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” (a) “[Dr. Weiner] billed for performing a plantar fasciotomy when [his] records indicate that surgical incisions were done only at the toe level of the foot where there is no plantar fascia”; [and/or] (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”*

Dr. Van Enoo

Dr. Van Enoo testified that the same improper billing practices noted under Patient 29, below, also occurred in this case on bills for services dated 3-14-85, 3-21-85, 3-28-85, and 4-11-85. (St. Ex. 18, pp. 70, 72, 74, and 75, respectively; Tr. 304) Nevertheless, Dr. Van Enoo observed that on the bills for services dated 3-14-85 and 3-21-85, , Dr. Weiner used CPT Code 21213, which is a non-

existent number. Dr. Van Enoo agreed that Dr. Weiner's usage of that number was probably a mistake. (St. Ex. 18, pp. 70 and 72; Tr. 451-454)

Dr. Weiner

Dr. Weiner said that on 3-14-85 he performed tendon lengthenings and arthrotomies on 2, 3, and 4 right. These were done for hammer toes, general foot pain, and pain in the heels and arch. (St. Ex. 18, p. 24; Tr. 3500-3501)

Dr. Weiner stated that on 3-28-85 he performed arthrotomies on 1 and 5 right. These were performed because of contracted extensor tendons, bursitis, and painful feet and toes. (St. Ex. 18, p. 26; Tr. 3501)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 8, 9a, or 12.]*

PATIENT 19

Patient 19, female, d.o.b. 5-1-46, first visited Dr. Weiner's office on 11-15-91. (St. Ex. 19, p. 32)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Van Enoo

Dr. Van Enoo testified that on the Initial Visit Record, a caution note indicates, among other things, "circular disorders," which Dr. Van Enoo interpreted to mean circulation disorders. Nevertheless, in the physical examination section of the initial visit record, there is nothing recorded under the heading "circulatory." Dr. Van Enoo testified that it was below the standard of care for Dr. Weiner not to describe the nature of Patient 19's circulatory disorder. (Tr. 162-164) Dr. Van Enoo noted that the record is clear that there was nothing charted as far as a circulatory examination is concerned. He acknowledged that, for purposes of his evaluation, if there was no examination charted, then no examination occurred. Nevertheless, Dr. Van Enoo described Dr. Weiner's practice of putting iridescent red warning stickers on the files of patients with special health problems as being a good practice. (Tr. 564-567)

[The Hearing Examiner will note further that there is no description of the problem elsewhere in Dr. Weiner's medical records for Patient 19. (St. Ex. 19)]

Dr. Goldenberg

Dr. Goldenberg acknowledged that it is below the minimal standards of care to have a patient note that she has a "blood or circular disorder" and not find out what the nature of that disorder is. When asked if it is below the minimal standards of care not to record the nature of the disorder, Dr. Goldenberg stated, "If your records only list abnormalities, that's what I would list down in my chart." (St. Ex. 19, pp. 30, 32; Tr. 2388-2389)

Dr. Weiner

Dr. Weiner testified that Patient 19 suffered from "[b]lood and circulatory disorders, high blood pressure." Such conditions would behoove Dr. Weiner to check the patient's circulation and blood tests. This, Dr. Weiner agreed, was part of his usual practice. (Tr. 3505) [It is worth noting, however, that the caution sticker attached to the progress notes, as well as the patient's questionnaire, indicated that the patient's mother, not the patient herself, suffered from high blood pressure, and that Patient 19 suffered from blood or "circular" disorders, stomach disorders, and "ear, nose, and throat disorders." (St. Ex. 19, pp. 30, 32)]

Dr. Weiner testified that there was nothing in the medical records to indicate that Patient 19's blood or circulatory disorders would have affected her treatment or healing. Dr. Weiner also indicated that if the patient's circulatory status had been impaired, he would not have performed the procedures that he performed. (Tr. 3508)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that the x-rays and blood tests ordered by Dr. Weiner were appropriate for a diagnosis of pain. It would have been below the minimal standards of care for Dr. Weiner not to have taken x-rays and ordered blood tests. (Tr. 1944-1946)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical records indicate that a blood sample was drawn on 11-15-91. Although the results of the blood tests were not received until 11-16-91 and 11-18-91, it appears that Dr. Weiner debrided two neoplasms on 11-15-91. (St. Ex. 19, pp. 32, 34-40)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Van Enoo

Dr. Van Enoo testified concerning Patient 19’s surgery on 11-22-91. The purpose of the surgery that was written on the consent form was to cut into tendons on the second and third toes of her left foot. The reason Patient 19 gave for the surgery was “painful stiff bent toes.” The operation report for the surgery indicated that the extensor tendons were incised, and a z-plasty tendon lengthening performed, on the third and fourth toes of Patient 19’s left foot. (St. Ex. 19, p. 7-8, 9; Tr. 305-306) Dr. Van Enoo testified further that Dr. Weiner’s operation report for a procedure performed on 11-25-91 stated that, among other things, a complete tenotomy was performed on the extensor tendons of the second, third, and fourth toes of Patient 19’s left foot. Dr. Van Enoo testified that there was no rationale contained in the medical record for first lengthening the tendons, and later severing them. (St. Ex. 19, p. 16; Tr. 308-312) However, a photograph dated 11-25-91 of Patient 19’s right foot appears to show that it was actually the right foot rather than the left foot that was operated on that date. (St. Ex. 19, p. 5; Tr. 683)

Dr. Van Enoo noted that St. Ex. 19, p. 29, is a description of a flexible hammertoe. However, the patient had indicated that her toe was “stiff” in her consent form. Dr. Van Enoo said that a rigid hammertoe generally requires bonework.

Dr. Van Enoo acknowledged on cross-examination that he assumed that the term “stiff” on Dr. Weiner’s consent form meant that the hammer toe was either rigid or semi-rigid. Dr. Van Enoo agreed that soft-tissue procedures are inappropriate in these situations. Dr. Van Enoo agreed that if Dr. Weiner

actually meant “reducible” or “flexible” in his use of the word “stiff” on the consent forms then, Dr. Van Enoo’s criticisms of Dr. Weiner’s care of Patient 19 in this regard were in error. (Tr. 575-577)

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to perform soft-tissue surgery to correct Patient 19’s hammer toes on 11-22-91. He disagreed with Dr. Van Enoo’s assertion that the word “stiff” as used in the consent form was synonymous with non-reducible. (St. Ex. 19, pp. 7-8; Tr. 1953-1954)

Dr. Weiner

Dr. Weiner testified that on 11-22-91 he performed arthrotomies and extensor tendon lengthenings on 3 and 4 left. He acknowledged that the consent form indicated 2 and 3 left, but testified that the proper toes were operated upon, and that the error in the consent form did not impact patient care. (St. Ex. 19, p. 7; Tr. 3505-3507) Dr. Weiner further testified that on 11-25-91 he performed arthrotomies on 2, 3, and 4 right, although he acknowledged that the operation report indicated that 2, 3, and 4 left had been operated upon. Dr. Weiner said that the purpose for the surgery was hammer toes, bone spurs, and enlarged metatarsal heads. (St. Ex. 19, p. 16; Tr. 3507-3508)

- 9b. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” * * * (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”*

Dr. Goldenberg

Concerning an operation report dated 11-25-91, Dr. Goldenberg acknowledged that he could not tell from reading the report if capsulotomies or arthrotomies had been performed. Although Dr. Goldenberg did not know if arthrotomies are reimbursed at a higher rate than capsulotomies, he acknowledged that it made sense that they would be, because arthrotomies are a more complicated procedure. (Tr. 2390-2392)

12. *“[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient’s*

postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy'". (a) "Further, even when postoperative complications occurred, [Dr. Weiner] failed to document adequately the existence, development and treatment of such complications."

Dr. Van Enoo

Dr. Van Enoo noted that on 11-25-91 a sample was taken from an abscess on Patient 19's fourth toe. Dr. Van Enoo was not certain from reading the medical records if the toe was on the right or the left foot. In either case, laboratory results indicated that an infection was present. Nevertheless, Dr. Weiner's medical records for Patient 19 are silent concerning the infection and any treatment rendered for the infection. The severity, or lack of severity, of the infection is not noted. Furthermore, Dr. Weiner performed an arthrotomy of the second, third, and fourth toes of the right foot on the same day. Dr. Van Enoo testified that this is outside the standard of care. (St. Ex. 19, pp. 32, 42; Tr. 197-199; 569-570)

Dr. Van Enoo acknowledged on cross-examination that Dr. Weiner prescribed Keflex, an antibiotic, to Patient 19 on 11-25-91. (St. Ex. 19, p. 4; Tr. 571-572)

Dr. Van Enoo criticized Dr. Weiner for not noting the results of Patient 19's lab tests in the progress notes, for not making any subsequent references to problems concerning the infection, and for not describing the infection. (Tr. 573-575)

Dr. Goldenberg

Dr. Goldenberg testified that it was "very appropriate" for Dr. Weiner to prescribe an antibiotic to Patient 19 when he did, prior to receiving back the results of the culture and sensitivity, because the antibiotic covered a broad spectrum of organisms. When the culture and sensitivity report came back, the bacteria was shown to be sensitive to Keflex. Therefore, it was appropriate to maintain Patient 19 on that antibiotic. (St. Ex. 19, pp. 4, 32-33, 42-43; Tr. 1951-1953)

* [Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, or 9b.]

PATIENT 20

Patient 20, female, d.o.b. 5-19-43, first visited Dr. Weiner's office on 7-25-85. (St. Ex. 20, pp. 18, 19)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 5, 7, 10, or 12.]*

PATIENT 21

Patient 21, female, d.o.b. 12-29-66, first visited Dr. Weiner's office on 4-29-85. (St. Ex. 21, pp. 13, 32)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 4-29-85. On that date, Dr. Weiner performed a nail procedure and excised a neoplasm. The results of the blood tests are not dated, however. (St. Ex. 21, pp. 13, 16)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, or 12.]*

PATIENT 22

Patient 22, female, d.o.b. 2-26-53, first visited Dr. Weiner's office on 2-21-85. (St. Ex. 22, pp. 9, 19)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was drawn on 2-21-85. On that date, Dr. Weiner performed a plantar fasciotomy on 4 right and 4 left, and debrided four neoplasms. The blood test results are dated 2-22-85 and 2-23-85. (St. Ex. 22, pp. 9, 20)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 9a, 9b, or 12.]*

PATIENT 23

Patient 23, female, d.o.b. 10-2-25, first visited Dr. Weiner's office on 1-10-85. (St. Ex. 23, pp. 43, 46)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to obtain x-rays and order blood tests on Patient 23, in light of the patient's presenting circumstances. (Tr. 1961-1962)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 1-10-85. On that date, Dr. Weiner performed a plantar fasciotomy on 2 through 5 right, and debrided two neoplasms. The results of the blood chemistry tests are not dated; however, the hematology report is dated 1-14-85. (St. Ex. 23, pp. 44-45, 46)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

[Note: Testimony was offered concerning surgical technique and the potential complications of surgical technique. To the extent that the testimony addressed whether surgery was performed with or without indication, the testimony is relevant. However, to the extent that the testimony simply addressed a surgical technique or potential complications of a surgical technique, or postoperative recordkeeping, it is irrelevant and will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

Dr. Van Enoo

Dr. Van Enoo testified that the right second digit appeared to be very straight, the third has a slight distal contracture, and the fourth and fifth appear to have varus rotation rather than contracture. Dr. Van Enoo testified that he saw no indication on the x-rays for doing arthrotomies on 2 through 5 right or 2 through 5 left. (St. Exs. 23A through 23F; Tr. 3968)

Dr. Van Enoo testified further that the x-rays do not show any indication for plantar fasciotomies on all toes. (St. Exs. 23A through 23F; Tr. 3968)

Concerning Dr. Weiner's surgery on 2-21-85, in which Dr. Weiner performed multiple adjacent metatarsal osteotomies of 2, 3, and 4 right and an osteotomy of the proximal phalanx of the right hallux, (although the State's representative incorrectly referred to these surgeries as having been performed on the left foot that day), Dr. Van Enoo acknowledged that the osteotomy on the hallux was indicated in order to correct the hallux varus condition. Dr. Van Enoo found no indication for the multiple adjacent metatarsal osteotomies, however, stating that the metatarsals were in good alignment, and that there was no enlargement of the metatarsal heads. (St. Ex. 23B; Tr. 3969-3970)

Dr. Van Enoo acknowledged that if there were plantar clavi under the second, third, and fourth metatarsal heads, that could possibly be an indication for doing metatarsal osteotomies. But there are no indications visible on x-ray. (St. Exs. 23B and 23D; Tr. 3970-3972)

Dr. Van Enoo acknowledged that painful calluses are an accepted reason to perform metatarsal osteotomies. (Tr. 4172-4173)

Dr. Weiner

Dr. Weiner testified that the reasons for performing plantar fasciotomies on Patient 23 were hypertrophic metatarsal heads and hammer toes. (Tr. 3516)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, 8, 9a, 9b, 10, or 12.]*

PATIENT 24

Patient 24, female, d.o.b. 11-23-25, first visited Dr. Weiner's office on 3-6-87. Dr. Weiner's medical records for Patient 24 indicated that Patient 24 was diabetic, and used insulin, on iridescent red "Caution" stickers that were

attached to the cover of the file and to the first page of the progress notes. The progress note for her first visit indicated that a blood sample was taken. (St. Ex. 24, pp. 2, 38-39; Tr. 549-550)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

Dr. Goldenberg testified that the history and physical exam taken and recorded by Dr. Weiner are appropriate. (St. Ex. 24, pp. 38-40; Tr. 1972-1973)

Dr. Weiner

Dr. Weiner testified that Patient 24's chief complaints were that all her toes and nails hurt. Dr. Weiner's diagnostic impressions were exostosis toes, contracted tendons, and that all of her nails were fungus nails. Dr. Weiner also noted that Patient 24 was diabetic. (Tr. 3538)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that x-rays and blood tests were properly ordered on this patient. (Tr. 1972-1973)

Dr. Weiner

Dr. Weiner stated that he took x-rays of this patient because of her exostosis and the contracted tendons. Dr. Weiner also said that he wanted to see if Patient 24's arteries had become calcific. Dr. Weiner testified that he did not ordinarily do blood typing for his patients. The only occasions where he did were patients who were going to have blood tests who requested that

Dr. Weiner find out their blood type. Dr. Weiner testified that he did this as a courtesy, and did not charge anything extra for the blood typing. Dr. Weiner further testified that it was not necessary to draw any extra blood for the typing. (Tr. 3559-3542)

4. “[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”

and/or

11. “[Dr. Weiner] performed elective podiatric surgery on known diabetics without first ascertaining whether their diabetes was controlled.”

Dr. Van Enoo

Dr. Van Enoo testified that Patient 24 had surgery during her first visit. On 3-6-87, Dr. Weiner performed a total simple nail procedure on the first toe, left, and excised a neoplasm (proud flesh) on the same digit. The progress note indicated that the nail was inflamed but not infected. Dr. Van Enoo characterized these procedures as elective. (St. Ex. 24, pp. 26, 39; Tr. 274-278)

The results of the blood test, dated the day following Patient 24’s surgery, indicated that Patient 24 had a fasting blood glucose level of 223.

Dr. Van Enoo testified that it was below the minimal standards of care for Dr. Weiner to perform a total simple nail procedure and excision of proud flesh on a diabetic patient without waiting on the results of her blood test. Further, it was below the minimal standards of care for Dr. Weiner to perform these procedures on a patient with a fasting blood glucose level of 223. Dr. Weiner should have enlisted the aid of Patient 24’s family practitioner to bring Patient 24’s blood glucose level down before performing the surgery. (St. Ex. 24, p. 42; Tr. 277-278) Dr. Van Enoo further testified that, even if there was an infection, there would have been other ways of dealing with such an emergency situation besides removing the whole nail. (Tr. 552)

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to have performed the procedures that he did. “Her nails hurt, she had proud flesh present, which could be early signs of infection.” (St. Ex. 24, pp. 26-27, 38-40, 42; Tr. 1973-1975)

Dr. Weiner

Dr. Weiner testified that the patient was in a lot of pain. (Tr. 3540-3541) On cross-examination, Dr. Weiner testified that the fact that a blood test was drawn on this patient, and recorded as being drawn in the progress note entry dated 3-6-87, indicated that the in-office blood tests of bleeding time, clotting time, and blood sugar were performed. The blood for those tests is taken while the patient is bleeding from the blood draw. Dr. Weiner acknowledged, however, that the results of the bleeding time, clotting time, and blood sugar tests were not noted in the record. (St. Ex. 24, p. 39; Tr. 3762-3763)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Goldenberg

Dr. Goldenberg testified that the reason for capsulotomies performed on 2 and 3, left on 3-16-87; 4 and 5, right on 3-20-87; and 4 and 5, left on 3-23-87 was contracted tendons. The preoperative diagnosis on the operation report for 3-16-87 listed exostosis. The operation report for 3-20-87 listed a preoperative diagnosis of contracted tendons and toes. The operation report for 3-23-87 listed as preoperative diagnoses acute bursitis toes and exostosis toe.

Dr. Goldenberg testified that the contracted tendons may have led to the exostoses, but acknowledged that capsulotomies would not help exostosis.

Dr. Goldenberg derived his opinion for the reason behind the surgeries from the consent forms. (St. Ex. 24, pp. 39, 49, 51, 52; Tr. 3067-3069)

Dr. Weiner

Dr. Weiner testified that on 3-16-87 he performed capsulotomies and tendon surgery on Patient 24. Dr. Weiner testified that whenever a capsulotomy or arthrotomy was performed, a tendon procedure was also performed.

Dr. Weiner also said that, in Patient 24's case, there was no mention of the tendon surgery in the operation report. A tendon report should have been generated, but the person who typed up the reports failed to do so. Dr. Weiner said that he never utilized the operation reports in his treatment of patients anyway. (Tr. 3542-3546)

Dr. Weiner noted that on 3-20-87 he performed tendon surgery and capsulotomies on 4 and 5 right. Dr. Weiner further testified that on 3-23-87 he

performed tendon procedures and capsulotomies, but that, in this case, there was an operation report for the tendon procedure, but none was generated for the capsulotomies. Dr. Weiner noted that the progress notes and the consent form for that date reference both the tendon procedures and the joint procedures. (Tr. 3546-3549)

Dr. Weiner acknowledged that the progress note for 3-23-87 indicated that a capsulotomy was performed, while the operation report merely indicated that a z-plasty tendon lengthening was performed. Dr. Weiner testified that both procedures were actually performed; the separate operation report for the capsulotomy was lost. Dr. Weiner testified that a separate operation report was always prepared for each procedure. Dr. Weiner did not produce combination reports, even when procedures were done in combination. (St. Ex. 24, pp. 38, 52; Tr. 3764-3766)

7. *"[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost."*

Dr. Weiner

Dr. Weiner testified that he did not perform all of Patient 24's surgeries at the same time because the patient decided, with Dr. Weiner's consultation, to have the surgery done in stages. (Tr. 3549-3550)

9. *"[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:" * * * (b) "[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only."*

Dr. Van Enoo, State's Case-in-Chief

Dr. Van Enoo testified that the same improper billing practices noted under Patient 29, below, also occurred in this case. (St. Ex. 24, p. 58; Tr. 304)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, or 12.]*

PATIENT 25

Patient 25, male, d.o.b. 5-17-42, first visited Dr. Weiner's office on 1-21-85. (St. Ex. 25, pp. 19, 21)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Stewart

Dr. Stewart testified that Dr. Weiner's medical records for Patient 25 indicated that Patient 25 suffered from a work-related trauma to his left foot. Patient 25 also suffered from pain in his feet that was apparently unrelated to the trauma. "Diagnostic impressions include contusion of left foot; neuromas, bilateral 2, 3, which [Dr. Stewart assumed] refer to the space, the intermetatarsal space; bursitis, metatarsal heads; exostosis; bursitis, lesser toes; plantar fasciitis, both feet." (St. Ex. 25, pp. 19, 21; Tr. 854-856) On the typed record, the diagnoses were contusion toes and feet, and dislocated toes on the left foot. (St. Ex. 25, p. 20; Tr. 857)

Dr. Stewart testified that he does not believe that a diagnosis of bursitis of the metatarsal heads could have reliably been made, in light of the amount of post-traumatic swelling that would have been present following Patient 25's injury. (Tr. 864-865)

The progress note dated 1-31-85 indicated that arthrotomies were performed on 2, 3, and 4, left. Diagnoses of tendonitis and bursitis were also noted. However, Dr. Stewart testified that the operation report dated 1-31-85 gave a diagnosis of contracted tendons, and described capsulotomies of the 2, 3, and 4 MP joints of the left foot. Dr. Stewart said there was no way to tell if the tendon problems were related to Patient 25's injury and dislocated toes, because the source of the dislocation was never noted in the record. (St. Ex. 25, pp. 12, 21; Tr. 858-860)

Dr. Weiner

Dr. Weiner testified that Patient 25's chief complaints were a work injury to his left foot, and pain in both feet on the balls of feet and toes. Dr. Weiner's

diagnostic impressions were contusion left foot, and, unrelated to his work injury, neuromas 2, 3, and 4 bilaterally, and bursitis and exostosis of the toes. Dr. Weiner further stated that x-rays showed that there was impingement of the metatarsal heads of 2 and 3 bilaterally, and the fourth had shifted toward the third, which indicates neuromas. This would also cause bursitis, “because the metatarsal heads would be in an abnormal position pushing on the floor causing pain and inflammation.” (Tr. 3551-3552)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”*

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to obtain x-rays and blood tests on this patient. (Tr. 2172-2173, 2175)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Goldenberg

Dr. Goldenberg testified that the arthrotomies on 2, 3, and 4, left, performed by Dr. Weiner on 1-31-85 were for a diagnosis of contracted toes, and were appropriate for that condition. (St. Ex. 25, pp. 10-11; St. Exs. 25A–25C; Tr. 2175-2178, 3209-3210) [It should be noted, however, that Dr. Goldenberg’s diagnosis contradicts Dr. Weiner’s testimony, below.]

Dr. Weiner

Dr. Weiner stated that on 1-31-85 he performed an arthrotomy of 2, 3, and 4 left. This was done for exostosis toes and bursitis of the toes. These procedures were not meant to address Patient 25’s work-related injury. (Tr. 3553-3554)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 10, or 12.]*

PATIENT 26

Patient 26, female, d.o.b. 4-13-41, first visited Dr. Weiner's office on 4-3-87. (St. Ex. 26, pp. 4, 6)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

In Dr. Goldenberg's opinion, Dr. Weiner's recordkeeping in this case was appropriate. Dr. Goldenberg assumed that Dr. Weiner's physical examination was within the standard of care. (Tr. 1977-1979)

Dr. Weiner

Dr. Weiner said that Patient 26 complained of painful calluses and toes. Dr. Weiner diagnosed hammer toes, osteoarthropathy, bone spurs, hypertrophic metatarsal heads on 2, 3, 4, and 5 bilaterally, and contracted tendons causing tendinitis. (Tr. 3554-3555)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 9-3-87. On that date, Dr. Weiner performed arthrotomies on 2 through 5, right. The blood tests results are dated 9-5-87. (St. Ex. 26, pp. 6, 36)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

[Note: There was a significant amount of testimony concerning the advisability of performing floating multiple adjacent metatarsal osteotomies. To the extent that the testimony addressed whether the surgery was performed with or without indication, the testimony is relevant. However, to

the extent that the testimony simply addressed the surgical technique or potential complications of a surgical technique, it is irrelevant, and will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

Dr. Van Enoo

Dr. Van Enoo testified that an operation report dated 10-15-87, with a diagnosis of exostosis, described an ostectomy on the second, third, and fourth digits of Patient 26's left foot. However, in his review of Dr. Weiner's x-rays of Patient 26, Dr. Van Enoo found no exostosis. Moreover, Dr. Van Enoo testified that the x-rays show that four osteotomies had been performed on the metatarsals, but nothing had been done to the toes. (St. Ex. 26, p. [31]; St. Exs. 26A-C; Tr. 230-233)

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to perform arthrotomies during Patient 26's first visit. He further testified that the multiple adjacent metatarsal osteotomies performed by Dr. Weiner on 10-15-87 for painful calluses and painful feet were appropriate and within the standard of care. (Tr. 1980-1981) Dr. Goldenberg testified that the multiple adjacent metatarsal osteotomies were appropriate for the patient's conditions. Dr. Goldenberg said that the patient complained of calluses on 2, 3, and 5 on the right foot. Dr. Goldenberg also stated that the fifth right metatarsal appeared to be deviated laterally. The multiple adjacent metatarsal osteotomies were intended to move the metatarsals up so that they would be less prominent, and further to move the fifth metatarsal medially. (St. Ex. 26A; Tr. 3258-3260) Dr. Goldenberg did not know why there were two operation reports for the 10-15-87 procedure, but testified that the one that had a pre-operative diagnosis of deformity of metatarsal heads was the correct one. Further concerning the two operation reports for 10-15-87, Dr. Goldenberg was asked if the procedure described in the other operation report, with the preoperative diagnosis of exostosis, actually occurred. The procedure was described in the operation report as an ostectomy/osteotripsy. Dr. Goldenberg opined from a review of the x-rays that it did actually occur. Dr. Goldenberg acknowledged that the procedure was not mentioned in the progress notes, but said that it was mentioned in the consent form. The consent form described a proposed procedure to "file and fracture" the metatarsals. Dr. Goldenberg said that filing is the same as an osteotripsy. (St. Ex. 26, pp. 6, 29-32; Tr. 1981, 3073-3076)

Dr. Weiner

Dr. Weiner testified that on 10-15-87 he performed metatarsal osteotomies on 2 through 5 left. These were done to elevate the metatarsal heads, because they were enlarged and causing the patient pain. He opined that if there was any confusion concerning what procedure he performed that day, it could be resolved by looking at the x-rays. (St. Ex. 26, p. 32; Tr. 3555-3558)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 7, 10, or 12.]*

PATIENT 27

Patient 27, male, d.o.b. 1-9-56, first visited Dr. Weiner's office on 1-20-89. (St. Ex. 27, pp. 94, 100)

[Note: There was a considerable amount of testimony on the advisability of removing 60 warts from the plantar surface of Patient 27's left foot. Much of the testimony concerning the surgery and subsequent billing for this surgery failed to address any relevant issue in this case. Similarly, testimony concerning Dr. Weiner's billing for a midfoot capsulotomy on 2-24-89 did not address a relevant issue. Finally, testimony concerning floating multiple adjacent metatarsal osteotomies was largely irrelevant, to the extent that it failed to address whether or not the surgery was medically or clinically justified. Accordingly, this testimony will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

Dr. Goldenberg testified that a history was obtained from the patient. An exam revealed, dermatologically, that there were warts, calluses, and seed corns on the plantar surfaces bilaterally; circulation, DP and PT was 68 beats per minute; the patella and achilles reflexes were normal, neurologically; and musculoskeletal revealed pes cavus deformities. Dr. Weiner's diagnostic impressions were "osteoarthropathy, contracted tendons, seed cords, calluses,

pain, itching, arthritis, and arthrosynovitis.” (St. Ex. 27, pp. 42, 47; Tr. 1991-1992) Dr. Goldenberg further found that the x-rays reveal contracted digits on all toes, bilaterally, and also hypertrophic metatarsal heads on 1 through 5, bilaterally. (St. Ex. 27A–27C; Tr. 1994-1995)

Dr. Weiner

Dr. Weiner testified that Patient 27 complained of pain, which Dr. Weiner characterized as diffuse pain rather than localized. Dr. Weiner testified that the patient had numerous benign neoplasms, including warts, calluses, and seed corns. He had a pes cavus foot. Dr. Weiner’s diagnostic impressions were contraction of all tendons, osteoarthropathy, seed corns, calluses, itching, arthritis, arthrosynovitis, and burning pain. Dr. Weiner said burning pain can be differentiated from ordinary pain as it concerns calluses, because “a callus gives you burning pain because of the shearing of the torsion on it.”

Dr. Weiner said that when he merely lists “pain,” it is not burning pain. (St. Ex. 27, p. 42; Tr. 3559-3560)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

Dr. Weiner

Dr. Weiner noted that on 1-20-89 he obtained x-rays and took blood tests. Dr. Weiner stated that he didn’t perform bone surgery until three days later because “I must have the results of my testing before I do bone surgery.” Dr. Weiner said there is never any indication to do bone surgery without having the results of the blood tests. (Tr. 3560-3561)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to remove the seed corns or “benign neoplasms” from the bottom of Patient 27’s feet. If they were not removed, they could spread and/or cause pain during ambulation. Moreover, Dr. Goldenberg said that the multiple adjacent metatarsal osteotomies performed by Dr. Weiner on 1/23/89 were appropriate, given the

diagnosis of hypertrophic metatarsal heads and the presence of calluses. The contraction of the toes cause the bases of the proximal phalanges to rest on the dorsal aspect of the metatarsal heads, forcing them down and causing the calluses. (Tr. 1995-1999, 3258)

Dr. Weiner

Dr. Weiner testified that 60 warts were removed from the bottom of Patient 27's foot. He did not measure each lesion, but merely estimated their size. The reasons that they were removed were that warts are very contagious, and they were painful. (Tr. 3562-3564)

Dr. Van Enoo, State's Rebuttal

Dr. Van Enoo testified that Patient 27's metatarsal heads were normal, and not hypertrophied. Dr. Van Enoo further testified that he disagreed with Dr. Goldenberg's testimony that St. Ex. 27B shows contracted digits on 1 through 5 bilaterally, and hypertrophic metatarsal heads on 1 through 5 bilaterally. [See Allegation 1, above.] Dr. Van Enoo noted a slight distal contracture on 2 right, and a slight varus rotation on 3, 4, and 5 right. (Tr. 3978) Dr. Van Enoo further testified that the x-ray does not show a natural position of the feet because it is not a weight-bearing x-ray. It makes the plantar condyles appear more prominent. Dr. Van Enoo stated that this shows why podiatric x-rays should be taken while the feet are weight-bearing, and why these x-rays are not of diagnostic quality. (Tr. 3907-3908, 3978-3981)

Dr. Van Enoo further testified that he disagreed with Dr. Goldenberg's testimony that the x-rays show contractures of the toes that cause the bases of the proximal phalanges to sit on top of the metatarsal heads, forcing the metatarsal heads down toward the floor. Dr. Van Enoo stated:

These are very visible spaces between the metatarsal head and the proximal base of all the lesser digits on both feet, indicating cartilage is present, indicating that the x-ray beam went right through the cartilage. A bone sitting up would obliterate that cartilage. That's not the case here; therefore, looking at these x-rays, there's no way that one can say that these were sitting on top of the metatarsals, pushing the metatarsals down.

(St. Exs. 27A-27E; Tr. 3981-3983)

Subsequent treater testimony

Muneer Mirza, D.P.M., testified as a witness on behalf of the state. Dr. Mirza has been practicing podiatry for about 13 years. Dr. Mirza treated Patient 27 subsequent to Dr. Weiner. Dr. Mirza testified that he diagnosed Patient 27 on or about 5/19/89 as suffering from metatarsalgia secondary to osteotomies. Dr. Mirza remarked that he had thought it unusual for a patient to have four transverse osteotomies performed for a complaint of warts. Such procedures done at one time would be very difficult. (Tr. 1480-1487) Nevertheless, on cross-examination, Dr. Mirza acknowledged that Patient 27 no longer had warts when Dr. Mirza examined him. Dr. Mirza also acknowledged that he did not know if the metatarsal osteotomies eventually healed perfectly, as the last time Dr. Mirza saw Patient 27 was when the osteotomies were still healing. (Tr. 1501-1505)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, or 12.]*

PATIENT 28

Patient 28, female, d.o.b. 6-5-56, first visited Dr. Weiner's office on 1-27-89. (St. Ex. 28, pp. 16, 18)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 8, 10, 12.]*

PATIENT 29

Patient 29, male, d.o.b. 5-25-45, first visited Dr. Weiner's office on 3-18-85. (St. Ex. 29, pp. 31, 61)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Weiner

Dr. Weiner stated that Patient 29's chief complaints were swollen feet, itching, pain on the top of foot, pain in the balls of feet, pain on palpation of the

metatarsal areas and arches. Dr. Weiner diagnosed pes cavus, venous edema, hypertrophic metatarsal heads, and contracted tendons. (St. Ex. 29, p. 31; Tr. 3564)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

In Dr. Goldenberg's opinion, it was appropriate for Dr. Weiner to take blood tests and x-rays of Patient 29. (Tr. 2009)

9. *"[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:" * * * (b) "[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only."*

Dr. Van Enoo

Dr. Van Enoo testified concerning a surgical procedure performed by Dr. Weiner on 4-11-85. The operation report dated 4-11-85 (St. Ex. 29, p. 19) stated that "Approximately ¼" incision was made on the 1st MPJ joint L foot. The wound was deepened and the joint was incised. This procedure was repeated on the 5th MPJ joint L foot." Dr. Van Enoo testified that the procedure Dr. Weiner described in this operation report was a capsulotomy. (Tr. 283) [The Hearing Examiner will note that the procedure(s) were described as "ARTH" in the progress note for 4-11-85. (St. Ex. 29, p. 31)]

Dr. Van Enoo testified that Dr. Weiner billed the insurance company for CPT Code 28024, which Dr. Weiner described as an arthrotomy of the first MPJ, left foot; and CPT Code 28020, which Dr. Weiner described as an arthrotomy of the fifth MPJ, left foot. Dr. Van Enoo testified that the procedure to be billed under CPT code 28020 is described in the CPT book as "Arthrotomy with exploration, drainage or removal of loose or foreign body[;] intertarsal or tarsometatarsal joint." (St. Ex. 29, p. 43; St. Ex. 97, p. Surgery/127; Tr. 284-285, 639) The procedure to be billed under CPT code 28024 is described in the CPT book as "Arthrotomy with exploration, drainage or removal of loose or foreign body[;]

interphalangeal joint.” (St. Ex. 97, p. Surgery/127; Tr. 293) Arthrotomies are more extensive procedures than capsulotomies, Dr. Van Enoo said, and are therefore reimbursed by insurance companies at a higher rate. Moreover, neither procedure was performed on the mid- or rear-foot. (Tr. 293; 642)

Dr. Van Enoo disagreed *Tabor’s Cyclopedic Medical Dictionary* that the definition of arthrotomy is “cutting into a joint.” A term, as used in medicine, goes beyond the meaning of the root components of a word. What is more important is the meaning of the term as agreed upon in its usage by a profession. The agreed-upon usage of the term “arthrotomy” was reflected in the CPT code, and the definition of arthrotomy, as it appears in the CPT code, is what must be used by the physician when billing for a procedure. An arthrotomy, as defined in the 1984 CPT code, must be performed for certain specified purposes, and requires an open incision of the joint. A capsulotomy, by comparison, is cutting into the joint for the purpose of getting release.

Dr. Van Enoo noted that a letter prepared by Patient 29 and included in the patient record substantiates that a capsulotomy was performed, rather than an arthrotomy. Dr. Van Enoo testified that the patient described a minimal incision capsulotomy; an arthrotomy would have been considerably more involved. (St. Ex. 29, p. 54; Tr. 293-298, 621)

Dr. Van Enoo noted that the same type of billing practice occurred on bills dated 3-21-85 and 3-28-85. (St. Ex. 29, pp. 41 and 42; Tr. 299-303) [It is worth noting, however, that although CPT code 28024 was used in the 3-28-85 billing, the 3-21-85 billing did not include either CPT code 28020 or 28024, but instead used CPT code 21213 for surgeries described as arthrotomies. (St. Ex. 29, pp. 41 and 42) It may also be worth noting that Dr. Weiner used CPT code 28024 on a bill dated 4-18-85 for work described as arthrotomies. (St. Ex. 29, p. 44)]

Dr. Goldenberg

Dr. Goldenberg disputed that a patient’s description of his surgery as acupuncture could be reliably interpreted as a capsulotomy versus an arthrotomy. “Usually the patient is anesthetized, so they have really no way of knowing what is happening at that particular moment at the area of surgery. So they may feel a small stick from a needle from being anesthetized and associate that with being acupuncture, but, following the anesthesia, they’d have no way of being able to feel the exact procedure going on at that particular time.” (Tr. 2002-2003) Nevertheless, Dr. Goldenberg testified that he did not know if the patient actually saw what was being done. Dr. Goldenberg testified that patients are usually draped, however. (Tr. 3081-3089, 3254-3255)

Dr. Goldenberg further testified that arthrotomies can be performed via minimal incision surgery. (Tr. 2003) Dr. Goldenberg testified that arthrotomy would have been an appropriate procedure for this patient. (Tr. 2003-2004)

Dr. Weiner

Dr. Weiner testified that on 2-28-85, 3-21-85, 4-11-85, and 4-18-85, he performed arthrotomies on Patient 29. Dr. Weiner stated that he did not know how to respond to the patient's written allegation that Dr. Weiner performed acupuncture because, in Dr. Weiner's opinion, the patient does not really know what happened. Dr. Weiner testified that a drape is always placed between the patient and the operating field. The purpose of the drape is because it would be traumatic for most people to watch surgery being performed on their own feet. Dr. Weiner also said that all patients are anesthetized before surgical procedures are performed. Dr. Weiner also testified that the surgeries went beyond mere capsulotomies, and that if he had performed capsulotomies, that he would have listed them as such. (Tr. 3566-3568)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 9a, or 12.]*

PATIENT 30

Patient 30, female, d.o.b. 6-2-49, first visited Dr. Weiner's office on 2-28-85. (St. Ex. 30)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 8, 9a, 9b, 10, or 12.]*

PATIENT 31

Patient 31, male, d.o.b. 10-24-30, first visited Dr. Weiner's office on 1-7-85. (St. Ex. 31, pp. 33, 36)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical record indicated that a blood sample was taken on 1-7-85. On 1-10-85, Dr. Weiner performed arthrotomies on 2 and 3 left. The hematology report is not dated, but the blood chemistry report is dated 1-14-85. (St. Ex. 31, pp. 35, 36)

- 9b. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” * * * (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”*

Dr. Van Enoo

Dr. Van Enoo testified that the same improper billing practices noted under Patient 29, above, also occurred in this case on bills for services rendered on 1-10-85, 2-14-85, 2-7-85, and 1-17-85, St. Ex. 31, pp. 45, 50, 53, and 56, respectively. (Tr. 304) However, on cross-examination, Dr. Van Enoo noted that Dr. Weiner had used CPT Code 21213 on each of the aforementioned bills. Dr. Van Enoo stated that this CPT Code number does not exist. He assumed that Dr. Weiner used it in error. (St. Ex. 31, pp. 45, 50, 53, and 56; Tr. 454-458)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 8, 9a, 11, or 12.]*

PATIENT 32

Patient 32, male, d.o.b. 7-8-41, first visited Dr. Weiner’s office on 2-5-88. (St. Ex. 32, p. 16, 18)

1. *“[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”*

Dr. Van Enoo

Referring to the 2-12-88 operation report, Dr. Van Enoo stated that Dr. Weiner excised eight “benign neoplasms” from Patient 32’s right foot. Dr. Van Enoo testified that it was below the standard of care for Dr. Weiner not to further identify what type of benign neoplasms these were. (St. Ex. 32, p. 13, 16; Tr. 149-151, 554-557)

Dr. Goldenberg

Dr. Goldenberg testified that, in his opinion, Dr. Weiner's medical records for this patient conform to the standards of care. He noted that, within that record, Dr. Weiner appropriately identified benign neoplasms as corns, clavuses, or warts. (Tr. 2010) Dr. Goldenberg acknowledged that the term "benign neoplasms could describe either corns or warts. (St. Ex. 32, pp. 13, 16; Tr. 3090-3091) Nevertheless, Dr. Goldenberg averred that the standard of care did not require Dr. Weiner to specify whether warts, corns, or calluses were remove; noting them simply as benign neoplasms was sufficient. (Tr. 3253-3254)

Dr. Weiner

Dr. Weiner noted that Patient 32's chief complaints included painful fungus nails and painful corns. Diagnostic impressions included corns, calluses, warts, and porokeratosis. Dr. Weiner stated that it is appropriate to use the general term "benign neoplasms" in an operation report as long as the neoplasms are defined somewhere else in the medical records. Dr. Weiner stated that in this instance the benign neoplasms were corns, warts, and porokeratosis. (St. Ex. 32, p. 13, 16; Tr. 3568-3570)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified it would have been below the standard of care for Dr. Weiner not to have taken blood tests and x-rays of this patient. X-rays were necessary to identify deformities causing the skin problems, and blood tests were necessary, because of the deformities, osteoarthropathy, and in case bone surgery was to be considered. (Tr. 2010-2011)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, or 9b.]*

PATIENT 33

Patient 33, male, d.o.b. 10-10-52, first visited Dr. Weiner's office on 7-21-89. (St. Ex. 33, pp. 38, 40)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicate that a blood sample was taken on 8-25-89. On that date, Dr. Weiner performed tenocentesis and tenolysis on 1 through 5 left. The blood test results are dated 8-26-89. (St. Ex. 33, pp. 38, 43)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 8, 10, or 12.]*

PATIENT 34

Patient 34, female, d.o.b. 12-24-37, first visited Dr. Weiner's office on 1-25-92. (St. Ex. 34, pp. 25, 31)

[Note: It may be worth noting that a second copy of the Initial Visit Record can be found at St. Ex. 34, p. 35. It appears to be identical to the copy referred to in the preceding paragraph (St. Ex. 34, p. 25), including the handwriting, with the exception of the chief complaint. On p. 35, it merely says "Pain." On p. 25 the words "toes - feet" appear to have been added. (St. Ex. 34, pp. 25, 35; Tr. 1681) Dr. Weiner testified that he didn't know how that occurred. (Tr. 3824)]

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Kushner

Dr. Kushner testified that Dr. Weiner's entire preoperative evaluation, history, and physical examination of Patient 34 totaled less than 20 words. The patient's chief complaint of "Pain, toes, feet" is not an adequate chief complaint. (St. Ex. 34, p. 25; Tr. 1237-1239)

Concerning the dermatologic part of the exam, which indicated that there was a corn between the fourth and fifth toes of Patient 34's left foot, Dr. Kushner testified:

I don't know whether it's a corn between the toes distally, whether it's a corn between the toes proximally. I don't know the size of the corn. I certainly don't know how long the corn has been here, whether there's been any treatment for the corn in the past, whether the patient's tried anything for it herself.

I don't know whether it's ulcerated, ever been infected. I know nothing about it, basically, from this record. In addition—I know nothing else about the dermatologic exam, other than there's a corn between the toes.

(St. Ex. 34, p. 25; Tr. 1239-1240)

Dr. Kushner testified that, for the circulatory exam, Dr. Weiner recorded a blood pressure and a pulse. It does not say whether the pulses were palpable in the feet, or refer to the quality of Patient 34's circulation in her feet. (St. Ex. 34, p. 25; Tr. 1240)

Concerning the musculoskeletal exam section, Dr. Kushner testified that Dr. Weiner recorded that Patient 34 had hammer toes and bone spur. Dr. Kushner stated that these were not examination findings, but diagnoses. (St. Ex. 34, p. 25; Tr. 1240-1241)

Dr. Kushner noted that there was nothing recorded in the section for structural and gait abnormalities. (St. Ex. 34, p. 25; Tr. 1241)

Dr. Kushner testified that there appeared to have been no examination on which to base the diagnostic impressions. Further, there were no radiographic findings recorded. (St. Ex. 34, p. 25; Tr. 1241)

Further, Dr. Kushner testified that, in addition to the lack of examination findings, Dr. Weiner's progress notes for Patient 34 failed to document enough information concerning the patient and her progress. There were consent forms, billing records, and Polaroid pictures included in the medical records, and from these Dr. Kushner could deduce that surgical procedures were performed on this patient. (St. Ex. 34, p. 25; Tr. 1241-1242)

Concerning a surgical procedure that Dr. Weiner performed on 3-17-92, Dr. Kushner testified that the consent form and the operation report referred to

different toes. The operation report indicated that Dr. Weiner performed extensor tenotomies and dorsal capsulotomies on the 2, 3, and 4 toes of the right foot. However, the consent form indicated that Dr. Weiner would cut into the tendons and joints of the 3, 4, and 5 toes, dorsum, right foot. Patient 34's reason for surgery, as identified on the second page of the consent form, was "Painful stiff bent toes." The diagnosis listed on the operation report was contracted metatarsophalangeal joints. Dr. Kushner noted that there was no mention in the exam of dorsal contractures of the metatarsophalangeal joints. The progress note for 3-7-92 indicated that an arthrotomy of the 2, 3, and 4 toes was performed. The billing record also states that arthrotomies were performed. However, Dr. Kushner testified that no arthrotomy was performed that day, just capsulotomies and tenotomies. (St. Ex. 34, pp. 14-15, 16, 25, 31; Tr. 1242-1245)

Dr. Goldenberg

Dr. Goldenberg testified that, as long as the physical examination is done, it doesn't matter if the record is 20 words long or 1,000 words long. Dr. Goldenberg also testified that he knew Dr. Weiner performed an examination of the part of the foot that was having problems because "[i]n order to arrive at the diagnosis, the examination and palpation had to be performed." (Tr. 2185) "A review of the radiographs also show the contractions for the diagnosis of hammer toes." (Tr. 2186)

Dr. Weiner

Dr. Weiner testified that Patient 34's chief complaints were pain in toes and feet. Dr. Weiner diagnosed HM 4-5 left, hammer toes, and bone spur. (St. Ex. 34, p. 25; St. Ex. 34A; 3570-3572) Dr. Weiner testified that the HM 4-5 left was located on the proximal interphalangeal joint of the fourth left toe and the distal interphalangeal joint of the fifth left toe. (St. Ex. 34A; Tr. 3572)

2. "[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."

Dr. Goldenberg

Dr. Goldenberg testified that x-rays were indicated because of Patient 34's conditions, and blood tests were indicated because the patient's conditions may have required bone surgery. (Tr. 2183)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Kushner

Dr. Kushner testified that the standard of care is not to do soft-tissue procedures, such as tenotomies and capsulotomies, for stiff, rigid, or semi-rigid toes. (St. Ex. 34, pp. 14-15; Tr. 1248-1250, 1683, 1689-1691) Concerning the 3-7-92 surgery, Dr. Kushner testified that he interpreted the word "stiff," as it was used in the consent form, to mean not flexible or not reducible. (Tr. 1687)

Concerning surgery performed on Patient 34 by Dr. Weiner on 3-14-92, Dr. Kushner testified that the operation report stated that Dr. Weiner performed z-plasty tendon lengthenings on the extensor tendons of the 1 and 2 toes, left foot. Dr. Kushner noted that the progress note for that date stated that Dr. Weiner performed arthrotomies on 1 and 2, left, in addition to the tendon lengthenings. Dr. Kushner testified that the operation report makes no reference to an arthrotomy having been performed. In Dr. Kushner's opinion, the surgeries described in the operation report were not indicated, based upon the lack of an adequate examination being documented. (St. Ex. 34, pp. 17-18, 19, 25; Tr. 1250-1252)

Concerning surgery performed on Patient 34 by Dr. Weiner on 5-16-92, Dr. Kushner testified that the progress note stated that a plantar fasciotomy of the 2, 3, 4, and 5 toes of Patient 34's right foot was performed. The operation report for that date stated, however, that Dr. Weiner performed a z-plasty tendon lengthening of 2, 3, 4, and 5, right. (Although the operation report indicated that the tendon was "severed" in four places, Dr. Kushner interpreted this to mean "incised.") When asked if a plantar fasciotomy is the same as a tendon lengthening, Dr. Kushner replied, "No. Not even close." (St. Ex. 34, pp. 10, 26; Tr. 1256-1259)

Dr. Goldenberg

Dr. Goldenberg disputed Dr. Kushner's testimony that no arthrotomy was performed on 3-7-92, just capsulotomies. Dr. Goldenberg said, "the consent was for cutting into the tendons and the joints, which is an arthrotomy." Dr. Goldenberg further said that the podiatrist who did the surgery is in the best position to know what procedure was performed. (Tr. 2188-2189)

Concerning the surgery dated 5-16-92, Dr. Goldenberg testified that the plantar fasciotomy would be performed prior to the z-plasty tendon lengthening. If the podiatrist does not obtain the desired correction with the plantar fasciotomy, then a z-plasty flexor tendon lengthening is performed. (Tr. 2189-2190) Dr. Goldenberg acknowledged that the operation report does not refer to the plantar fasciotomy. (Tr. 3179-3180)

Dr. Weiner

Dr. Weiner testified that on 3-7-92 he performed tendon lengthenings and arthrotomies on 2, 3, and 4 right for hammer toe correction. He testified that one of the components of a hammer toe is a contracted metatarsophalangeal joint. Hammer toes are essentially contracted tendons and joints. (St. Ex. 34, pp. 16, 25; Tr. 3572-3573)

Concerning surgery performed on 3-14-92, Dr. Weiner testified that he performed arthrotomies and tendon incisions on 1 and 2 left. (Tr. 3573-3574)

6. *The procedures referred to in allegation #5 "were frequently being performed upon the great toes and tendons were cut inappropriately."*

Dr. Kushner

Dr. Kushner indicated that it is appropriate to do a tendon lengthening on the extensor tendon of the hallux as part of a hammertoe repair if the first metatarsophalangeal joint is contracted dorsally. When questioned if the tendon lengthening on Patient 34's hallux was appropriate, Dr. Kushner answered that it is not appropriate to do capsulotomies and tenotomies on stiff, bent toes. However, it can be appropriate as part of the treatment for a hallux hammer toe. (Tr. 1254-1255)

- 9b. *"[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:" * * * (b) "[Dr. Weiner] billed*

for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”

Dr. Van Enoo

Dr. Van Enoo testified that the same improper billing practices noted under Patient 29, above, also occurred in this case. (St. Ex. 34, p. 31; Tr. 304-305)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, or 12.]*

PATIENT 35

Patient 35, female, d.o.b. 12-8-52, first visited Dr. Weiner’s office on 10-1-87. (St. Ex. 35, pp. 63, 65)

[**Note:** Questions and responses from Tr. 2193, line 25 through and including Tr. 2194, line 10 are stricken and must be disregarded. See Procedural Matters, Section 7.c., above.]

1. *“[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”*

Dr. Kushner

Dr. Kushner testified that the physical examination and documentation of the patient’s complaint were not within the standard of care. Dr. Kushner stated, “There essentially is no history and physical exam. The entire history and physical exam consists of ten words.” (St. Ex. 35, p. 65; Tr. 1260)

Dr. Kushner testified that a benign neoplasm is a term that refers to a new growth that is presumably not malignant. He stated that a wart is a benign neoplasm; proud flesh, corns and calluses are not. They are not new growth of a tissue type, they are a thickening of the skin. Concerning the documentation

of the removal of warts, calluses, and other dermatological lesions,
Dr. Kushner testified:

Standard of care is you document the lesions preoperatively; that is, what they look like; specifically, how large they are, where they are. And if you remove them, you document that you removed them, how you removed them. Send them for pathology reports, and document the pathology report in the chart of the medical record.

(Tr. 1261-1263)

Dr. Kushner testified that, although a callus was noted on Patient 35's left foot, underneath the fourth MPJ, no benign neoplasms were noted in Dr. Weiner's physical examination record. Nevertheless, in the Dr. Weiner's progress notes, references are made to the excisions of benign neoplasms on 12-10-87 and 10-15-87. The notes do not indicate the location of the neoplasm, or any pathology report. Dr. Kushner testified that the notations on the progress notes concerning the benign neoplasms fall below the minimal standards of care. (St. Ex. 35, p. 65; Tr. 1264-1265)

Dr. Goldenberg

Dr. Goldenberg testified that Dr. Weiner's dermatologic exam revealed a callus under the fourth metatarsal of the left foot. Circulation, neurologic, musculoskeletal and structural/gait were all noted by Dr. Goldenberg as normal, (although in the medical record the spaces for circulation, musculoskeletal, and structural/gait were left blank). Dr. Weiner's diagnostic impressions were "osteoarthritis of the metatarsals—osteoarthropathy and increased hypertrophic metatarsal heads. (St. Ex. 35, pp. 63, 65; St. Exs. 35A-D; Tr. 2190-2193) [It may be worth noting that, although Dr. Goldenberg noted from the x-rays the presence of a spur beneath the nail of a hallux, and "an extremely large calcaneal spur on the left and a calcaneal spur on the right[,] these are not noted in Dr. Weiner's diagnostic impressions or progress notes. (St. Ex. 35, pp. 65-66; Tr. 2191-2192)]

Dr. Goldenberg disagreed with Dr. Kushner's testimony that calluses, corns, and proud flesh are not benign neoplasms, "[b]ecause they're all benign neoplasms. Calluses, corns, warts, granulomas are all benign neoplasms." (Tr. 2193)

Dr. Weiner

Concerning Dr. Kushner's criticism that Dr. Weiner failed to note the size of neoplasms excised on 1-15-87 and 12-10-87, and that Dr. Weiner failed to obtain a pathology report for the excised specimens, Dr. Weiner replied that the sizes were noted on the progress notes for both dates. Dr. Weiner further replied that there was no need to send the specimen to a pathology lab because he knew that the neoplasm was a callus. (St. Ex. 35, p. 65; Tr. 3576-3578)

Nevertheless, Dr. Weiner acknowledged that a neoplasm that was debrided on 10-20-88 was not mentioned in the consent form for that day. Dr. Weiner further acknowledged that the neoplasm was not mentioned in the medical records until it was noticed and debrided. (St. Ex. 35, pp. 14, 66; Tr. 3772-3774)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg noted that Dr. Weiner obtained x-rays and blood tests on Patient 35, and testified that it was appropriate to do so. Because of the presence of the callus, x-rays were necessary to determine if metatarsal(s) were deformed, and to compare the conditions of the two feet. Blood tests were appropriate, because "[i]n the course of doing any bone work, anticipated bone work, blood tests would be in order." (Tr. 2192-2193)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records stated that a blood sample was taken on 10-1-87. The results of the blood tests are dated 10-5-87. The first surgery that Dr. Weiner performed was an osteotomy of the fourth metatarsal left and excision of neoplasm on 10-15-87. (St. Ex. 35, pp. 65, 67)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other*

related procedures regardless of presenting complaint and without medical or clinical indication or justification.”

Dr. Kushner

Dr. Kushner acknowledged that, based on Patient 35's chart, he did not understand how Dr. Weiner arrived at his diagnoses; thus he assumed that the diagnoses were inappropriate. Dr. Kushner also assumed that all the procedures performed on this patient were inappropriate. (Tr. 1694-1695) Finally, Dr. Kushner assumed that if something was not included in the medical record it was not done. (Tr. 1698)

- 9b. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” * * * (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”*

Dr. Van Enoo

Dr. Van Enoo testified that the same improper billing practices noted under Patient 29, above, also occurred in this case. (St. Ex. 35, pp. 81, 86, 125; Tr. 305)

Dr. Kushner

Dr. Kushner testified that Dr. Weiner's medical records for Patient 35 contain a bill for services rendered on 3-10-88. Nevertheless, there are no other indications in the medical records that Dr. Weiner saw Patient 35 on that date. (St. Ex. 35, pp. 125-126; Tr. 1265-1267)

Dr. Goldenberg

Dr. Goldenberg acknowledged that there are HCFA claim forms for nail procedures, arthrotomies, flexible cast, nerve block and office visit for 3-10-88, and that such procedures on that date are not listed elsewhere in the medical records. Dr. Goldenberg speculated that it was a billing error. (Tr. 3181)

Dr. Weiner

Dr. Weiner acknowledged that a bill for services provided on 3-10-88 appears in the record, but that no such surgery is recorded in the medical records, and

that no record of payment is included in the record. Dr. Weiner testified that this matter just came to his attention, and that if any payment for that billing was made, he would make arrangements to rectify the situation. (St. Ex. 35, p. 125; Tr. 3774-3776)

Further, Dr. Weiner noted that Patients 35 and 36 were husband and wife, and the State stipulated to the fact that they shared the same last name. Dr. Weiner testified that the services billed to Patient 35 were actually performed on Patient 36, and are recorded on an operation report dated 3-10-88, included with Dr. Weiner's medical records for Patient 36. Dr. Weiner acknowledged that the services that he performed for Patient 36 were inadvertently billed to the spouse, but that the services were, in fact, performed. (St. Ex. 35, pp. 125-126; St. Ex. 36, pp. 16, 19, 24; Tr. 3815-3819)

10. *"[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated."*

Dr. Kushner

Dr. Kushner testified that Dr. Weiner prescribed a systemic steroid, Decadron, to Patient 35 on 12-1-88. Dr. Kushner testified that Decadron is a dangerous medication which is indicated in specific circumstances, none of which appeared to be present in the case of Patient 35. The patient was subjected to another surgery following her nearly month-long course of therapy with Decadron, which put her at further risk. Dr. Kushner stated that systemic steroids have many side effects, including loss of bone mass and delayed wound healing. Most importantly, however, they can cause the patient's adrenal glands to shut down, which is potentially life-threatening. Dr. Kushner further testified that systemic steroids such as Decadron are not indicated for the treatment of post-surgical inflammation. To prescribe such drugs for this purpose falls below the minimal standards of care. (Tr. 1268-1272)

Dr. Goldenberg

Concerning Dr. Weiner's prescribing Decadron on 12-1-88, Dr. Goldenberg stated that it was appropriate to prescribe Decadron. He said that steroids can be used to treat postoperative inflammation. Dr. Goldenberg further testified, concerning a subsequent surgery, that it would have been below the minimal standards of care for Dr. Weiner "to discontinue steroids at any time during surgical periods." (Tr. 2194-2196)

Dr. Weiner

Concerning Dr. Kushner's criticism that Dr. Weiner had prescribed steroids for Patient 35 on or about 12-1-87, Dr. Weiner replied that the patient was suffering from postoperative pain and swelling. (Tr. 3578)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, or 12.]*

PATIENT 36

Patient 36, male, d.o.b. 1-6-52, first visited Dr. Weiner's office on 3-3-88. (St. Ex. 36, pp. 23, 24)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records state that a blood sample was drawn on 3-3-88. That day, Dr. Weiner performed a radical nail procedure and capsulotomy on 1 left. The blood test results are dated 3-5-88. (St. Ex. 36, pp. 24, 29)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 8, 9b, or 12.]*

PATIENT 37

Patient 37, male, d.o.b. 5-6-57, first visited Dr. Weiner's office on 7-6-89. (St. Ex. 37, pp. 15, 17)

[Note: Testimony concerning the billing for tenolysis and/or tenocentesis was irrelevant to the Board's allegations. Accordingly, this testimony will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

Dr. Goldenberg testified that the physical examination and complaint were within acceptable limits. (St. Ex. 37, p. 15; Tr. 2198-2199)

Dr. Weiner

Dr. Weiner testified that the patient first came to his office on 7-6-89. The patient's chief complaint was pain on the bottom of his feet. Dr. Weiner diagnosed tendonitis, myositis, arthropathy; all of these diagnoses were diffuse and not site-specific. (St. Ex. 37, p. 15; Tr. 3579)

Dr. Weiner testified that an x-ray revealed metatarsal impingement of the second and third metatarsals bilaterally. The base of the third proximal phalanges is "abutting and digging into" the head of the second metatarsals bilaterally. There are bone spurs, and contractures of the metatarsophalangeal joints. Dr. Weiner also testified that the fourth toes bilaterally are rotated and tucked under the third toes. Further, the fifth toes bilaterally are on twisted and laying on their sides. (St. Ex. 37A; Tr. 3579-3580) Moreover, concerning Patient 37's heels, Dr. Weiner testified that the plantar calcaneus is pronounced, and is pointed. This was indicative of plantar fasciitis. (St. Ex. 37B; Tr. 3580-3581)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg noted that Dr. Weiner obtained x-rays and blood tests on Patient 37, and stated that it was appropriate for Dr. Weiner to do so. X-rays were needed because of the pes cavus deformity and to determine the cause for pain. In addition, "[b]lood tests were ordered because after the x-rays, there were spurs noted, which would indicate bone work might be necessary." (St. Exs. 37A-C; Tr. 2188-2200)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Kushner

Dr. Kushner testified that, on 7-20-89, Dr. Weiner billed for both a tenolysis and a tenocentesis of the tendons of toes 1-5 on Patient 37's left foot.

Dr. Kushner testified that there were nothing in the medical records to support a diagnosis of tendon adhesions. (Tr. 1782-1783)

Dr. Goldenberg

Dr. Goldenberg testified that the tenolysis was appropriate. (Tr. 2200-2202)

Dr. Weiner

Dr. Weiner testified that on 7-13-89 he performed a plantar fasciotomy on the right heel, and tenolysis. (Tr. 3581-3583) Dr. Weiner acknowledged that he did not record in the medical records that the plantar fascia was inflamed, but said that fact can be inferred from other items in the medical record.

Dr. Weiner further acknowledged that one cannot see tendinitis on x-rays, but that one can assume that tendinitis was there because of the hammer toes. (St. Ex. 37A; Tr. 3777-3780)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, 8, 10, or 12.]*

PATIENT 38

Patient 38, female, d.o.b. 2-22-38, first visited Dr. Weiner's office on 5-22-86. (St. Ex. 38, pp. 21, 23)

Dr. Van Enoo

[Note: Dr. Van Enoo discussed an operation report dated 6-5-86 that he testified did not accurately describe the procedure actually performed. The matters discussed were not, however, included among the Board's allegations, and are therefore irrelevant. Following that brief testimony, Dr. Van Enoo was asked if there was "anything about Patient 38 that you found to be problematic?" Dr. Van Enoo replied, "No," (Tr. 253-254)]

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient*

history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”

Dr. Goldenberg

In Dr. Goldenberg’s opinion, Dr. Weiner’s recordkeeping in this case was within the standard of care. (Tr. 2015) Dr. Goldenberg further testified that his review of the x-rays of this patient supported Dr. Weiner’s diagnostic impressions. (St. Ex. 38, pp. 21 and 23; St. Exs. 38A and 38C; Tr. 2013-2015)

Dr. Weiner

Dr. Weiner testified that his diagnostic impressions were hammer toes, bone spurs on the fourth toe left, neuromas bilaterally, metatarsalgia bilaterally, and hypertrophic metatarsal heads. The patient also had a corn on the fourth toe left. (St. Ex. 38, p. 23; Tr. 3583-3584)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”*

Dr. Goldenberg

Dr. Goldenberg testified that it would have been beneath the standard of care for Dr. Weiner to have failed to obtain x-rays and blood tests, given the bone procedures that were performed. Dr. Goldenberg noted that Dr. Weiner did not perform any bone surgery on Patient 38 prior to receiving the results of the blood tests. (Tr. 2017-2018)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Goldenberg

Dr. Goldenberg testified that the surgeries performed by Dr. Weiner on 6-5-86, namely capsulotomies 2, 3, and 4 left, and an osteotripsy on 4 left, were appropriate: “Capsulotomies were performed to reduce the contraction of the hammer toes. The osteotripsy was performed for removal of a spur or addressing the spur on the fourth toe, proximal and lateral phalanx, lateral aspect of the left foot.” Dr. Goldenberg stated that a postoperative x-ray indicates that in addition to the osteotripsy, a “de-rotational osteotomy” was performed. This, Dr. Goldenberg said, “would be a minimal incision technique that would coincide with the open technique of an arthroplasty, which is to get a further correction of the deformity by doing a de-rotational osteotomy.” Dr. Goldenberg stated that this procedure was appropriate in this case, given the severe deformity of the fourth toe. (St. Ex. 38B; Tr. 2015-2017, 2018-2019)

Dr. Van Enoo

Dr. Van Enoo disagreed with Dr. Goldenberg’s testimony that Dr. Weiner’s performance of capsulotomies at the metatarsophalangeal joint level was indicated to reduce contractions of hammer toes. Dr. Van Enoo testified:

First of all, there’s no contractures at the MP joint level. The only contractures that exist are distal and in a plantar direction, which means that the tendons and capsule plantarly are pulling those toes in that position. From the looks of this, it’s positional, it’s not pathological. But if it were pathological and you were going to do something, then this is the level you should be doing it: the plantar distal level, not at the dorsal MP joint level. If anything, that increases the contracture plantarly, because now you’ve cut the opposing force that brings the toes up. Now all the plantar flexion muscles bring the toes down, with an imbalance dorsally. So this is not appropriate.

(St. Exs. 38A–38C; Tr. 3990-3991)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 8, 12, or 12a.]*

PATIENT 39

Patient 39, female, d.o.b. 10-24-33, first visited Dr. Weiner’s office on 1-25-92. (St. Ex. 39, pp. 35, 37)

1. *“[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”*

Dr. Kushner

Dr. Kushner testified that, in his opinion, the chief complaint of “Heel spurs, swollen heels, toes also” was not specific enough. At a minimum, Dr. Weiner should have identified the location of the spurs on Patient 39’s heel.

Dr. Kushner further testified that the physical examination recorded was not adequate, and assumed that if it was not recorded, it was not done. (Tr. 1701-1705)

Dr. Goldenberg

Dr. Goldenberg testified that Dr. Weiner’s charting in this case was within the accepted standards of care in the podiatric community. Dr. Goldenberg stated that he assumed, in reviewing the 1984 and 1985 medical records of Dr. Weiner, that if an exam had nothing noted it meant that it was normal. (St. Ex. 39, pp. 35-37; Tr. 2019-2020, 2024, 2204-2205)

Dr. Weiner

Dr. Weiner testified that the patient’s chief complaints were heel spurs, swollen heels and toes. He testified that she had painful hammer toes bilaterally, plantar fasciitis on toes and feet, and heel spurs. Dr. Weiner noted that his physical examination mentioned that the patient was overweight. Excess weight puts greater than normal strain on the feet and can cause fasciitis. (St. Ex. 39, p. 35; St. Exs. 39A and 39B; Tr. 3587)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”*

Dr. Goldenberg

Dr. Goldenberg opined that it would have been below the minimal standards of care for Dr. Weiner to have failed to obtain x-rays and blood tests on this patient, based on Dr. Weiner's diagnoses of hammer toes, fasciitis, and heel spurs. (Tr. 2024-2025, 2205)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Kushner

Dr. Kushner took issue with an operation report for a procedure performed by Dr. Weiner on 5-16-92. The diagnosis listed on the operation report says "Contracted plantar fascia toes." The operative report goes on to describe a plantar fasciotomy having been performed on toes 2 and 3 left. Dr. Kushner testified that there is no plantar fascia in the toes. (St. Ex. 39, p. 23; Tr. 1295-1296)

Dr. Goldenberg

Dr. Goldenberg concluded that arthrotomies were appropriate procedures for this patient, because the x-rays show contracted digits. (St. Exs. 39A-39C; Tr. 2025-2027)

Concerning plantar fasciotomy of the toes, Dr. Goldenberg noted that if the plantar fascia is the "deforming force" on the toes, then a plantar fasciotomy can reduce some of that deforming force. Additionally, a plantar fasciotomy at the level of the MP joint can treat heel pain as well as contracted tendons. Using a model of the bones of the foot to assist in his description, Dr. Goldenberg said:

Again, going back to the Windlass action, which we discussed previously, the plantar fascia is attached to the heel bone, in this area [pointing to the bottom and front of the calcaneus]. * * * As it goes out to the metatarsal heads, it then passes the metatarsal heads and [the] plantar fascia inserts into the toes. If the plantar fascia is tight and it pulls the foot in a tight position like this [pulling the metatarsal heads of the model down], and because of the Windlass action of Hicks, as it comes up, it

pulls the toe up into a dorsal position, and then, along with the tendons, will cause a contraction of the toes.

(Tr. 2029)

Dr. Weiner

Dr. Weiner testified that on 2-8-92, 2-15-92, 2-22-92, and 2-29-92, he performed arthrotomies and extensor tendon lengthenings. These were performed for the hammer toe condition and for the fasciitis. (Tr. 3589) Moreover, on two occasions Dr. Weiner performed hammer toe repair, which is a tendon and joint procedure. Dr. Weiner said that they were plantar procedures to unbend and uncurl the toes and relieve the strain on the heels. (Tr. 3590)

7. *"[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost."*

Dr. Kushner

Dr. Kushner testified that Dr. Weiner performed 28 surgical procedures on Patient 39 over the course of eight visits. Dr. Kushner testified that he could find no good reason for staging the procedures on Patient 39's feet over so many visits, two toes at a time. "I don't think it's within the standard of care to perform those procedures in a serial fashion, unless there's some medical necessity for doing so, which is obviously not documented in this record." Dr. Kushner noted that the patient questionnaire indicated that Patient 39 was employed at a telephone answering service. (St. Ex. 39, pp. 35-37; Tr. 1301-1310)

Dr. Goldenberg

Dr. Goldenberg stated that it was appropriate for Dr. Weiner to do surgery in a serial fashion on Patient 39, particularly in light of her weight problem. (Tr. 2207-2208)

Dr. Weiner

Dr. Weiner testified that he performed 28 procedures on this patient over a span of eight visits in order to keep the patient ambulatory. Dr. Weiner stated that these procedures could have been performed in one sitting if the patient

wanted to take time off work and be off her feet. Dr. Weiner stated that the minimal incision philosophy differed from the philosophy of state's experts, Dr. Stewart and Dr. Kushner. Dr. Weiner stated:

Minimal-incision surgery wants to keep the patient on their feet, and actually incisions are much smaller and cause less trauma. Whereas, surgeons like Dr. Kushner and Dr. Stewart put people in hospitals or open the foot and create more trauma, and people are off their feet. The minimal-incision people keep people ambulatory. Keep them as pain free as they can, relatively pain free.

(Tr. 3590-3591)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 9a, 9b, 10, or 12.]*

PATIENT 40

Patient 40, male, d.o.b. 7-16-47, first visited Dr. Weiner's office on 11-5-84. (St. Ex. 40, pp. 6, 8; Tr. 1315)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Kushner

Dr. Kushner noted from the patient questionnaire that Patient 40 was taking Allopurinol. Allopurinol is a medication given to patients who have hyperuricemia, which in the past was believed to cause gout. Although Allopurinol was mentioned in the patient questionnaire, there was no record in the progress notes of any discussion by Dr. Weiner with the patient about her problems with gout. Such an omission falls below the minimal standards of care. (St. Ex. 40, pp. 6, 8; Tr. 1311-1314)

Dr. Goldenberg

Dr. Goldenberg testified that the charting for Patient 40 was within normal limits. Dr. Goldenberg further testified that it was not necessary for

Dr. Weiner to repeat Patient 40's notation of a history of gout anywhere else in the medical record. No signs of gout were noted on the exam. It was contained on the history page. (St. Ex. 40, pp. 6-7, 8; Tr. 2208-2210)

Dr. Weiner

Dr. Weiner testified that Patient 40's chief complaints were pain on the bottom of feet, plantar wart, cramps in legs and feet, and painful toes. Dr. Weiner's diagnostic impressions were pes cavus and pes adductus, metatarsalgia bilaterally, hammer toes and exostosis on all toes. (St. Ex. 40, p. 6; Tr. 3592-3593)

Dr. Weiner testified that the word "gout" that appears above the patient's statement that he was taking Allopurinol was in Dr. Weiner's handwriting, and shows that he discussed the patient questionnaire with the patient. Dr. Weiner also testified that the patient did not complain of a gouty attack, and that none of the treatment that was rendered related to the patient's gout. (St. Ex. 40, p. 8; Tr. 3593-3594)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg noted that Dr. Weiner obtained x-rays and blood tests on this patient, and testified that it was appropriate for Dr. Weiner to do so. X-rays were warranted based on the diagnostic impressions, and blood tests were indicated "given the fact that the patient may have surgery performed at some time." (Tr. 2210-2211)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical record indicates that a blood sample was taken on 11-5-84. On that day, Dr. Weiner performed arthrotomies on 1 through 3 left. The blood test results are not dated. (St. Ex. 40, pp. 5, 6)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Kushner

Dr. Kushner testified that the procedures performed by Dr. Weiner on Patient 40 were not indicated. Dr. Kushner acknowledged that he wrote in a report to the Board in 1994 that “There is no way to determine from the medical record if any of the surgical procedures or therapies were necessary.” (Tr. 1715-1717)

7. *“[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost.”*

Dr. Kushner

Dr. Kushner further testified that Dr. Weiner’s medical records for Patient 40 indicate that surgery was performed by Dr. Weiner on Patient 40 during eight separate visits to his office. Dr. Kushner stated that he did not find any medical reason for the procedures to have been performed in a serial fashion. (St. Ex. 40, pp. 6-7; Tr. 1317-1318)

9. *“[Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:” * * * (b) “[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only.”*

Dr. Kushner

Dr. Kushner testified that, although Dr. Weiner’s operation report for the 11-5-84 procedure indicated that capsulotomies were performed, Dr. Weiner’s insurance claim form billed for arthrotomies, which are reimbursed at a higher value. In addition, Dr. Kushner noted that a non-existent CPT code was used. (St. Ex. 40, pp. 21, 64; St. Ex. 97; Tr. 1318-1322) Similarly, on 12-13-84, Dr. Weiner performed what was described in his operation report as a plantar fasciotomy on toes 2 and 3 right. Dr. Weiner billed for plantar fasciotomies on toes 2 and 3 right, using CPT code 21662, which Dr. Kushner testified is a non-

existent code. Dr. Kushner testified that, in his opinion, a plantar fasciotomy cannot be performed on a digit. (St. Ex. 40, pp. 24, 48; St. Ex. 97; Tr. 1322-1323)

Dr. Van Enoo

Dr. Van Enoo testified that the same improper billing practices noted under Patient 29, above, also occurred in this case on bills for services rendered on 11-12-84 and 11-5-84. However, on cross-examination, Dr. Van Enoo noted that a non-existent CPT Code, 21283, was used by Dr. Weiner on both of the aforementioned bills. (St. Ex. 40, pp. 55, 64; Tr. 305, 458-459)

Dr. Goldenberg

Noting that Dr. Weiner had billed under two nonexistent CPT codes, Dr. Goldenberg could not envision any possible benefit that could have accrued to Dr. Weiner for doing so. (Tr. 2213)

Dr. Weiner

Dr. Weiner testified that he did not intentionally use a nonexistent CPT code in connection with Patient 40 or any other patient. (Tr. 3596-3598)

Dr. Weiner disagreed with Dr. Kushner that there is no plantar fascia in the toes, and stated that there is a CPT code number that covers plantar fasciotomy performed on the digit, namely, CPT code number 28008. (Tr. 3597)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 9a, 10, or 12.]*

PATIENT 41

Patient 41, female, d.o.b. 5-29-35, first visited Dr. Weiner's office on 9-26-88. (St. Ex. 41, pp. 27, 29)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Kushner

Dr. Kushner criticized Dr. Weiner's patient record, stating that there was essentially no patient history or physical exam recorded. Dr. Weiner performed several surgeries, placed the patient on a strong systemic steroid, and ordered a venous Doppler study, with no specific indications in the record. Additionally, the patient noted in the questionnaire that she had had rheumatic fever. Nevertheless, nothing in the history and physical exam that was recorded indicated that Dr. Weiner had discussed with the patient whether she had rheumatic heart disease. (St. Ex. 41, pp. 27, 29; Tr. 1323-1326, 1328)

Dr. Kushner testified that Dr. Weiner noted slight edema in Patient 41's feet, ankles, and legs. In Dr. Weiner's diagnostic impressions, he stated that venostasis should be ruled out. Dr. Kushner testified that venostasis can cause swelling in the feet, but also causes other problems. There was no record of any of the other problems that venostasis can cause. In addition, there in no recorded examination of Patient 41's venous system prior to the Doppler exam. (St. Ex. 41, p. 29; Tr. 1325-1327)

Dr. Goldenberg

Dr. Goldenberg testified that the physical examination and history were appropriate and within accepted standards of practice. Dr. Goldenberg testified that it was not necessary for Dr. Weiner to note in the physical examination that Patient 41 had a history of rheumatic fever because this had already been noted by the patient on the history form. (St. Ex. 41, pp. 27, 29; Tr. 2216-2219)

Dr. Weiner

Dr. Weiner testified that the patient's chief complaints were painful heels, feet, and legs. Dr. Weiner's diagnostic impressions were contracted tendons, slight edema in the feet and ankles, and rule out heel spurs and/or venous stasis. Dr. Weiner testified that the patient's edema was non-pitting. He stated that the x-rays show the beginnings of heel spurs, and turned, contracted toes. There are multiple exostoses of the toes, and accessory bones on the second and fifth metatarsal heads bilaterally. (St. Ex. 41, p. 29; St. Exs. 41A-41C; Tr. 3599-3600)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting*

complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”

Dr. Goldenberg

Dr. Goldenberg noted that Dr. Weiner obtained x-rays and blood tests on Patient 41, and testified that it was appropriate for Dr. Weiner to do so. The x-rays were needed because of the diagnostic impressions of heel spurs and myositis, and blood tests because of the possibility of bone surgery being necessary. (Tr. 2217-2218)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical record indicates that a blood sample was taken on 9-26-88. On that day, Dr. Weiner performed arthrotomies on 2 through 5 left. The blood test results are dated 9-27-88. (St. Ex. 41, pp. 29, 42)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Kushner

Dr. Kushner testified that, on 10-14-88, Dr. Weiner performed an adhesiotomy on the flexor tendons of toes 2, 3, 4, and 5 left. Dr. Kushner noted that adhesions are fibrous tissue that inappropriately connect different structures. He stated that there was nothing in the record that indicated adhesions, or what could have caused them, for example, trauma or previous surgery. (St. Ex. 41, p. 105; Tr. 1331-1333)

Dr. Weiner

Dr. Weiner responded to Dr. Kushner’s criticism concerning Dr. Weiner’s performance of tenolysis. Dr. Weiner testified that occasionally when he would do a tendon lengthening the tendons would be adhered, usually, to a bone. The adhesions need to be released in order for the tendon lengthening to have any effect. Tenolysis is simple to perform and probably takes less than one minute. (Tr. 3602-3603)

10. *"[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated."*

Dr. Kushner

Dr. Kushner testified that Dr. Weiner placed Patient 41 on a strong systemic steroid with no specific indications in the record. (St. Ex. 41, pp. 27, 29; Tr. 1323–1326, 1328)

Dr. Goldenberg

Dr. Goldenberg testified that steroids are appropriate drugs to treat generalized inflammation and pain in the legs and feet. (Tr. 2219)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, 9b, or 12.]*

PATIENT 42

Patient 42, d.o.b. 3-6-44, first visited Dr. Weiner's office on 9-19-89. (St. Ex. 42, pp. 22, 33)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Kushner

Dr. Kushner noted that the patient's chief complaint at the first visit was that her heels and feet hurt. Dr. Weiner's diagnostic impressions stated "[rule out] heel spurs fasciitis, osteoarthropathy contracted plantar fascia → pain Hammer toes." (St. Ex. 42, p. 22; Tr. 1333-1334)

Dr. Goldenberg

Dr. Goldenberg testified that the chart was within acceptable standards of practice. (St. Ex. 42, p. 22; St. Exs. 42A-C; Tr. 2223-2226)

Dr. Weiner

Dr. Weiner testified that Patient 42's chief complaints were that her heels and feet hurt. Dr. Weiner's diagnostic impressions were pes cavus, heel spurs, fasciitis, and osteoarthropathy, which was "general joint pain in the hammer toes." (St. Ex. 42, p. 22; Tr. 3603-3604) Dr. Weiner testified that the x-rays confirm these diagnoses, as well as bunion deformity. (St. Exs. 42A-42C; Tr. 3604) [It may be worth noting that a diagnosis of bunion deformity was not included in Dr. Weiner's exam or progress notes. (St. Ex. 42, p. 22)]

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that x-rays were appropriate based on Dr. Weiner's diagnostic impressions, and that blood tests were necessary because of the possibility of bone surgery to correct heel spurs and/or hammer toes. (Tr. 2225)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Kushner

Dr. Kushner noted that operation reports for procedures performed by Dr. Weiner on 10-10-89 and 12-12-89 refer to tendon adhesiotomies and lengthenings. On 10-10-89, this was done to toes 2 and 3 left, and on 12-12-89, this was done on toes 4 and 5 left. Dr. Kushner testified that he could find no indication for surgery on the digits in the chart; the patient complained of heel pain. Dr. Kushner stated that it is not within the standard of care for a podiatrist to perform surgical procedures on the toes to treat heel pain. Dr. Kushner testified that operating on the digits is not going to help a patient with plantar fasciitis. "I know of no credible medical literature that supports the notion that doing tendon lengthenings, tenotomies in the digits will reduce the pain of a plantar fasciitis in the heel." (St. Ex. 42, pp. 22, 38, 43; Tr. 1334-1338)

Dr. Kushner further testified that it is not appropriate to treat heel pain with soft tissue releases at the MP joint level. Dr. Kushner acknowledged that he is aware that some people believe that it can. In Dr. Kushner's opinion, however, there is almost no literature to support such procedures. (Tr. 1729-1730)

Dr. Weiner

Dr. Weiner stated that on 9-26-89 he performed a fasciotomy of the left heel. This was done to correct the pes cavus condition. (Tr. 3604-3605)

Dr. Weiner disputed Dr. Kushner's criticism that it was not within the standard of care to perform soft tissue procedures at the level of the toes in order to correct heel pain. Dr. Weiner said that releasing tension in the toes also releases the plantar fascia. In Dr. Weiner's opinion, it is within the standard of care to perform releases at the toe level to relieve heel pain. (Tr. 3605-3606)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, 10, or 12.]*

PATIENT 43

Patient 43, female, d.o.b. 4-23-52, first visited Dr. Weiner's office on 10-19-92. (St. Ex. 43, pp. 61, 65)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

In Dr. Goldenberg's opinion, the recordkeeping in this case was appropriate. (Tr. 2034-2035)

Dr. Weiner

Dr. Weiner testified that Patient 43's chief complaint was pain in her toes. Dr. Weiner's diagnostic impressions were hammer toes and HM 4-5 right and left. Dr. Weiner obtained x-rays and blood tests on 10-19-92. The x-rays revealed "rotational deformities of the third, fourth, and fifth right. Rotational

deformities of the fourth and fifth left with contractures of the MPJs and the IPJs of both feet. They show a deviation of the hallux to the lateral side bilaterally.” (St. Ex. 43, p. 61; St. Exs. 43A and 43B; Tr. 3607-3608)

2. “[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”

Dr. Goldenberg

Dr. Goldenberg testified that x-rays and blood tests were appropriate for this patient, based on the indications of bony problems. (Tr. 2035)

5. “[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”

Dr. Van Enoo

Dr. Van Enoo testified that the diagnosis noted on the 2-15-93 operation report said “Hypertrophy of bone 4th and 5th toes right foot.” The operation report said that a transverse osteotomy was performed on the proximal phalanges of the fourth and fifth right toes. The distal fragments were then impacted back against the proximal fragments. In his criticism of this procedure, Dr. Van Enoo noted first that the x-rays do not reveal hypertrophied, or enlarged, toes. Secondly, Dr. Van Enoo noted that the procedure as described would not be appropriate for the diagnosis. Further, the postoperative x-ray dated 2-15-93 does not show that an osteotomy was performed. “Instead, a cloud of bone debris is noted, with at least three-quarters of the head of the proximal phalanx obliterated. The joint is completely obliterated, filled with bone chips, and the intermediate phalanx is half gone.” There did not appear to be any osteotomy on the fifth proximal phalanx either. (St. Ex. 43, p. 53; St. Exs. 43A and B; Tr. 254-257) Dr. Van Enoo acknowledged that parts of Dr. Weiner’s medical records for Patient 43, other than the operation report, such as the progress note and the consent form, correctly indicated that an osteotomy was to be performed. (St. Ex. 43, p. 47, 62 [reverse]; Tr. 614-621)

Dr. Van Enoo testified further that the medical records indicated that Patient 43 had a soft corn between the fourth and fifth toes. Nevertheless, the surgical treatment rendered by Dr. Weiner on 2-15-93 would not solve this problem. The corn was caused by the head of the fifth proximal phalanx rubbing the base of the fourth proximal phalanx. Dr. Weiner did not treat those areas, and instead focused on the more distal areas of the fourth proximal phalanx. Dr. Van Enoo testified that this opinion is further supported by a letter from a subsequent treating podiatrist, dated 4-13-93. The letter indicated that Patient 43 still had a soft corn between the fourth and fifth toes of her right foot. (St. Ex. 43, p. 60; Tr. 257-259)

Dr. Van Enoo testified that he believed that an osteotripsy is an appropriate procedure for HM 4-5. When asked if this was accomplished, based on his reading of the x-rays, Dr. Van Enoo replied:

It appears that a portion of bone was removed from the proximal phalanx, as well as the intermediate phalanx, with bone paste and bone chips in place. It is not a hemiphalangectomy, however, as other experts have stated that it was.

A hemiphalangectomy, in podiatric medicine, means an arthroplasty or removal of a section of bone of the proximal phalanx. That's a hemiphalangectomy.

So, in this case, a large section of bone was removed, and partially the joint was entered, but—I say partially, two, maybe three-fourths of the joint was entered. Only a very small spike of bone and cartilage was left, so now you have just a little tiny segment of bone with a lot of bone paste around it. That, to me, constitutes a destruction of a joint. That's what I see here.

It probably accomplished removing enough bone to get rid of the pressure in the HM, but in the process, you have invited a problem joint in the future in the fact that a small portion of the joint was left. It was not a true hemiphalangectomy.

(St. Exs. 43A and 43B; Tr. 3995-3997)

Dr. Van Enoo testified that in a true hemiphalangectomy or arthroplasty, the entire joint would have been removed. “Leaving a portion of the joint with bone paste and bone chips invites trouble.” (Tr. 3997)

Dr. Goldenberg

Dr. Goldenberg testified concerning the surgery that Dr. Weiner performed on Patient 43 on 2-15-93. Dr. Goldenberg indicated that a postoperative x-ray dated 2-15-93 indicates that a hemiphalangectomy and osteotripsy were performed. Dr. Goldenberg testified that these were appropriate procedures for a diagnosis of HM 4-5: "Based on the preoperative radiographs, the corn was present over the proximal interphalangeal joint of the fourth toe and the distal phalanx of the fifth toe, and so this procedure would be indicated for this type of corn." Further, the procedures were performed on the appropriate areas. (St. Ex. 43B; Tr. 2036-2037) Removing the spurs or bony prominences in this fashion should decrease the pressure on the skin between the two toes, and the HM should resolve. (Tr. 3248-3251) Dr. Goldenberg testified that there was still joint space present at the proximal and distal interphalangeal joints, but testified that it would not have been below the minimal standards of care even if the joints had been destroyed. (Tr. 2038-2039) Dr. Goldenberg testified that the term "arthroplasty" means joint destruction. (Tr. 3093-3094)

Dr. Weiner

Dr. Weiner testified that he performed arthrotomies on 10-22-92 and 11-2-92 for two reasons. First, to reduce the contracture of the toes, and, second, to alleviate the pressure between the toes that was causing the corns. Moreover, Dr. Weiner stated that he performed plantar fasciotomies and additional arthrotomies on Patient 43 in order to relieve plantar flexion. Plantar flexion was a contributing factor in this patient's hammer toes. (Tr. 3608)

Concerning Dr. Van Enoo's criticism of the surgery of 2-15-93 which, Dr. Weiner stated, was an ostectomy of the fourth toe right, Dr. Weiner stated that he filed off a bony prominence below the patient's corn. Dr. Weiner acknowledged that the surgery could be termed an arthroplasty, but testified that the joint was not destroyed. (Tr. 3608-3609)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, 9a, 9b, 12, or 12a.]*

PATIENT 44

Patient 44, female, d.o.b. 5-14-23, first visited Dr. Weiner's office on 4-29-85. (St. Ex. 44, pp. 45, 48)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical records indicate that a blood sample was drawn on 4-29-85. On that day, Dr. Weiner performed arthrotomies on 2 through 4 left. The blood test results bear what appears to be a submission date of 4-30-85; the results themselves are not dated. (St. Ex. 44, pp. 47, 48)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 9a, 9b, or 12.]*

PATIENT 45

Patient 45, male, d.o.b. 5-6-54, first visited Dr. Weiner’s office on 7-7-88. (St. Ex. 45, pp. 30, 32)

1. *“[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”*

Dr. Weiner

Dr. Weiner testified that Patient 45 presented with chief complaints of pain in the toes and pain between the toes. Dr. Weiner’s diagnostic impressions were HM 4-5 right and left, arthritis, osteosynovitis (inflammation of the bone covering), and bursitis. Dr. Weiner stated that bursitis is inflammation of the tissue above the joint. (St. Ex. 45, p. 32; Tr. 3612)

Dr. Weiner testified that an x-ray shows multiple arthritic areas in the toes, and flexion and rotation deformities of toes 2 through 5, as well as contractures at the metatarsophalangeal joints and all of the interphalangeal joints. (St. Ex. 45A; Tr. 3612-3613)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood*

count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”

Dr. Goldenberg

Dr. Goldenberg testified that obtaining x-rays and blood tests was appropriate, based on the indications of bony problems. (Tr. 2045-2046)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical records indicate that a blood sample was taken on 7-7-88. On that day, Dr. Weiner performed arthrotomies on 2 through 5 left. The blood test results are dated 7-8-88. (St. Ex. 45, pp. 32, 33)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Van Enoo

Dr. Van Enoo testified that the operation report for 7-14-88 describes an ostectomy on the phalanges of the fourth and fifth toes left. Dr. Van Enoo testified that the postoperative x-ray taken on 7-14-88 does not show any evidence of an ostectomy on those bones, but shows instead an osteotomy through the fourth metatarsal head and almost completely through the fifth metatarsal. Dr. Van Enoo said that the fourth metatarsal head was destroyed. He stated that the x-ray gave the appearance of a gunshot wound. (St. Ex. 45, p. 24; St. Exs. 45A and B; Tr. 259-261) Dr. Van Enoo testified that it was inappropriate to treat an HM, stating that the surgical site was too far removed from the webbing in the toes to be effective in that manner. (St. Ex. 45B; Tr. 4000-4001)

It should be noted, however, that another operation report dated 7-14-88 in St. Ex. 45, p. 26, indicates that an osteotomy was performed on the fourth and fifth left metatarsals. The progress note also indicated that an osteotomy was to be performed on the fourth and fifth left metatarsals. (St. Ex. 45, pp. 26, 32)

Dr. Goldenberg

Concerning the surgery dated 7-14-88, Dr. Goldenberg testified that the osteotripsy at the at the base of the proximal phalanges of the fourth and fifth toes was appropriate for the diagnosis of HM 4-5, and was performed appropriately, as well as an osteotripsy on the lateral aspect of the head of the fourth metatarsal. The osteotomies on the fourth and fifth metatarsals “would be performed also to reduce pressure on the HM, and if the metatarsal heads are prominent, it would allow the metatarsals to rise up and take pressure off the plantar aspect of the foot.” (St. Ex. 45B; Tr. 2047-2049, 2052-2053)

Dr. Goldenberg further opined that the osteotomies were performed in an appropriate manner, and although a thin cortex of bone was left intact on the lateral side of the fifth metatarsal, as soon as the patient walked, it would have broken through completely. (Tr. 2049-2051)

Concerning Dr. Van Enoo’s earlier testimony comparing what he saw in St. Ex. 45B to a gunshot wound, Dr. Goldenberg stated that the ossicles may have given Dr. Van Enoo the impression of pellets. Dr. Goldenberg stated that their presence does not reflect in any negative way on Dr. Weiner’s performance of the surgery. (St. Ex. 45B; Tr. 2051-2052)

Dr. Weiner

Dr. Weiner testified that on 7-7-88 he performed arthrotomies on 2 through 5 left. (Tr. 3613)

On 7-14-88 Dr. Weiner performed flexor tendon lengthenings. He also performed an osteotomy of the fourth and fifth metatarsals left and osteotripsies of the fourth and fifth toes left. The osteotripsies were performed to remove the bony protuberances that were causing the corn. Dr. Weiner acknowledged that there was some damage to the joints that occurred because of the nature of the procedure, and that the procedures were also arthroplasties. Dr. Weiner testified that the area appears worse on the postoperative x-ray because of the presence of small accessory bones, or ossicles. The other foot has corresponding ossicles. (St. Ex. 45B; Tr. 3613-3616)

Dr. Weiner testified that the osteotomies were performed to slide the fourth and fifth metatarsals apart. This was performed because of the hypertrophied metatarsal heads. (Tr. 3625-3626)

On cross-examination, Dr. Weiner testified that he performed arthrotomies 2 through 5 left on the patient’s first visit to treat a corn between the toes, to

reduce pressure between the toes, to reduce pressure on the metatarsal heads and to increase spacing, to relieve pressure of bone spurs on the shoes, and for bursitis. (Tr. 3783-3784)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2b, 6, 7, 8, 9b, 10, or 12.]*

PATIENT 46

Patient 46, female, d.o.b. 12-3-48, first visited Dr. Weiner's office on 10-3-91. (St. Ex. 46, pp. 22, 23)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Weiner

Dr. Weiner testified that the patient's chief complaint was pain in the heels and bottom of feet. Dr. Weiner took x-rays and obtained blood tests. His diagnostic impressions were heel spur right foot and hammer toes. From the x-rays, Dr. Weiner noted that Patient 46's heel spurs were actually bilateral, and toes 3, 4, and 5 bilaterally were rotated. She had multiple spurs on her toes. There was also contracture at the metatarsophalangeal joints and interphalangeal joints. (St. Ex. 46, p. 22; St. Exs. 46A-46C; Tr. 3617)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Goldenberg

Dr. Goldenberg stated that on 11-7-91 after trying conservative measures for about a month, including steroids and taping, Dr. Weiner performed a plantar fasciotomy on the right heel. Dr. Goldenberg stated that the patient wanted correction. (St. Ex. 46, p. 22; Tr. 2056-2057) Dr. Goldenberg testified that plantar fasciotomies can be performed at the heel level, at the level of the digits, or both, depending on the patient's complaint. If contractions are the

primary source of the problem, it would be more appropriate to perform the plantar fasciotomy at the toe level. If heel pain is a greater concern, then it should be performed at the level of the heel. (Tr. 3099-3100)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2b, 5, 7, 8, 10, 12.]*

PATIENT 47

Patient 47, female, d.o.b. 10-16-55, first visited Dr. Weiner's office on 6-12-87. (St. Ex. 47, pp. 39, 42)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

Dr. Goldenberg testified that the charting for Patient 47 was appropriate. (St. Ex. 47, pp. 39, 42; St. Exs. 47A and B; Tr. 2232-2235, 2237)

Dr. Weiner

Dr. Weiner testified that Patient 47's chief complaints were of pain in various areas of her foot. Dr. Weiner diagnosed fasciitis, heel spurs, fasciitis plantar and disseminated osteoarthropathy. (St. Ex. 47, p. 39; Tr. 3619) From the patient's x-rays, Dr. Weiner testified that she had hammer toes with contractures at the metatarsophalangeal and interphalangeal joint levels. He also noted rotation of the fourth and fifth toes bilaterally. He further noted some pointing of the left calcaneus, and a medium pes cavus foot. (St. Exs. 47A and 47B; Tr. 3620)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Noting that Dr. Weiner obtained x-rays and blood tests on this patient, Dr. Goldenberg testified that x-rays were necessary because of the complaints of heel pain, and heel spurs and fasciitis. Blood tests were necessary because of possible surgical management, and “[a]dditionally, the patient had a history of high blood pressure and was on high blood pressure medication, so blood work would be indicated to check the patient prior to any surgery.” (Tr. 2233-2234)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Kushner

Dr. Kushner testified that an operation report for a 6-15-87 contains a preoperative diagnosis of “contracted flexor tendons.” The report described freeing the flexor tendons of toes 2 through 5, right foot, of adhesions and lengthening the tendons. Dr. Kushner testified, however, that the diagnosis of contracted flexor tendons did not appear anywhere on the initial visit record; no structural abnormalities were noted. (St. Ex. 47, pp. 26, 39; Tr. 1339-1340)

Concerning an operation report for surgery performed by Dr. Weiner on 6-19-87, Dr. Kushner testified that the pre-operative diagnosis was “exostosis toes.” The report described freeing from adhesions and lengthening the flexor tendons of toes 2 and 3 left. Dr. Kushner testified that there was no information in the physical examination or patient history to support such surgery. (St. Ex. 47, pp. 23, 39; Tr. 1341-1342)

Concerning an operation report for surgery performed by Dr. Weiner on 6-26-87, Dr. Kushner testified that the pre-operative diagnosis was “Contracted flexor tendons.” The report described freeing from adhesions and lengthening the flexor tendons of toes 4 and 5 left. Dr. Kushner stated that there was nothing in the history and physical examination to support this surgery. (St. Ex. 47, pp. 15, 39; Tr. 1342-1343)

Concerning an operation report for surgery performed by Dr. Weiner on 6-29-87, Dr. Kushner testified that the pre-operative diagnosis was “exostosis toes.” The report described a capsulotomy on the second and third MP joints left. Dr. Kushner testified that the physical examination mentioned no problems with the digits. (St. Ex. 47, pp. 19, 39; Tr. 1340)

Concerning an operation report for surgery performed by Dr. Weiner on 7-6-87, Dr. Kushner testified that the pre-operative diagnosis was “exostosis of the toes, as well as an acute bursitis of the toe.” The report described a dorsal capsulotomy of the second and third MP joints right. Dr. Kushner stated, “The medical record does not describe any digital pathology whatsoever. The dermatologic examination doesn’t describe any signs of bursitis in any digit or anywhere else.” (St. Ex. 47, pp. 30, 39; Tr. 1343-1344)

Concerning an operation report for surgery performed by Dr. Weiner on 7-10-87, Dr. Kushner testified that the pre-operative diagnosis was “exostosis toes.” The report described a four-tendon-incision z-plasty tendon lengthening on toes 4 and 5, left, made through an approximately one-quarter-inch incision through the skin, which Dr. Kushner testified is usually done thorough either a longer skin incision, or multiple skin incisions. Dr. Kushner testified that there was nothing in the medical record that Patient 47 suffered from a contracture of the MP joints. (St. Ex. 47, pp. 11, 39; Tr. 1344)

Concerning an operation report for surgery performed by Dr. Weiner on 7-13-87, Dr. Kushner testified that the pre-operative diagnosis was “Exostosis toes. Deformity of metatarsal heads.” Dr. Kushner noted that the diagnosis did not describe the deformity. The report described a four-tendon-incision z-plasty tendon lengthening on toes 4 and 5, right, through an approximately one-quarter-inch incision through the skin. Dr. Kushner testified that the report does not specify which tendons were lengthened, but he presumed they were the extensor tendons. Dr. Kushner testified that there were no such deformities mentioned in the physical examination, and that he did not think the surgery was indicated. (St. Ex. 47; Tr. 1344-1345)

Dr. Kushner testified that, in his opinion, the previously described seven surgeries, performed on Patient 47 over an approximately one-month period, did not address the patient’s chief complaint of heel pain. Dr. Kushner stated that such treatment falls below the minimal standards of care. Dr. Kushner also noted that the patient had initially been given steroids, but that therapy had not been given a chance to take effect prior to the surgeries. “[T]here’s no evidence of discussions of conservative care, trials of conservative care.” (St. Ex. 47, pp. 39, 66; Tr. 1345-1346)

Dr. Goldenberg

Dr. Goldenberg disagreed with Dr. Kushner’s assertion that none of the surgeries performed by Dr. Weiner on Patient 47 addressed Patient 47’s

complaint of heel pain. Dr. Goldenberg testified that soft tissue releases at the toe level can be effective in treating plantar fasciitis. (Tr. 2235-2236)

Dr. Weiner

Dr. Weiner described the surgical procedures that he performed on Patient 47. On 6-15-87, he performed flexor tendon lengthenings on 2 through 5 right. On 6-19-87, he performed flexor tendon lengthenings on 2 and 3 left. Both of these procedures were performed for hammer toes and fasciitis. (Tr. 3621)

Arthrotomies with extensor tendon lengthenings were performed on 6-29-87 and 7-6-87. These were performed to alleviate dorsal contractures, heel spurs, and osteoarthropathy. (Tr. 3621)

On 7-10-87, Dr. Weiner performed extensor tendon lengthenings for hammer toes and bone spurs. (Tr. 3621)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, 9b, 10, or 12.]*

PATIENT 48

Patient 48, female, d.o.b. 7-16-63, first visited Dr. Weiner's office on 4-12-90. (St. Ex. 48, pp. 25, 26)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical record indicated that a blood sample was drawn on 4-12-90. On that date, Dr. Weiner excised two warts. The blood test results are dated 4-15-90. (St. Ex. 48, pp. 26, 28)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2b, 10, or 12.]*

PATIENT 49

Patient 49, female, d.o.b. 11-24-65, first visited Dr. Weiner's office on 5-29-90. (St. Ex. 49, pp. 23, 25)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, and 12.]*

PATIENT 50

Patient 50, female, d.o.b. 9-8-50, first visited Dr. Weiner's office on 9-1-89. (St. Ex. 50, pp. 49, 50)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Kushner

Dr. Kushner testified that the history and physical examination of Patient 50 was inadequate. He further stated that:

This patient's treated for benign neoplasms with debridement and curettage, yet there's nothing in the medical record and physical exam that mention that there's any kind of lesions whatsoever, benign or otherwise.

There is a bill, when the patient is billed for a venous Doppler, as well as an arterial Doppler, of the upper extremity, yet there's nothing in the physical examination that indicates there's any problems with circulation, arterial, venous, or otherwise.

Additionally, if there was a problem with the arterial circulation that for some reason wasn't charted, I mean, wouldn't you pursue those questions prior to doing surgery on a patient, not after you've done multiple procedures already?

(Tr. 1347-1349)

Dr. Kushner went on to testify that the musculoskeletal exam indicated that the patient had pes cavus, which is a high-arched foot. Patients that have this condition also frequently suffer from digital deformities that result from the mechanics of the pes cavus condition. In such cases, soft-tissue tenotomies and capsulotomies almost always fail. (Tr. 1350)

Dr. Goldenberg

Dr. Goldenberg testified that the recordkeeping in Patient 50's case was within acceptable standards of practice in the podiatric community. (Tr. 2253)

Dr. Weiner

Dr. Weiner stated that Patient 50 came to his office with a chief complaint of foot pain and heel pain. Dr. Weiner found that she had pes cavus, bilateral heel spurs, contracted tendons, and osteoarthropathy in the form of multiple bone spurs and joint problems in her toes. (St. Ex. 50, p. 50; Tr. 3626)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Kushner

Dr. Kushner noted that a blood typing was ordered which didn't appear to be necessary. (Tr. 1351)

Dr. Goldenberg

Dr. Goldenberg noted that Dr. Weiner obtained x-rays and blood tests on Patient 50. He testified that x-rays were appropriate because of the patient's complaints of heel pain and general foot pain. Blood tests were necessary because of the possible need for bone surgery, and because heel pain can result from some systemic problems. (Tr. 2244)

Dr. Weiner

Dr. Weiner acknowledged that he did blood typing on Patient 50, but stated that the blood typing was done at the patient's request. There was no additional blood drawn for the typing, and there was no extra charge for that service. (Tr. 3632)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other*

related procedures regardless of presenting complaint and without medical or clinical indication or justification.”

Dr. Kushner

Dr. Kushner noted that, “according to this medical record, * * * this patient didn’t have any deformities at all.” (Tr. 1350-1351) Dr. Kushner testified that, based on the history and physical examination, Patient 50’s surgery was not necessary. (Tr. 1777)

Dr. Goldenberg

Dr. Goldenberg testified that in his opinion the tendon and capsule procedures that Dr. Weiner performed were appropriate for the patient’s complaint of heel pain. (Tr. 2246-2247) Moreover, Dr. Goldenberg testified that Patient 50’s pes cavus condition was mild, and that the soft-tissue procedures that Dr. Weiner performed were indicated to prevent or delay the need for bone work. (Tr. 2251-2253)

Dr. Weiner

Dr. Weiner testified that he performed a plantar fasciotomy on the left heel for the heel spur condition. He also performed arthrotomies and tendon lengthenings for Patient 50’s hammer toes, as well as the heel spur. (Tr. 3630)

Dr. Weiner further testified that he performed surgery on the patient’s right foot because she had a heel spur on her right foot, as well as the same problems that she had with her left foot. (St. Ex. 50, p. 50; Tr. 3790-3792)

10. “[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated.”

Dr. Kushner

Dr. Kushner expressed concern that Patient 50 was placed on systemic steroids four times within a period of seven months. Dr. Kushner characterized such prescribing as “downright scary.” (Tr. 1347-1349)

Dr. Goldenberg

Dr. Goldenberg testified that Dr. Weiner’s prescriptions for systemic steroids were within the standards of care for the podiatric community. “the very short

courses of steroids over a seven-month period in decreasing dosages should not cause any problems and would be beneficial to the patient to reduce pain, inflammation, and swelling.” (Tr. 2247-2250) Dr. Goldenberg testified that four short courses of these drugs in low dosages do not present much risk for side effects. (Tr. 3183-3184, 3202-3203)

Dr. Goldenberg acknowledged that the fact that Dr. Weiner prescribed these drugs to Patient 50 tells us that she needed them. Dr. Goldenberg also testified that the steroids were prescribed for postoperative swelling, stating “that’s my opinion based on a review of the chart and the dates of procedures and the dates of treatment.” Dr. Goldenberg acknowledged that Dr. Weiner’s medical records for Patient 50 do not specifically say that steroids and physical therapy were utilized for postoperative inflammation, but that there would be no other indication for them. (Tr. 3184-3186) Dr. Goldenberg testified that it is not below the minimal standards of care not to list the reasons that steroid medications are prescribed. (Tr. 3204)

Dr. Weiner

Dr. Weiner acknowledged that he prescribed steroids for Patient 50 on four separate occasions over a seven or eight month period of time. Dr. Weiner testified that this was done initially for heel pain, and later for postsurgical pain and inflammation. (Tr. 3631)

Patient testimony

Patient 50 testified at the present hearing. She originally went to see Dr. Weiner because of pain in her left foot. Her testimony appears at Tr. 1380-1429.

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 6, 7, 8, 9b, or 12.]*

PATIENT 51

Patient 51, female, d.o.b. 8-27-47, first visited Dr. Weiner’s office on 4-20-89. (St. Ex. 51, pp. 4, 6)

12. *“[Dr. Weiner] routinely failed to observe, to evaluate, and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient’s*

postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy'". (a) "Further, even when postoperative complications occurred, [Dr. Weiner] failed to document adequately the existence, development and treatment of such complications."

Dr. Stewart

Dr. Stewart testified that on 5-25-89, approximately four weeks after Patient 51's bunion surgery, Dr. Weiner placed her foot in what Dr. Stewart interpreted to be a dry sterile dressing. The progress note also indicated "Heal well." Four days later, on 5-29-89, Patient 51 presented to Timken Mercy Medical Center with a deep infection of the great toe area. Dr. Stewart acknowledged that the bacteria responsible for Patient 51's infection, beta strep, typically results in a rapid onset infection. The onset could potentially have been less than four days. Dr. Stewart further acknowledged that the rapid onset of Patient 51's infection was corroborated by the triage note from Timken, which indicated that Patient 51 began complaining of pain and discoloration in her foot starting that afternoon. Dr. Stewart noted that Dr. Weiner cannot be faulted for failing to note the infection at Patient 51's last visit because the infection would have been undetectable at that time. (St. Ex. 51, pp. 6, 33, 128, 143; Tr. 1010-1021)

Dr. Stewart testified further, however, that a radiology report from Timken indicated that there were bone fragments and fracture or osteotomy defect involving a joint surface of the great toe. Dr. Stewart testified that this was a complication of Dr. Weiner's osteotomy that he performed on that foot that had remained undiagnosed. Dr. Stewart testified that it was this complication that formed a basis for his claim that there was an undocumented complication during the patient's postoperative course. (St. Ex. 51, p. 140; Tr. 1023-1024) Dr. Stewart acknowledged that there was nothing in the radiology report that would indicate that the fracture was present four days earlier. (Tr. 1047) [It is worth noting, however, that the triage note indicated "No known injury." (St. Ex. 51, p. 128)]

Dr. Kushner

Concerning the allegation that Dr. Weiner failed to document a postoperative complication, Dr. Kushner testified that an emergency room note dated 5-29-89 said "Draining, puss-ed-up toe." Dr. Weiner's progress note dated 5-25-89 mentioned nothing about infection or drainage, but merely said, "heal well." (St. Ex. 51; p. 6; Tr. 1760) Dr. Kushner noted that the infection that Patient 51 had on 5-29-89 was "a beta strep. * * * It's non-hemolytic strep,

which is the most common; the one that does travel the most quickly and acts most acutely.” Dr. Kushner also acknowledged that the 5-29-89 triage note contained on the ER registration form indicated that the “pain and discoloration of [Patient 51’s] foot ... started this afternoon.” (St. Ex. 51, p. 143; Tr. 1764-1777) Nevertheless, Dr. Kushner stated that “[t]here was radiographic evidence of osteomyelitis. It takes at least 14 days to show up, which means if this patient has been having problem for some time, at least the wound didn’t look good for some time, that that should have been documented in the chart. Since there was no documentation, we’ll never know.” Dr. Kushner added, “We know this patient had osteomyelitis diagnosed four days after Dr. Weiner saw her.” (Tr. 1768)

Dr. Goldenberg

Dr. Goldenberg testified that he previously served as an expert witness on Dr. Weiner’s behalf in a civil action concerning this patient. The issue in the civil case was whether Dr. Weiner failed to identify Patient 51’s infection during the course of treatment. Dr. Goldenberg testified that, after he had reviewed the evidence, he came to the opinion that Patient 51’s infection “manifested within 24 hours of when the patient arrived at the emergency room on the 29th of May.” Dr. Goldenberg based his opinion on emergency room records that indicated that Patient 51 had the onset of pain and drainage on 5-29-89. His opinion was based also on the culture and sensitivity reports concerning the bacteria that caused the infection; the tests showed that the bacteria were beta strep, not Group A, B, or D. Dr. Goldenberg testified that such bacteria are typically “rapid onset, rapid growing organisms.” Therefore, Dr. Goldenberg said, Patient 51 could not have had the infection when Dr. Weiner last saw her on 5-25-89, four or five days earlier. (Tr. 1869-1873)

Dr. Weiner

Dr. Weiner testified that there were no postoperative complications of infections when the patient visited his office on 5-24-89 or 5-25-89. Dr. Weiner testified that Patient 51 suffered from a gram negative bacterial infection that is rapid in its onset, and occurs within 24 to 30 hours. Dr. Weiner stated that he did not fail to diagnose or chart any postoperative infection. (Tr. 3634-3636)

PATIENT 52

Patient 52, female, d.o.b. 12-28-37, first visited Dr. Weiner’s office on 5-9-85. (St. Ex. 52, pp. 23, 25)

1. *“[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:” (a) “[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;” (b) Dr. Weiner did not attempt “to localize symptoms to specific anatomic structures;” [and/or] (c) Dr. Weiner’s “palpation examination as documented was not specific to anatomic structures.”*

Dr. Kushner

Dr. Kushner testified that Patient 52 presented with a chief complaint of “Painful nail injury. Toes hurt in work shoes and walking.” The note does not say which toes hurt, where they hurt, or how long they had hurt. No history of the illness was recorded. (St. Ex. 52, p. 23; Tr. 1353) [The Hearing Examiner noted that the patient questionnaire indicated that Patient 52’s injury was work-related. (St. Ex. 52, p. 25)]

Dr. Goldenberg

In Dr. Goldenberg’s opinion, the history and physical were appropriate. (St. Ex. 52, pp. 23, 25; Tr. 2253-2254)

Dr. Weiner

Dr. Weiner testified that this patient suffered from a painful nail injury. She had pes cavus and hammer toes. (Tr. 3636)

2. *“[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint”; [and/or] (b) “[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”*

Dr. Goldenberg

Dr. Goldenberg noted that Dr. Weiner obtained x-rays and blood tests on this patient, and stated that it was appropriate for Dr. Weiner to do so. The x-rays were necessary because of the work injury and the possibility of fractures. The blood tests were needed in case there were fractures of the toe that would require surgical repair, and because the hammer toes may have required bone work. (Tr. 2254-2255)

4. *“[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results.”*

The medical record indicates that a blood sample was drawn on 5-9-85. On that day, Dr. Weiner performed a radical nail procedure. No blood test results could be found in the medical records. (St. Ex. 52, p. 23)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Kushner

Dr. Kushner testified that a radical nail procedure was performed by Dr. Weiner on Patient 52 at her first visit. The progress note for that day noted a diagnosis of “Traumatic ingrown toenail, [right large] toe.” Dr. Kushner acknowledged that the procedure was appropriate for that diagnosis. (St. Ex. 52, p. 23; Tr. 1354)

Patient 52’s next surgery occurred on 6-10-85. Dr. Kushner said that the progress note for that date indicated that an arthrotomy was performed on 1, 2, and 3 right. The operation report, however, stated that capsulotomies were performed on the first, second, and third MP joints right. Dr. Kushner testified that the operation report describes capsulotomies, and that the capsulotomies were not indicated for a diagnosis of ingrown toenail. He acknowledged that Dr. Weiner’s musculoskeletal exam gave a diagnosis of pes cavus hammer toes, but Dr. Kushner stated that tenotomies and capsulotomies would not be indicated even if Patient 52 did have digital contractures. (St. Ex. 52, pp. 11, 23; Tr. 1354-1356)

Dr. Kushner further testified that the operation report for a 6-17-85 surgery gives a diagnosis of hammer toes, and dorsal capsulotomies on the second, third, and fourth MP joints left. Dr. Kushner noted that the consent form mentions stiff, bent toes, but there was no finding of contractures in the physical examination. In any case, if Patient 52 had had stiff, bent toes, tenotomies and capsulotomies would not have been indicated. (St. Ex. 52, pp. 14-15, 16, 23; Tr. 1356-1357)

Dr. Goldenberg

Dr. Goldenberg testified that the arthrotomies performed by Dr. Weiner on 6-10-85 were appropriate to treat the cause of the ingrown toenail problem. (Tr. 2255-2257) When questioned why it would be necessary to perform arthrotomies to treat a nail problem that was recorded as being traumatic in origin, Dr. Goldenberg replied that the patient's problem arose "[f]rom the initial trauma or long-term pressure on the toenail from her work shoes." When asked if it would still be traumatic in origin, Dr. Goldenberg replied, "It's a gradual process. It's trauma from constant trauma from the shoe." (Tr. 3187-3188)

Dr. Goldenberg opined that the term, "stiff and bent toes," as used in the consent form, referred to flexible hammer toes, for which soft tissue work would be appropriate. (St. Ex. 52, pp. 14-15; Tr. 2257)

Dr. Weiner

Dr. Weiner testified that the arthrotomies he performed on 6-10-85 were done to relieve contractions that were aggravating the patient's nail condition. (Tr. 3637-3638)

* [Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, 8, or 12.]

PATIENT 53

Patient 53, female, d.o.b. 1-26-45, first visited Dr. Weiner's office on 4-18-88. (St. Ex. 53, pp. 21, 22)

* [Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 8, 9a, 10, or 12.]

PATIENT 54

Patient 54, male, d.o.b. 5-31-34, first visited Dr. Weiner's office on 8-12-88. (St. Ex. 54, pp. 49, 50)

* [Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 8, 9b, 10, or 12.]

PATIENT 55

Patient 55, male, d.o.b. 8-18-27, first visited Dr. Weiner's office on 1-10-85.
(St. Ex. 55, pp. 18, 19)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Goldenberg

Dr. Goldenberg discussed his review of the physical examination and history, and testified that the record comported with the standard of care for recordkeeping. (St. Ex. 55, pp. 18-20; Tr. 2061-2062)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg noted that Dr. Weiner ordered blood tests and x-rays at the patient's first visit, and noted further that it was appropriate to do so. The x-rays were appropriate because of the contractures and the deformities of the metatarsal heads. The blood tests were appropriate because of the possibility that bone surgery would be performed, and because of the patient's problem with warts, in order to rule out a systemic viral infection. (Tr. 2063-2065)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

[Note: Discussion by the experts and Respondent concerning the excision of several warts from the feet of this patient was irrelevant in that it did not address allegations contained in the cite letter. Accordingly, this testimony

will not be considered in the Findings of Fact, Conclusions of Law, or Proposed Order.]

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 10, or 12.]*

PATIENT 56

Patient 56, male, d.o.b. 1-12-77, first visited Dr. Weiner's office on 3-28-91. (St. Ex. 56, pp. 12, 16)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Van Enoo

Dr. Van Enoo testified that the Initial Visit Record indicated that Patient 56's chief complaint was ingrown nail. Dr. Van Enoo further noted that the diagnoses contained in the operation report for 3-28-91 were contracted extensor tendons, deformed toes, and hypertrophied nails. (St. Ex. 56, p. 16, 29; Tr. 164-165) Dr. Van Enoo testified that it is very unusual for a 14-year-old boy to suffer from a contracted or cocked-up hallux. If a podiatrist is confronted with such a situation, it is necessary to do some type of work-up to determine the cause of the problem. Dr. Van Enoo said that a neurological problem must exist, although none is noted in Dr. Weiner's medical records for Patient 56. (St. Ex. 56; Tr. 166-167)

Dr. Goldenberg

Dr. Goldenberg described the physical examination and history as appropriate. (St. Ex. 56, pp. 16, 17; Tr. 2066-2067) Dr. Goldenberg disagreed with Dr. Van Enoo's assertion that the condition of hallux dorsiflexus in a 14-year-old boy would indicate a neurological problem. When contracted tendons result from a neurological problem, Dr. Goldenberg said, the hallux is usually in a hammer toe position. When the hallux is in an extended or dorsiflexed position, it is not an indication of neurological problems. (Tr. 2070) Moreover, Dr. Goldenberg testified that if Patient 56 had a neurological problem, Patient 56's patella and achilles reflexes would not have tested normal.

Dr. Goldenberg stated that he did not know if Dr. Weiner did any further neurological testing beyond the patella and achilles reflexes, because it's not in the record. (Tr. 2394-2397)

Dr. Kobak

Dr. Kobak noted that Dr. Weiner's neurological examination did not reveal any abnormal findings. Therefore, further neurological evaluation was not necessary. Dr. Kobak acknowledged that this was based on the assumptions that Dr. Weiner performed an examination but charted only abnormal findings. (Tr. 2842-2843)

Dr. Weiner

Dr. Weiner disagreed that this condition in a young person indicated a neurological problem. Dr. Weiner stated that he performed a neurological exam on the patient, and that there were no problems. Dr. Weiner testified that Patient 56 had an excellent gait. (Tr. 3641)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Van Enoo, State's Case-in-Chief

Dr. Van Enoo testified that there were no preoperative x-rays performed on this patient. (Tr. 172-173)

6. *The procedures referred to in allegation #5 "were frequently being performed upon the great toes and tendons were cut inappropriately."*

Dr. Van Enoo, State's Case-in-Chief

Dr. Van Enoo testified that it was below the standard of care for Dr. Weiner to perform an extensor tendon lengthening on the first toe of each foot on Patient 56, on the first visit, without obtaining preoperative x-rays, or substantiating the problem. A more thorough neurological workup needed to be done before performing this surgery. In addition, Dr. Van Enoo testified that it was below the standard of care for Dr. Weiner to incise the tendons in

four places, which risks breaking these very important tendons. (St. Ex. 56, pp. 16, 23-24, 34-35; Tr. 168-178)

Dr. Van Enoo testified that he disagreed with Dr. Goldenberg's testimony that Patient 56 had contracted tendons of all toes and hallux dorsiflexus.

Dr. Van Enoo testified that the AP view x-ray (St. Ex. 56A) shows a perfectly straight hallux. If the hallux were in an extensus position, the joint space at the interphalangeal joint would not be visible. (St. Ex. 56A; Tr. 4014-4017) [It must be noted, however, that there were no preoperative x-rays taken for this patient, therefore, the x-rays to which Dr. Van Enoo referred are postoperative x-rays.]

Dr. Van Enoo testified concerning Dr. Goldenberg's testimony that if there were a neurological condition, the toe would have been in a hammer toe position, rather than dorsiflexed. Dr. Van Enoo testified:

[T]o do tenotomies or to plan to do tenotomies and capsulotomies on a 14-year-old boy that doesn't have contractures is not appropriate. If he did have these contractures, in a 14-year-old, then that would raise your index of suspicion that there's something wrong. Some contractures in older—in the older population could be justified because of the shoes that we wear, the length of time that we've been on our feet. But not a 14-year-old boy.

If a 14-year-old has that many contractures and disorders of the forefoot, you would think in terms of, well, there's got to be something wrong neurologically or something is going on, whether neurologically or not, most likely neurologically, because that causes contractions. MS, post-polio, some kind of a neurological deficit would be your index of suspicion. That would then arouse you to think, well, maybe we should get a consultation on this from a neurologist before you start cutting on tendons and ligaments and capsules in a young boy like that.

(Tr. 4022-4024) Dr. Van Enoo concluded that if the hallux was either in a state of contracture or extensus, it did not matter which, it would indicate a neurological problem. (Tr. 4024)

Moreover, Dr. Van Enoo disagreed with Dr. Kobak's testimony that there was no need to refer Patient 56 to a neurologist because the neurological exam was normal, the Babinski was normal, and there was no history of polio or MS. First, Dr. Van Enoo testified that there was nothing contained in the record

that indicated that the Babinski was normal. Further, even if the patient did not mention MS or polio on a questionnaire, the podiatrist's index of suspicion should not be affected. Dr. Van Enoo stated that "if these signs or symptoms are truly there, it's not my job or a podiatrist's job to diagnosis why, whether it be multiple sclerosis, post-polio, whatever. You would just have a suspicion if there's something going on that requires more in-depth study." (Tr. 4024-4027)

Dr. Goldenberg

Dr. Goldenberg testified further concerning the surgery dated 3-28-91, which consisted of a radical nail procedure, and extensor tendon lengthenings of the great toes, bilaterally. Dr. Goldenberg testified that the radical nail was performed to correct an ingrown toenail. Dr. Goldenberg explained that he ingrown toenail had resulted from hallux dorsiflexus. Lengthening the extensor tendons brought the tips of the great toes down into a straighter, more anatomically correct position. Dr. Goldenberg said that the extensor tendon lengthenings were appropriate procedures to perform for the condition. (Resp. Exs. D and E; Tr. 2067-2069)

Dr. Weiner

Dr. Weiner stated that on the patient's first visit, he performed a radical nail procedure and a matrix resection. The patient also required extensor tendon lengthenings of the first toes bilaterally to correct a condition in which the toes were upturned by about one-eighth inch, and pressing against the shoe. (Tr. 3640-3641)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 7, 8, 9b, or 12.]*

PATIENT 57

Patient 57, male, d.o.b. 11-15-62, first visited Dr. Weiner's office on 1-27-89. (St. Ex. 57, pp. 44, 50)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Van Enoo

Dr. Van Enoo testified that there were x-rays that were recorded as having been taken that were not included in the patient record. (St. Ex. 57, pp. 40, 41; Tr. 262)

Dr. Goldenberg

Dr. Goldenberg stated that the physical examination and history comport with podiatric standards. Dr. Goldenberg noted that Dr. Weiner diagnosed osteopathy. Dr. Goldenberg testified that osteopathy is a general term that refers to any disease of the bone. When asked what disease of the bone Patient 57 suffered from, and where the disease was located, Dr. Goldenberg testified that it was the hypertrophic metatarsal heads. Dr. Goldenberg acknowledged that both osteopathy and hypertrophic metatarsal heads were both listed under Dr. Weiner's diagnostic impressions, and was asked if the diagnosis of osteopathy could have referred to something else. Following a brief review of the medical records and x-rays, Dr. Goldenberg noted some spurring on the distal phalanx of the hallux bilaterally, some accessory bones, some spurring on the lesser digits, and on the right foot a bipartite medial sesamoid. Although none of these items were noted in the initial visit record, Dr. Goldenberg stated that "[t]hey could be part of the osteopathy." (St. Ex. 57, pp. 44, 50; Tr. 2072-2074; 3103-3105)

Dr. Weiner

Dr. Weiner testified that Patient 57 came to him with a chief complaint of calluses and pain around the calluses. Dr. Weiner said the patient had calluses on the heels and metatarsals, hammer toes, structural alignment deformity, osteopathy, and hypertrophic metatarsal heads. Dr. Weiner noted that an x-ray demonstrates curvature of the toes, diffuse osteopathy, hypertrophic metatarsal heads with ossicle formations on the second metatarsal heads, contraction at the metatarsophalangeal and interphalangeal joints, and rotated medially toes. (St. Ex. 57, p. 44; St. Ex. 57B; Tr. 3642-3643)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that it was appropriate for Dr. Weiner to obtain x-rays and blood tests in this case. X-rays were warranted by the structural deformities. Because of the accessory bone, bone surgery would usually be necessary, which justified the blood tests. (Tr. 2075, 2079)

Concerning the type of blood tests ordered, which may have been either an SMA-12 or SMA-18, Dr. Goldenberg testified that it didn't matter which test was ordered. The SMA-18 just gives a few more tests to look at. It is not below the minimal standards of care to order one test over the other. Dr. Goldenberg noted that the treating podiatrist is in the best position to determine which kind of blood test to order. (Tr. 2075-2076)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records state that a blood sample was taken on 1-27-89. The blood test results are dated 1-28-89. The records indicate that Dr. Weiner did not perform surgery on Patient 57 until 2-3-89. (St. Ex. 57, pp. 44, 49)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Goldenberg

Dr. Goldenberg testified that on 2-6-89 Dr. Weiner performed osteotomies on the metatarsals 2 through 5 left. Dr. Goldenberg stated that this procedure was indicated because the patient had a diagnosis of hypertrophic metatarsal heads and calluses. Dr. Goldenberg further testified that the arthrotomies were appropriate for the hammer toe condition. Dr. Goldenberg stated that there is a reduction of the contractions of the toes bilaterally in comparing a postoperative x-ray, St. Ex. 57A, with a pre-operative x-ray, St. Ex. 57B. (St. Exs. 57A and 57B; Tr. 2076-2077)

Dr. Weiner

Dr. Weiner testified that arthrotomies were performed on Patient 57 to correct his hammer toe condition. He further testified that one can assume that tendon procedures were done in conjunction with the arthrotomies. (Tr. 3646-3647)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 6, 7, 8, 9b, 10, or 12.]*

PATIENT 58

Patient 58, female, d.o.b. 5-24-48, first visited Dr. Weiner's office on 7-18-88. (St. Ex. 58, pp. 35, 36)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Kushner

Dr. Kushner criticized Dr. Weiner's history and physical as being "grossly inadequate prior to operating on a patient." Also, Dr. Kushner noted that on 7-26-88, Patient 58 received a Doppler exam, although there was nothing in the medical record to indicate a Doppler exam. Dr. Kushner added, "And if you had a question about the patient's circulation, why wouldn't you do the exam before you operate on them, not after you've already operated on them?" (St. Ex. 58, pp. 35, 36, 51; Tr. 1357-1359)

Dr. Goldenberg

In Dr. Goldenberg's opinion, Dr. Weiner's recordkeeping in this case was appropriate. (St. Ex. 58, pp. 35, 36; St. Exs. 58A & B; Tr. 2258-2262)

Dr. Weiner

Dr. Weiner testified that this patient's chief complaints were heel pain, and toe and foot pain. Dr. Weiner diagnosed HD 2 through 5 bilaterally. The patient also had fibrous achilles tendons bilaterally, as well as tenosynovitis of the achilles tendon, and osteoarthropathy of the feet and toes. An HD is a heloma

durum, which is a hard corn on the top of the toe. (St. Ex. 58, p. 36; Tr. 3647, 3648) Dr. Weiner further testified that Patient 58 had hammer toes. When asked why hammer toes were not noted among Dr. Weiner's diagnoses, Dr. Weiner replied that it was implied under the dermatological exam that she had hammer toes, because she had corns on the tops of toes 2 through 5 bilaterally, and this only occurs when the patient has hammer toes. (St. Ex. 58, p. 36; Tr. 3794-3795)

On cross-examination, Dr. Weiner was asked why he ordered a Doppler study for Patient 58. Dr. Weiner replied that he ordered it because the patient was having more discomfort than was standard, and Dr. Weiner wanted to rule out any vascular problems. Dr. Weiner was then asked where in his medical records for Patient 58 was it indicated that Patient 58 was having unusual postoperative discomfort or cramping. Dr. Weiner attempted to find it, then replied that he only charted abnormalities, and there was no reason to chart it since everything was normal. The following exchange then took place:

Ms. Strait: But, Doctor, you said that the cramping, the discomfort she was having wasn't normal and that's why you ordered the Doppler.

Dr. Weiner: The cramping was above normal, but not alarmingly so.

Ms. Strait: So you would've only charted it if it was alarming?

Dr. Weiner: Yes.

(Tr. 3796-3798)

Dr. Weiner was unable to find the results of the Doppler study in his medical records for Patient 58, and stated that he had no idea where they would be. (Tr. 3798)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Noting that Dr. Weiner obtained x-rays and blood tests on Patient 58, Dr. Goldenberg testified that it was appropriate for Dr. Weiner to do so. X-rays were necessary because the patient has an HD (hard corn), which is usually caused by a bony prominence, as well as osteoarthropathy. Bone surgery is usually necessary to treat these conditions, and blood tests were necessary prior to any bone surgery. (Tr. 2259-2260)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Kushner

Dr. Kushner criticized Dr. Weiner for performing surgery on all of Patient 58's toes, in spite of the fact that there was nothing in the history or physical examination that indicated that Patient 58 had problems with her digits. (St. Ex. 58, pp. 35, 36, 51; Tr. 1357-1359)

Dr. Goldenberg

Dr. Goldenberg disagreed with Dr. Kushner's testimony that there were no diagnoses to support the surgery that Dr. Weiner performed on the digits. "Given the diagnostic impressions of fibrous tendons, tenosynovitis, which is an inflammation of the tendon, as well as the osteoarthropathy and the radiographic findings of contracted toes, those would be indicated procedures." (Tr. 2262-2263) [It may be worth noting that the Hearing Examiner could find no note in the medical record concerning any radiographic findings of contracted toes made by Dr. Weiner. (St. Ex. 58)]

Dr. Weiner

Dr. Weiner testified that on 7-25-88 he performed flexor tendon lengthenings on 2 through 5 as well as a lengthening of the achilles tendon. On 8-8-88 these procedures were performed on the other foot. (Tr. 3648-3649)

Dr. Weiner testified that arthrotomies and extensor tendon lengthenings of the toes on the right foot were performed. The purpose was to reduce the dorsal contracture of the toes, which caused the toes to rub against the shoe. (Tr. 3649)

Dr. Weiner further testified that Patient 58's achilles tendon was contracted, and that he lengthened it using an eye-blade. (St. Ex. 58, p. 36; Tr. 3792-3794)

7. *"[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost."*

Dr. Weiner

Dr. Weiner testified that the soft-tissue procedures were not all performed on the same day because the patient did not want to take time off from work. (Tr. 3650)

8. *"[Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that in his opinion physical therapy was given this patient to improve the patient's ambulation. In Dr. Goldenberg's opinion, it was within the standard of care for Dr. Weiner to order physical therapy for Patient 58 and not specify a reason in the chart "as long as it was done for postoperative care." (Tr. 2263-2264)

Dr. Weiner

Dr. Weiner testified that physical therapy was performed for postoperative care of the patient's foot problems. (Tr. 3650)

10. *"[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated."*

Dr. Kushner criticized Dr. Weiner for placing Patient 58, who suffered from stomach ulcers, on systemic steroids, which are ulcerogenic. Patient 58 noted on the patient questionnaire that she was taking Zantac for ulcers. (St. Ex. 58, pp. 12, 16, 35; Tr. 1358)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 7, 8, 9a, 9b, or 12.]*

PATIENT 59

Patient 59, female, d.o.b. 11-6-62, first visited Dr. Weiner's office on 8-3-92.
(St. Ex. 59, pp. 35, 39)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 5, 7, 9a, 9b, 12.]*

PATIENT 60

Patient 60, female, d.o.b. 11-28-32, first visited Dr. Weiner's office on 2-21-85.
(St. Ex. 60, pp. 14, 16)

4. *"[E]ven though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results."*

The medical records indicated that a blood sample was taken on 2-21-85. On that date, Dr. Weiner performed a radical nail procedure on 2 right and arthrotomies on 2 through 4 right. The blood test results were dated 2-22-85 and 2-23-85. (St. Ex. 60, pp. 15, 16)

- * *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 6, 7, 8, 9a, 9b, 10, or 12.]*

PATIENT 61

Patient 61, male, d.o.b. 12-12-28, first visited Dr. Weiner's office on 5-12-88.
(St. Ex. 61, pp. 13, 17)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Weiner

Dr. Weiner testified that on 5-12-88 Patient 61 presented with a chief complaint of “pain in heels on bottom of feet.” Dr. Weiner’s diagnostic impressions were mild pes cavus, fungus nails, myositis, synovitis, arthropathy, and contracted tendons bilaterally. Dr. Weiner testified that he was aware, from the patient questionnaire, that Patient 61 had experienced problems with gout. (St. Ex. 61, p. 13, 17; Tr. 3651-3652)

5. *“[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification.”*

Dr. Weiner

Dr. Weiner testified that he performed a plantar fasciotomy on the left heel on 5-16-88, and on 6-2-88 performed flexor tendon lengthenings on 2 through 5 left. These procedures were performed to correct the pes cavus foot, tight fascia, and hammer toes. On 6-16-88, Dr. Weiner performed arthrotomies on 2 through 5 left. These were done to reduce dorsal contractures of the toes as well as for heel pain. (St. Ex. 61, p. 13; Tr. 3652-3653)

10. *“[Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated.”*

Dr. Weiner

Dr. Weiner noted that steroids were prescribed for Patient 61 for Patient 61’s “original problem,” and again for postoperative pain and swelling. (Tr. 3653-3654)

Patient testimony

Patient 61 testified that he first went to see Dr. Weiner because he had pain in the heel of his left foot. Patient 61 had received a mailer from Dr. Weiner’s office. First, Dr. Weiner placed him on two medications. According to Patient 61, the treatment was effective, and his heel felt better. Nevertheless, at his next visit to Dr. Weiner, Dr. Weiner told Patient 61 that he would require surgery in order to fix the problem and avoid being on medication the rest of his life. Subsequently, Dr. Weiner’s treatment consisted of three surgeries, performed on three different occasions. The first, according to

Patient 61, involved heel surgery. The next two involved surgery on Patient 61's toes. Patient 61 had difficulty understanding why surgery was necessary on his toes, since he had no pain in his toes, just his heel. Nevertheless, he placed his faith in Dr. Weiner and agreed to the surgery. (Tr. 1522-1535)

Patient 61 testified that he continued to have pain following Dr. Weiner's treatment, and that the pain was the same as it was before he sought treatment. In addition, Patient 61 testified that he went through a long and uncomfortable recovery period following his foot surgeries. Patient 61 wrote several letters to Dr. Weiner expressing his displeasure. In at least one of these letters, he requested that Dr. Weiner refund to Patient 61 some of the funds that Patient 61's insurance company had paid to Dr. Weiner, as compensation for Patient 61's pain and suffering. (Tr. 1533-1556)

Patient 61 finally resolved his foot problems by taking ibuprofen. He has regularly taken ibuprofen since 1989. (Tr. 1536-1537, 1550-1556)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 7, 8, 9b, 10, or 12.]*

PATIENT 62

Patient 62, female, d.o.b. 1-29-65, first visited Dr. Weiner's office on 9-8-92. (St. Ex. 62, pp. 10, 40)

1. *"[Dr. Weiner] routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to take and/or record an adequate patient history essential to a proper diagnosis;" (b) Dr. Weiner did not attempt "to localize symptoms to specific anatomic structures;" [and/or] (c) Dr. Weiner's "palpation examination as documented was not specific to anatomic structures."*

Dr. Kushner

Dr. Kushner testified that both the handwritten history and physical and the typed treatment program were lacking, and fell below the standard of care, in that there was no history or exam findings, merely a list of diagnoses. Dr. Kushner stated that there were no findings documented to support Dr. Weiner's diagnoses. (St. Ex. 62, pp. 10-11, 31; Tr. 1365-1372)

Dr. Goldenberg

In Dr. Goldenberg's opinion, Dr. Weiner's charting in Patient 62's case was appropriate. (St. Ex. 62, pp. 10, 40; St. Ex. 62A; Tr. 2264-2267)

In response to Dr. Kushner's criticism that there was no indication as to how Dr. Weiner arrived at his diagnoses, Dr. Goldenberg said that was not an appropriate criticism. "If you look, again, back at the physical exam, dermatological exams states ingrown toenail. Musculoskeletal exam states that she had hammer toes, and he arrived at the diagnosis of hammer toes and ingrown toenail. And along with the review of the radiographs, which would support that, it's an appropriate diagnostic impression, based on the record." Dr. Goldenberg stated that the standard of care in the podiatric community does not require more than that. (Tr. 2269-2270)

Dr. Weiner

Dr. Weiner testified that Patient 62 presented with a chief complaint of painful toes bilateral and painful nails. Dr. Weiner testified that an x-ray shows that toes 3, 4, 5 left are not just hammered but rotated medially. The same is true for toes 2 and 3 right. The second toe on the left is just hammered. Both halluxes are deviated laterally. Dr. Weiner asserted that the x-ray supports his diagnostic impressions. Dr. Weiner testified that his typed diagnosis was "chronic bursitis toes, myositis, fasciitis feet, metatarsalgia and hammer toes, capsulitis due to hammer toes, contracted extensor and flexor tendons, contracted plantar fascia toes. Edema feet. Limited motion dorsiflexion and dorsiflexion bilaterally." (St. Ex. 62, p. 10, 31; St. Ex. 62A; Tr. 3657-3658)

Dr. Weiner disagreed with Dr. Kushner's criticism that there was nothing in the record to support Dr. Weiner's diagnosis and findings. Dr. Weiner testified that the x-ray speaks for itself. He also stated that he palpated the fasciitis, myositis and the non-bony structures. (Tr. 3661-3662)

2. *"[Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:" (a) "[F]ull series x-rays were taken bilaterally on new patients regardless of the presenting complaint"; [and/or] (b) "[B]lood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures."*

Dr. Goldenberg

Dr. Goldenberg testified that x-rays were necessary to evaluate the causes of the patient's hammer toes, among other things. The blood tests were necessary "because of the possibility of doing bone work in future surgeries." (Tr. 2266)

3. *"[E]ven though [Dr. Weiner] routinely took x-rays, [his] records fail to reflect clinical notes or other reports regarding any radiological findings."*

Dr. Kushner testified that there were no radiographic findings in the medical record. (Tr. 1365)

5. *"[Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification."*

Dr. Goldenberg

Dr. Goldenberg testified that the radical nail procedure performed by Dr. Weiner on Patient 62's first visit was consistent with a deformity of the toenail on the great toe of her right foot. The other surgeries, Dr. Goldenberg testified, were necessary for the hammer toes. (Tr. 2267-2268)

Dr. Weiner

Dr. Weiner testified that he and Patient 62 discussed as options: bone resection of the toes for the exostosis, steroid injections, loose shoes, and/or tendon surgery. The patient opted for tendon surgery and steroid injections. Dr. Weiner testified that on 9-22-92 he performed arthrotomies and extensor tendon lengthenings on 2 and 3 left. On 9-29-92, he performed arthrotomies on 2 and 3 right. Both of the procedures were performed for hammer toe deformities. Dr. Weiner testified that all of the arthrotomies he performed on Patient 62 were done for "chronic bursitis toes, fasciitis feet, myositis, metatarsalgia, hammer toes, capsulitis, contracted extensor and flexor tendons, contracted plantar fascia." (Tr. 3658-3661)

7. *"[Dr. Weiner] routinely performed the procedures referred to in allegation #5 in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost."*

Dr. Kushner

Dr. Kushner testified that it was not necessary for Dr. Weiner to perform these surgeries in serial fashion; Dr. Weiner could have performed all of the procedures on this patient in one or possibly two sittings, and the patient could have remained ambulatory. Dr. Kushner said “[i]f it had all been done at once, she could have and would have remained ambulatory. This was not extensive surgery that should cause extreme pain or disability.” (Tr. 1778-1779)

Dr. Goldenberg

Dr. Goldenberg testified that serial surgery in this patient’s case was appropriate. A treatment plan was included in the patient chart, and the patient’s options were discussed. The patient opted to have the surgery done in stages in order to avoid extended time off work and to remain ambulatory. (St. Ex. 62, p. 31; Tr. 2268-2269)

Dr. Weiner

Dr. Weiner stated that patient chose to have the surgery performed in stages because she did not want to miss time at work. (Tr. 3658-3659)

* *[Note: The State presented no relevant expert testimony concerning Allegations 2a, 2b, 5, 9a, 9b, or 12.]*

ETHICS

Dr. Stewart testified that Dr. Weiner violated the code of ethics of the American Podiatric Medical Association in several areas. Specifically:

- Section 1, Provision B states, “Podiatric medical services must be provided with compassion, respect for human dignity, honesty, and integrity.” Dr. Stewart testified that in the 62 patient cases, this provision was not met. “Primarily in the areas of honesty and integrity with respect to the need for the procedures that were performed; with respect to the patient’s right to a full and thorough examination of their problem; and with respect to the patient’s right that they and their insurance company be billed only for medical services that are rendered and that were medically indicated.” (St. Ex. 87; Tr. 887-888)
- In Section E, it is provided that “Fees for podiatric medical services must not exploit patients or others who pay for those services.” Dr. Stewart

indicated that he had previously covered Dr. Weiner's violation of this provision. (St. Ex. 87; Tr. 888)

- Section G provides: "It is the duty of a podiatrist to place the patient's welfare and rights above all other considerations. To this end, one must subscribe to the ethical rules which are for the benefit of the patient." Dr. Stewart testified that, in Dr. Stewart's opinion, the patient's welfare was not the supreme determining factor in Dr. Weiner's case of the 62 patients. (St. Ex. 87; Tr. 888)
- Section 2, Subsection F, provides that "Surgeries shall be recommended only after careful consideration of the patient's physical, social, emotional, and occupational needs. The preoperative workup must document the indications for surgery. Performance of unnecessary surgery is an extreme, serious ethical violation." Dr. Stewart indicated that he already covered this section. (St. Ex. 87; Tr. 889)
- Subsection I provides "Podiatrists must not misrepresent the services that are performed or the charges made for those services." Dr. Stewart testified that Dr. Weiner's medical records and insurance billings did not match, and that the procedures that he performed did not represent the charges that were made. (St. Ex. 87; Tr. 889)
- Subsection J provides that "Podiatrists should only order those procedures, devices, or pharmacological agents that are in the best interest of the patient. Ordering unnecessary procedures or materials for pecuniary gain is unethical." Dr. Stewart testified that Dr. Weiner ordered procedures, physical therapy, blood work, and x-rays that were unnecessary given the specific conditions and chief complaints of the patients. (St. Ex. 87; Tr. 889-890)

FINDINGS OF FACT

- 1a. There was insufficient evidence presented at hearing to support a finding that Dr. Weiner failed to actually perform an adequate patient history and physical examination. However, the evidence presented is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely failed to * * * adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that:" (a) "[Dr. Weiner] failed to * * * record an adequate patient history essential to a proper diagnosis" with regard to Patients 1 through 62.

Dr. Weiner and his experts pointed out correctly that Dr. Weiner included a completed patient questionnaire in each patient record, and that the questionnaire is, itself, part of the medical record. Dr. Weiner testified that he always discussed each patient's questionnaire with the patient. Further, if the patient suffered from certain illnesses such as diabetes or high blood pressure, or regularly took medication, that fact was noted on the binder and on the progress notes with a fluorescent "Caution" sticker.

Nevertheless, the State presented credible evidence from its three experts that the patient history recorded by Dr. Weiner in each one of these cases was inadequate. Although Dr. Weiner had each patient fill out a questionnaire requesting information concerning the patient's medical background, in none of these cases did Dr. Weiner record that he had discussed the questionnaire with the patient. Further, Dr. Weiner failed to record that he had requested further information concerning the information provided by some of the patients.

For example, in Patient 41's case, Patient 41 had indicated on the patient questionnaire that she had had rheumatic fever. Nevertheless, there was no information contained in her medical record to indicate that Dr. Weiner had discussed with the patient whether she suffered from rheumatic heart disease. Moreover, concerning Patient 40, who had written down "Allopurinol" as one of his medications, Dr. Weiner testified that the word "gout" was written by Dr. Weiner on the patient questionnaire when Dr. Weiner discussed the questionnaire with the patient. Nevertheless, there was nothing contained on the patient's initial visit record that indicated that the patient had gout. Dr. Weiner testified that he only recorded abnormal findings, and that Patient 40 did not suffer a gouty attack while a patient of Dr. Weiner's. Nevertheless, based on all the evidence presented at the hearing, the standard of care required Dr. Weiner to at least note on the initial visit record that the patient suffered from gout, and that he had discussed the patient history questionnaire with the patient.

Determining the credibility of expert witnesses is always difficult, because in complex areas such as podiatry, reasonable and well-qualified minds can differ concerning major issues. However, the fact that the Respondent's experts began their reviews with an assumption that Dr. Weiner performed complete examinations made their testimony less credible. Moreover, Dr. Goldenberg's reluctance to acknowledge that complete and accurate medical records are important to subsequent treating podiatrists made his testimony less credible.

The more notable violations included the following:

- Patient 1: Dr. Weiner should have recorded a detailed patient history regarding Patient 1's problem, as well as a detailed neurological sensory examination, before performing tendon lengthenings.
- Patient 17: It was not noted in the medical record whether Dr. Weiner or a member of his staff had spoken to Patient 17 concerning her diabetes. Further, one cannot tell from the patient questionnaire whether a physician named Dr. Stewart was Patient 17's family doctor or a previous foot specialist.
- Patient 19: Caution stickers indicated that Patient 19 suffered from "circular disorders," but there was nothing in the medical records concerning the nature of Patient 19's circulation disorder.
- Patient 52: The patient complained of a painful nail injury, and that her toes hurt in her work shoes and when walking. Nevertheless, no history of Patient 52's injury or condition is contained in the chart, other than the fact that the injury was work-related.

Accordingly, there is sufficient evidence to support a finding that Dr. Weiner routinely failed to record "an adequate patient history essential to a proper diagnosis."

- 1b. The evidence presented is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely failed to * * * adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that * * * [Dr. Weiner did not attempt] to localize symptoms to specific anatomic structure[s]" with regard to Patients 1 through 62.

The State's experts testified that Dr. Weiner failed to "localize symptoms to specific anatomic structure[s]" in each of the 62 patient records reviewed. A substantial amount of evidence was presented by the State that Dr. Weiner regularly recorded a patient's chief complaint as simply "pain," or "pain in toes," or something similarly general. Further, Dr. Weiner routinely recorded observations such as "hammer toes," "exostosis toes," "contracted tendons," "osteomas," and "arthropathy," without indicating which toes, tendons, joints, or other parts of the feet were affected.

Dr. Weiner and his experts attempted to minimize this, stating that one must review the record as a whole, and that one could determine which anatomical structures were affected by the surgery that Dr. Weiner performed. This explanation is defective, however, as it only applies in cases where surgery is performed.

Dr. Van Enoo testified, convincingly, that patients are entitled to a complete and credible medical record. The patient may wish to change podiatrists, the patient may move, or the treating podiatrist may die. Further, Dr. Van Enoo testified that another reason to keep complete medical records is to enhance the treating podiatrist's memory concerning the treatment rendered a patient.

- 1c. The evidence presented is sufficient to support a finding that, “[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely failed to * * * adequately document the necessary preoperative examination and evaluation of [his] podiatric patients in that * * * the palpation examination as documented was not specific to anatomic structures” with regard to Patients 1 through 62.

Credible evidence was presented by the State that Dr. Weiner did not document a palpation examination in any of the 62 patient records that the State's experts reviewed for this case. Although the Respondent's experts testified that Dr. Weiner's palpation examination was part of the diagnostic impressions that he recorded, it must be noted that Dr. Weiner's diagnostic impressions were almost never specific to anatomic structures.

- 2a. Insufficient evidence was presented to support a finding that, “[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (a) “full series x-rays were taken bilaterally on new patients regardless of the presenting complaint * * *.”

The State's experts provided testimony that it is below the minimal standard of care to take bilateral x-rays on every patient, regardless of the patient's presenting complaint. Nevertheless, the State provided no evidence, concerning any individual patient, that the x-rays that Dr. Weiner obtained for that patient should not have been obtained. The State's experts seemed to focus instead on whether Dr. Weiner fell below the standard of care by taking non-weight-bearing x-rays rather than weight-bearing x-rays. Similarly, testimony was offered by the state that Dr. Weiner's x-rays were not of diagnostic quality. Nevertheless, neither of these issues is relevant to the

Board's allegations. No finding of fact or conclusion of law can be based on this evidence, nor can this evidence be used in support of any proposed order.

On the other hand, ample testimony was offered by Dr. Weiner and his experts that the x-rays that Dr. Weiner obtained for each patient were appropriate.

- 2b. Insufficient evidence was presented to support a finding that, “[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:” (b) “blood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures.”

Dr. Stewart testified that it is not always necessary to order blood tests on a patient prior to minimally-invasive surgery so long as the patient is in good health. Further, Dr. Kushner testified, generally, that Dr. Weiner did order blood tests inappropriately, and ordered an excessive volume of tests. Nevertheless, with one exception, Patient 50, the State did not provide any evidence with regard to a specific patient that the blood tests ordered were inappropriate.

With regard to Patient 50, Dr. Kushner testified that Dr. Weiner inappropriately ordered a blood typing. Dr. Weiner testified that he did so at the request of the patient, and without extra charge to the patient. Although there was nothing in the patient record to support Dr. Weiner's contention, it cannot be found that a superfluous blood typing on one patient is sufficient to support this allegation.

3. Sufficient evidence was presented in this case to support a finding that, “[d]uring the nine year period from 1984 through at least 1993, * * * even though [Dr. Weiner] routinely took x-rays, [Dr. Weiner's] records fail to reflect clinical notes or other reports regarding any radiological findings” with regard to Patients 1 through 62.

The State's experts testified that Dr. Weiner failed to include radiological findings in each of the 62 patient records that they reviewed for this case. The State offered evidence that, at least in cases where a surgical or biomechanical procedure is to be performed, the podiatrist must document that he or she took x-rays, when they were taken, what views were taken, and what the x-rays demonstrated.

Dr. Weiner and his experts testified that Dr. Weiner's radiographic findings were reflected in his diagnostic impressions. Nevertheless, there was nothing in the medical records to indicate that Dr. Weiner's diagnostic impressions were based on a review of the x-rays.

- 4a. The evidence presented is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, even though [Dr. Weiner] routinely ordered/performed lab tests, [he] failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results" with regard to Patients 1, 2, 4 through 10, 12 through 14, 16 through 19, 22 through 24, 26, 31, 33, 36, 41, 44, 45, 48, 52, and 60. A review of the medical records shows that Dr. Weiner initiated treatment and undertook elective surgical procedures on these patients prior to the date of the blood test results.

However, concerning Patients 35 and 57, the medical records indicate that Dr. Weiner did not perform surgery until after the blood test results were made available. Moreover, concerning Patients 21 and 40, the blood test results are not dated. Therefore, the evidence is insufficient to support a finding that Dr. Weiner committed the alleged conduct with regard to Patients 21, 35, 40, and 57.

- 4b. In certain patients, Dr. Weiner did perform procedures prior to receiving blood test results. However, these procedures were minimally invasive or non-invasive. Accordingly, it was not necessary that Dr. Weiner review the blood test results prior to performing the procedures. Specifically, Patients 7, 16, 19, and 48 underwent excisions and/or debridement of neoplasms; Patients 8 and 14 underwent nail procedures; and Patient 12 underwent arthrocentesis.
5. The evidence is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification" with regard to the following patients and surgeries:
- Patient 1, surgeries dated 4-11-88 and 4-18-88. Concerning the 4-11-88 surgery, extensor tendon lengthenings were performed at unknown levels, and capsulotomies were performed at the metatarsophalangeal joint level. There were mild contractions of the digits at the distal phalanges, but no contractions at the metatarsophalangeal joint level which would have justified this surgery.

Concerning the 4-18-88 procedure, the surgery was described in the medical record by Dr. Weiner as an osteotripsy of the fourth and fifth proximal phalanges of the right foot. This procedure would have been appropriate for the treatment of an HM 4-5. However, the procedure actually performed, verifiable on x-ray, was an osteotripsy of the fourth and fifth metatarsal heads, which was not medically or clinically indicated or justified. The actual surgical site was too far removed from the webbing of the toes to be effective treatment for an HM 4-5.

- Patient 2, surgeries dated 3-10-88 and 3-18-88. Dr. Weiner performed a plantar fasciotomy on the left heel and flexor tendon lengthenings on toes 2 through 5 left on 3-10-88. Dr. Weiner's diagnostic impressions were to rule out a heel spur, arthralgia, osteopathy, and metatarsalgia. A plantar fasciotomy is not a proper method for ruling out a heel spur. Moreover, there was no reference to a problem with Patient 2's toes to justify the flexor tendon lengthenings.

On 3-18-88, Dr. Weiner performed arthrotomies and extensor tendon tenotomies on toes 2 through 5 left. This was done ostensibly to release pressure that can cause heel pain and contraction of the digits. Nevertheless, there was no reference in the medical record to a problem with Patient 2's toes. Patient 2 herself testified that she had gone to see Dr. Weiner for pain in her left heel, and that she did not have pain in her toes or arches prior to seeing Dr. Weiner.

- Patient 4, surgeries dated 11-13-87 (arthrotomies only), 11-16-87, and flexor tendon lengthenings performed on 11-23-87. These surgeries were not indicated by the documented diagnoses.
- Patient 5, with regard only to the osteotomy of the neck of the first metatarsal performed on 6-10-85. The Akin osteotomy of the first proximal phalanx and the removal of an eminence (bunion) from the head of the first metatarsal were indicated. However, the osteotomy performed on the neck of the first metatarsal was not indicated.
- Patient 10, surgery dated 2-4-85. The supporting diagnoses were not specific to the surgical sites.
- Patient 12, surgery dated 2-18-85. Flexor tendon lengthenings and plantar fasciotomy were not supported by the diagnosis of hypertrophic metatarsal heads.

- Patient 18, surgery dated 1-17-85. Plantar fasciotomy at the toe level is not indicated for diagnoses of either hypertrophic metatarsal heads or heel pain.

[**Note:** Based upon all of the evidence concerning the issue of whether or not there is plantar fascia in the toes, the Hearing Examiner finds that there is plantar fascia in the toes, but only for a short distance distal to the metatarsophalangeal joint. However, the Hearing Examiner further finds that surgery on the plantar fascia, distal to its most proximal attachments at the metatarsophalangeal joint, was not medically or clinically indicated and/or justified to treat any malady germane to any of the 62 patients considered in this Matter.]

- Patient 35, all surgeries. This Board has in the past stated that if something is not included in a medical record, then it did not happen. Dr. Weiner's diagnoses were not adequately supported by the documented history and physical examination. Therefore, surgeries performed based upon those diagnoses were performed without medical or clinical indication or justification.
- Patient 37, surgery dated 7-20-89. Dr. Weiner performed tenolysis without anything in the medical records to support a diagnosis of tendon adhesions.
- Patient 39, surgery dated 5-16-92. A plantar fasciotomy was performed at the toe level based on a diagnosis of contracted plantar fascia in the toes. There cannot be contracted plantar fascia in the toes. In addition, see Finding of Fact #5 concerning Patient 18, above.
- Patient 40, all surgeries. Dr. Weiner's diagnoses were not adequately supported by the documented history and physical examination. Therefore, surgeries performed based upon those diagnoses were performed without medical or clinical indication or justification.
- Patient 41, surgery dated 10-14-88. An adhesiotomy was performed without a supporting diagnosis that adhesions were present.
- Patient 42, surgeries dated 10-10-89 and 12-12-89. Soft tissue procedures performed at the toe level were not medically or clinically indicated justified to treat heel pain.

- Patient 45, surgery dated 7-14-88. Osteotripsies and osteotomies performed for the stated purpose of treating HM 4-5 and/or hypertrophic metatarsal heads were too far removed from the area of the HM to be effective. Further, the patient did not have hypertrophic metatarsal heads.
- Patient 47, all surgeries. Surgeries at the toe level were performed without any diagnosis of a problem in the digits. Moreover, there was nothing documented in the history or physical examination to support these surgeries.
- Patient 50, all surgeries except plantar fasciotomy dated 9-18-89. Dr. Weiner's diagnoses of contracted tendons and osteoarthropathy were not adequately supported by the documented history and physical examination. Therefore, surgeries performed at the toe level based upon those diagnoses were performed without medical or clinical indication or justification. However, the plantar fasciotomy of the left heel on 9-18-89 was supported by the patient's chief complaint of heel pain and, possibly, by Dr. Weiner's musculoskeletal documentation of pes cavus.
- Patient 56, recommendation of arthrotomies and tenotomies on 2, 3, and 4 left. Dr. Weiner's planned surgery on the lesser digits, based on incomplete and inadequate examination for patient's chief complaint of ingrown toenail, constituted the recommendation of procedures without medical or clinical indication or justification.

Also see Finding of Fact #6, below.

- Patient 58, all surgeries. Surgery on the patient's digits was not supported by the medical record; no problem in the digits was mentioned in the history or physical examination. Dr. Goldenberg's assertion that "osteoarthropathy" alone is a sufficient diagnosis is rejected; the diagnosis must be more specific to the anatomic structure or area.

The evidence was insufficient to support a finding of the alleged conduct with regard to the following patients:

- Patient 3. Dr. Stewart testified that, based upon the incomplete records, he could not tell if the surgeries performed were indicated or not.
- Patient 9. Dr. Van Enoo testified that the procedure performed on 6-19-78 (or 6-14-87) that was described in the operation report, an ostectomy of the

fifth right proximal phalanx, was indicated by a diagnosis of exostosis. However, the procedure actually performed, based on the postoperative x-rays, was an osteotomy of the fifth right proximal phalanx. In defense, Dr. Weiner testified that he did not obtain sufficient relief with an osteotomy, and went on to perform a de-rotational osteotomy to reposition the toe. Dr. Weiner acknowledged that he failed to chart the de-rotational osteotomy. Dr. Goldenberg testified that a de-rotational osteotomy was performed, and that it was indicated. Dr. Kobak also testified that it would not be below the minimal standard of care to perform such an additional procedure. Nevertheless, Dr. Van Enoo testified that no de-rotational osteotomy occurred, evidenced by the fact that the toe remained in the same curled-under position as existed in the preoperative x-ray.

Although the State provided ample convincing evidence that the procedure actually performed did not match the procedure as it was described in the operation report, there was no testimony that the procedure that was actually performed was done “regardless of presenting complaint and without medical or clinical indication or justification.”

- Patient 16. Hammer toes in a rigid or semi-rigid stage cannot be successfully treated by soft-tissue procedures alone. However, the word “stiff,” as used on a consent form to refer to a hammer toe, is not sufficient evidence that a hammer toe was in a rigid or semi-rigid stage. Therefore, such usage does not, by itself, provide sufficient evidence that soft-tissue procedures were not medically or clinically indicated justified.
- Patient 23. Much of the testimony offered on both sides focused on the irrelevant issue of the advisability of performing multiple adjacent metatarsal osteotomies without internal fixation. The testimony on the relevant issue of whether the surgery performed was medically or clinically indicated or justified is so commingled with the irrelevant testimony that a finding of a violation cannot be made.
- Patient 26. Based on earlier testimony by Dr. Van Enoo that metatarsal osteotomies are appropriate treatment for calluses, it cannot be found that the multiple adjacent metatarsal osteotomies were not medically or clinically indicated or justified.

As in the case of Patient 23, a great deal of the testimony offered concerning Patient 26 focused on the advisability of performing multiple

adjacent metatarsal osteotomies without internal fixation. That issue is not relevant to the Board's allegations.

- Patient 27. As in the case of Patients 23 and 26, a great deal of the testimony offered concerning Patient 27 focused on the advisability of performing multiple adjacent metatarsal osteotomies without internal fixation. That issue is not relevant to the Board's allegations.
- Patient 34. The State offered testimony that Patient 34 had rigid or semi-rigid hammer toes based on the word "stiff" used in the consent form. The State further provided that soft-tissue procedures are inappropriate for rigid or semi-rigid hammer toes. As stated above concerning Patient 16, the word "stiff," as used on a consent form to refer to a hammer toe is not sufficient evidence that a hammer toe was in a rigid or semi-rigid stage. Therefore, such usage does not, by itself, provide sufficient evidence that soft-tissue procedures were not medically or clinically indicated justified.

Second, the State offered testimony that focused on inconsistencies between documents, and the standard of care concerning the preparation of operation reports. Nevertheless, the State did not offer testimony that the procedures were performed without medical or clinical indication or justification.

- Patient 38. Dr. Van Enoo testified that he found nothing problematic regarding this patient, other than an operation report that did not accurately describe the procedure performed.
- Patient 43. The State's criticism appeared to focus upon the surgical technique utilized and its results, rather than on whether the surgeries were medically or clinically indicated or justified.
- Patient 52. Dr. Kushner based his criticism of capsulotomies and tenotomies for pes cavus hammer toes on the use of the word "stiff" on the consent forms. As stated above concerning Patients 16 and 34, the word "stiff," as used on a consent form to refer to a hammer toe, is not sufficient evidence that a hammer toe was in a rigid or semi-rigid stage. Therefore, such usage does not, by itself, provide sufficient evidence that soft-tissue procedures were not medically or clinically indicated or justified.
- Patient 57. As in the case of Patient 23, a great deal of the testimony offered concerning Patient 57 focused on the advisability of performing multiple adjacent metatarsal osteotomies without internal fixation. That issue is not relevant to the Board's allegations.

In addition, no evidence or insufficient evidence was presented on this issue concerning Patients 6 through 8, 11, 13 through 15, 17, 19 through 22, 24, 25, 28 through 33, 36, 44, 46, 49, 53, 54, and 60 through 62.

6. The evidence is sufficient to support a finding that tendons of the great toe were cut inappropriately with regard to Patient 56. Incising the extensor tendons of both great toes in four places risked breaking the tendons. The situation was aggravated by the fact that those procedures were performed on a 14 year-old. Further, these procedures were performed based upon an inadequate and incomplete examination, and without documented indication. In spite of the fact that no preoperative x-rays are available for this patient, Dr. Weiner's diagnosis of hallux dorsiflexus is not supported by the record.

The evidence was not sufficient to support such a finding with regard to the following patients:

- Patient 3. Dr. Stewart based his opinion that tendon surgery on the great toe was inappropriate because he had assumed that the word "cut" on the consent form referred to a tenotomy rather than a tendon lengthening. However, the medical records indicated that a "plantar fasciotomy" was performed on the first and fifth right toes. A plantar fasciotomy is not a tenotomy.
- Patient 34. Dr. Kushner testified that z-plasty tendon lengthenings on a hallux hammer toe were inappropriate based on Dr. Weiner's use of the word "stiff" in the consent form. As previously discussed in Finding of Fact 5, above, the word "stiff," as used on a consent form, is not sufficient evidence that a hammer toe was in a rigid or semi-rigid stage. Therefore, such usage does not, by itself, provide sufficient evidence that soft-tissue procedures were not medically or clinically indicated or justified. Otherwise, Dr. Kushner testified that z-plasty tendon lengthenings on the hallux may be appropriate in a case of hallux hammer toe.

Moreover, no evidence or insufficient evidence was presented on this issue concerning Patients 5, 6, 7, 9, 10, 12, 13, 18, 19, 23, 29, 31, 33, 37, 40, 44, 45, 50, 52, 57, and 60.

7. The evidence is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely performed the procedures in [Finding of Fact #5] above in serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative

discomfort, and inconvenience to the patients as well as increased cost” with regard to Patients 3, 10, 18, 39, 40, and 62.

Dr. Weiner and his experts argued that these surgeries were performed in serial fashion in order for the patients to remain ambulatory. Nevertheless, the State provided credible and convincing evidence that these patients would have experienced little or no additional disability if the surgeries had been performed in fewer sittings. While the State’s experts acknowledged that there are valid medical indications for serial surgery in certain cases, such as patients with impaired healing ability, no such indications existed in these cases. In the aggregate, there were more days of pain and discomfort, more frequent visits to Dr. Weiner’s office to undergo anesthesia and surgery, and a longer overall period of convalescence than was medically necessary. Moreover, Dr. Weiner and his experts acknowledged that there is greater overall expense to the patient an/or third party payer when surgery is performed in serial fashion.

Dr. Weiner and his experts also argued that the choice to undergo surgery in serial fashion is a decision between the podiatrist and the patient. Nevertheless, it is the podiatrist’s responsibility to recommend treatment plans that are medically indicated and justified. The fact that a patient agreed to undergo a medically unindicated and unjustified treatment regimen does not absolve a podiatrist who presented such a regimen as a viable treatment option for the patient’s consideration. Nor does such an agreement absolve a podiatrist who actually performed a medically unindicated and unjustified treatment regimen.

Nevertheless, no evidence or insufficient evidence was presented to support this allegation with regard to patients 1, 2, 4 through 9, 11, 12, 14 through 17, 19 through 37, 41 through 47, 49, 50, 52 through 54, and 56 through 61.

8. Although there was a small amount of testimony concerning Dr. Weiner’s failure to chart reasons for physical therapy, the evidence is not sufficient to support a finding that, “[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro-stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies, and other related procedures[.]” and that “[t]hese modalities were not medically indicated for postoperative care following these procedures[.]”
- 9a. The evidence presented was insufficient to support a finding that, “[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely billed

for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:" (a) "[Dr. Weiner] billed for performing a plantar fasciotomy when [his] records indicate that surgical incisions were done only at the toe level of the foot where there is no plantar fascia * * *." As previously discussed in Finding of Fact 5, above, there is plantar fascia in the toe, albeit, for only a short distance distal to the metatarsophalangeal joint. Further, the CPT provides a code for plantar fasciotomy at the toe level.

- 9b. The evidence is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely billed for procedures other than those [he] indicated were performed on current forms, office notes or postoperative reports, or as shown in photographs taken at the time of surgery, in that:" * * * (b) "[Dr. Weiner] billed for arthrotomy MPJ when [his] records reflect the performance of at most a tenotomy or capsulotomy only" with regard to Patients 1, 4, 10, 18, 24, 29, 31, 34, 40.

In each of the referenced cases, Dr. Weiner billed under a CPT code number and/or description of "arthrotomy" when a corresponding operation report described either a capsulotomy or a tenotomy. An operation report for an arthrotomy needs to contain more information than a mere statement that the joint was incised.

Little or no evidence was presented concerning this issue with regard to Patients 1, 5, 6, 8, 12, 13, 15, 19, 22, 23, 30, 32, 35, 36, 39, 41, 43 through 45, 47, 50, 54, and 56 through 62. Therefore, no finding of a violation concerning these patients is found on this issue.

10. The evidence is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] frequently prescribed systemic steroids which were not medically indicated," with regard to the following patients:
- Patient 12. Dr. Stewart acknowledged that there may have been indications for the prescribing of systemic steroids for this patient, but none were listed in the medical records. For example, if Dr. Weiner had documented that Patient 12 suffered from acute bursitis rather than merely documenting "bursitis," the steroid prescribing may have been appropriate. Dr. Goldenberg unconvincingly testified that Dr. Weiner's prescribing of Prednisone and Medrol Dospak to Patient 12 was appropriate; he appeared to be uncertain as to the specific reason for such prescriptions.

- Patient 35. Dr. Kushner testified that there was no indication in the medical record for Dr. Weiner to prescribe Decadron to this patient. Dr. Goldenberg testified that such drugs can be used for post-surgical inflammation. However, no indication for such prescribing was documented in the medical record. Moreover, Dr. Kushner stated that Decadron has numerous side effects, and impairs wound healing. The patient was put at further risk by Dr. Weiner performing surgery after the patient's near-month-long course of Decadron therapy. Finally, Dr. Kushner testified that systemic steroids are not indicated for the treatment of post-surgical inflammation.

Dr. Weiner did not support his contention that systemic steroids are appropriate to treat post-surgical inflammation and do not impair wound healing. Beyond the bare assertion that such use is appropriate, Dr. Weiner and his experts presented as support a 1973 article concerning *locally administered* steroids and the effect of such treatment on healing in guinea pigs. The article does not support the Respondent's position that systemic steroids do not have a deleterious effect on post-surgical wound healing.

- Patient 41. Dr. Kushner testified that Dr. Weiner placed Patient 41 on a strong systemic steroid with no specific indications in the record. Although Dr. Goldenberg testified that steroids are appropriate drugs to treat generalized inflammation and pain in the legs and feet, such indications were not documented in the chart.
- Patient 50. Dr. Kushner expressed concern that the patient was placed on systemic steroids on four occasions in a seven-month period. Dr. Kushner indicated that such prescribing is "scary." Dr. Goldenberg stated that it would be appropriate to prescribe a steroid if the patient was not getting the desired level of relief from non-steroidal anti-inflammatory drugs. However, Dr. Goldenberg believed that Patient 50 needed the drugs simply because Dr. Weiner prescribed them. Dr. Goldenberg based his belief that Dr. Weiner prescribed the steroids to treat post-surgical inflammation on the dates of the surgical procedures and the dates of treatment. The medical record itself did not document the reason.

Nevertheless, little or no evidence was presented concerning this issue with regard to Patients 1, 7, 9, 10, 13, 14, 20, 25, 26, 28, 30, 33, 37, 39, 40, 42, 45

through 48, 53 through 55, 57, 58, 60, and 61. No finding of a violation is made concerning Dr. Weiner's treatment of these patients.

11. The evidence presented in this case is sufficient to support a finding that "[Dr. Weiner] performed elective podiatric surgery on known diabetics without first ascertaining whether their diabetes was controlled" with regard to Patients 14, 17, and 24. Furthermore, the evidence is sufficient to support a finding that "[Dr. Weiner's] record for Patient (17) indicates 'BS +2' for the day of surgery; her glucose test result, which was completed three days later, was 294 mg%."

The State provided testimony that diabetics are considered to be high-risk patients for surgical foot treatment. Poor circulation and high blood sugar can compromise their healing ability. It is important for the podiatrist to know the status of a diabetic surgical candidate. The podiatrist should check the patient's fasting blood sugar level prior to each elective surgery, or collaborate with the patient's family practitioner to ensure that the patient's diabetes is under control.

With regard to Patients 14, 17, and 24, the medical records show that blood samples were taken prior to their first-visit surgeries. Nevertheless, Dr. Weiner proceeded to perform elective surgery during Patient 14's and 24's first visits without any record of having first obtained a blood sugar level. With regard to Patient 17, the medical record reflects an in-office blood sugar level of "+2." Dr. Weiner testified that this meant that Patient 17's blood sugar was between 200 and 400. The blood test results eventually showed it to be 294, which Dr. Van Enoo described as too high for elective podiatric surgery.

Patient 14's blood sugar level was eventually found to be 154, which is within a safe range for surgery. Nevertheless, Dr. Van Enoo testified that it was a non-fasting level and, therefore, not sufficiently reliable. Patient 24's blood sugar was eventually found to be 223. This was too high for elective podiatric surgery, according to Dr. Van Enoo.

Although the blood test results for Patients 17 and 24 reflect fasting blood sugar levels, Dr. Weiner testified that all of his blood tests were non-fasting.

Dr. Weiner testified that he performed in-office blood sugar tests prior to surgery on each patient for whom blood was drawn for lab tests. However, concerning Patients 14 and 24, there is no evidence in the medical records that an in-office blood sugar test was performed prior to surgery. Dr. Weiner testified that if no results were recorded, then it meant that the results were

normal, because he only recorded abnormal findings. Nevertheless, there are some patient records, such as those for Patient 1, in which normal bleeding times, clotting times, and negative blood sugar levels are recorded. Therefore, this assertion lacks credibility.

Moreover, Dr. Weiner and his experts testified that the surgeries performed were necessary in order to prevent greater problems, such as infections. Dr. Weiner further testified that Patients 17 and 24 were in pain as a result of ingrown nails. Nevertheless, Dr. Goldenberg acknowledged that Patient 17's surgery could have been delayed for a week. Further, Dr. Van Enoo testified that, even if Patient 24 actually had an infection, which she did not, it would not have been necessary to remove the entire nail, as Dr. Weiner did.

Nevertheless, the State presented no evidence concerning this issue as it relates to Patient 31. Therefore, no finding is made concerning this issue with regard to Dr. Weiner's treatment of Patient 31.

12. The evidence is sufficient to support a finding that, "[d]uring the nine year period from 1984 through at least 1993, [Dr. Weiner] routinely failed to * * * prepare adequate clinical post operative evaluations of surgical wounds and patient status, and [he] failed to place those evaluations in patient records. During postoperative visits, [Dr. Weiner] either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as 'healing well' or 'patient happy'" with regard to Patients 1, 4, 9, 10, 19, and 51.

The State's experts testified that there needs to be some record of the podiatrist's observation of surgical patients' postoperative condition, sutures, drainage, and healing. Such notations were absent from these patients' medical records.

Dr. Weiner and his experts testified that, since Dr. Weiner only recorded negative findings, that it was not necessary to record any such observations as long as things were progressing well. Nevertheless, Dr. Weiner was inclined to note "heal well" on 11-16-87 and 1-8-88 with regard to Patient 4, and he noted "heal well" on numerous occasions with regard to Patient 9. Dr. Weiner noted "patient happy" several times with Patient 10. Further, "heal well" was noted on occasion in both Patient 19's and Patient 51's medical records. Therefore, Dr. Weiner's assertion that he only recorded negative findings lacks credibility.

The State presented little or no evidence, however, concerning this issue with regard to Patients 2, 3, 5 through 8, 11, 12, 14 through 18, 20 through 31, 33

through 50, and 52 through 62. Therefore, the evidence is insufficient to support a finding that a violation occurred with regard to those patients.

12a. The evidence is sufficient to support a finding that, “even when postoperative complications occurred, [Dr. Weiner] failed to document adequately the existence, development and treatment of such complications” with regard to Patients 9, 19, and 51.

- Patient 9 developed a problem with the circulation on her fifth right toe following surgery on 12-11-87. The medical record contains a notation of “↓ color” on 12-18-87, and a notation that Patient 9 was being referred to a vascular surgeon. Dr. Weiner saw Patient 9 again on 12-21-87, and there is no notation concerning any abnormal condition. Nevertheless, on 12-22-87, Patient 9 was seen by a vascular surgeon who found an “obvious gangrenous right toe with a large vesicle on the end.” A toe could not become gangrenous overnight. It was below the minimal standard of care to fail to note the existence of a developing gangrenous toe.
- Patient 19 developed an abscess on a fourth toe. Dr. Weiner took a sample from the abscess, and a laboratory determined that an infection was present. Dr. Weiner treated the infection, appropriately, with Keflex. Dr. Van Enoo faulted Dr. Weiner for failing to describe the infection, for not noting the results of lab tests in the progress notes, and for failing to make any subsequent references to any problems concerning the infection. Dr. Goldenberg testified that it was appropriate for Dr. Weiner to prescribe Keflex when he did, and to drain and take a culture of the abscess. Nevertheless, Dr. Goldenberg’s testimony does not rebut the State’s evidence that Dr. Weiner’s documentation of this episode was inadequate.
- Patient 51 developed an infection at a surgical site, the left hallux, that required treatment in an emergency room and subsequent hospitalization. Dr. Weiner had seen Patient 51 four days prior to this occurrence without noting any abnormal observations. The hospital eventually discovered that the bacteria that caused the infection was a variety that has a very rapid onset. However, the hospital also diagnosed osteomyelitis in the toe. Dr. Kushner testified that osteomyelitis would have taken fourteen days to develop. This meant that the surgical wound would not have looked good for some time. Nevertheless, Dr. Weiner did not document the appearance of the toe.

The State presented little evidence or no evidence concerning this issue with regard to Patients 38 and 43. Therefore, no finding is made with regard to those patients.

CONCLUSIONS OF LAW

1. As set forth in Findings of Fact 1, 3, 4a, 5 through 7, and 10 through 12a, above, the acts, conduct, and/or omissions of Dr. Weiner, individually and/or collectively, constitute “(a) departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established,” as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

The acts, conduct, and/or omissions as set forth in Finding of Fact 4b, above, concerned surgeries that were minimally invasive or non-invasive in nature. Therefore, no violation of Section 4731.22(B)(6), Ohio Revised Code, is found concerning Finding of Fact 4a with regard to those patients named in Finding of Fact 4b.

Dr. Weiner and his experts testified that medical recordkeeping is not a standard of care issue unless it affects patient care; it is, they asserted, a clerical issue. However, the State’s experts testified concerning reasons for keeping complete and accurate medical records, such as continuity of care for the patient, that would seem to place the issue of medical recordkeeping into the standard of care arena. Moreover, the potential for poor medical recordkeeping to harm a patient, even at some point in the remote future, would seem to be an issue as well. Furthermore, Section 4731.22(B)(6), Ohio Revised Code, states that this Board does not have to wait until patient harm is demonstrated before it acts. For these reasons, Dr. Weiner’s assertion that medical recordkeeping is not a standard of care issue was rejected.

2. As set forth in Finding of Fact 9b, above, the acts, conduct, and/or omissions of Dr. Weiner, individually and/or collectively, constitute “publishing a false, * * * deceptive, or misleading statement,” as that clause is used in Section 4731.22(B)(5), Ohio Revised Code

The use of incorrect or non-existent CPT codes constitutes a violation of the aforementioned statute. Further, Dr. Weiner’s records were frequently in conflict as to whether an arthrotomy was performed, a capsulotomy, or a tenotomy. Often, the operation report reflected a capsulotomy while the bill and the progress note reflected an arthrotomy. Nevertheless, although there

was evidence that arthrotomies are paid at a higher rate of reimbursement than capsulotomies or arthrotomies, the evidence presented was not sufficient to support a conclusion that Dr. Weiner intended to defraud his patients or their third-party payers.

3. The evidence presented is insufficient to support a conclusion that the acts, conduct, and/or omissions of Dr. Weiner, individually and/or collectively, constitute “(t)he obtaining of, or attempting to obtain, money or anything of value by fraudulent misrepresentations in the course of practice,” as that clause is used in Section 4731.22(B)(8), Ohio Revised Code, for the reasons discussed in Conclusion 2, above.
4. As set forth in Findings of Fact 5, 7, and 10, above, the above, the acts, conduct, and/or omissions of Dr. Weiner, individually and/or collectively, constitute “(t)he violation of any provision of a code of ethics of a national professional organization,” as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: American Podiatric Medical Association Code of Ethics, Section 1. Principles of Ethics, paragraphs B. and G., and Section 2. Rules of Ethics, paragraphs F., I. and J.

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The Findings of Fact and Conclusions of Law reached in this matter indicate that there are deficiencies in Dr. Weiner’s podiatric medical practice. Such deficiencies warrant serious intervention by the Board in order to protect the health-consuming public of Ohio.

PROPOSED ORDER

It is hereby ORDERED that:

1. The certificate of Alan Weiner, D.P.M., to practice podiatric medicine and surgery in the State of Ohio shall be **SUSPENDED** for an indefinite period of time, but not less than one year.
2. The State Medical Board shall not consider reinstatement of Dr. Weiner’s certificate to practice unless and until all of the following minimum requirements are met:
 - a. Dr. Weiner shall submit an application for reinstatement, accompanied by appropriate fees.

- b. Dr. Weiner shall take and successfully complete at least twelve (12) months of training in a post-graduate podiatric training program located in the United States or Canada, approved in advance by the Board.
 - i. If Dr. Weiner is accepted into a post-graduate training program that requires him to obtain a training certificate pursuant to Section 4731.291, Ohio Revised Code, this Order will not preclude Dr. Weiner from obtaining a training certificate, as long as he otherwise meets the requirements delineated in Section 4731.291(B), Ohio Revised Code.
 - ii. Dr. Weiner shall provide the Board with acceptable documentation verifying successful completion of the post-graduate training program.
 - c. Dr. Weiner shall submit to the Board and receive its approval for a plan of practice in Ohio and, unless and until otherwise determined by the Board, shall be limited to a supervised structured environment in which Dr. Weiner's activities will be directly supervised and overseen by another podiatric physician approved by the Board.
 - d. Dr. Weiner shall provide acceptable documentation of successful completion of a course on maintaining adequate and appropriate medical records, such course to be approved in advance by the Board or its designee.
 - e. In the event that Dr. Weiner has not been engaged in the active practice of podiatric medicine and surgery for a period in excess of two years prior to application for reinstatement, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of Dr. Weiner's fitness to resume practice.
3. Upon reinstatement and commencement of practice in Ohio, Dr. Weiner's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five (5) years:
- a. Dr. Weiner shall obey all federal, state and local laws, and all rules governing the practice of podiatric medicine in Ohio.
 - b. Dr. Weiner shall submit quarterly declarations under penalty of Board disciplinary action or criminal prosecution, stating whether there has

been compliance with all the conditions of probation. The first quarterly declaration must be received in the Board's offices on the first day of the third month following the month in which the probation becomes effective, provided that if the effective date is on or after the 16th day of the month, the first quarterly declaration must be received in the Board's offices on the first day of the fourth month following. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.

- c. Dr. Weiner shall appear in person for quarterly interviews before the full Board or its designated representative, or as otherwise directed 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. Although the Board will normally give Dr. Weiner written notification of scheduled appearances, it is Dr. Weiner's responsibility to know when personal appearances will occur. If he does not receive written notification from the Board by the end of the month in which the appearance should have occurred, Dr. Weiner shall immediately submit to the Board a written request to be notified of his next scheduled appearance.

- d. In the event that Dr. Weiner should leave Ohio for three (3) continuous months, or reside or practice outside the State, Dr. Weiner must notify the Board in writing of the dates of departure and return. Periods of time spent outside Ohio will not apply to the reduction of this probationary period, unless otherwise determined by motion of the Board in instances where the Board can be assured that probationary monitoring is otherwise being performed.
- e. Dr. Weiner shall, on a monthly basis, submit copies of his podiatric surgical schedule, complete with patient names and procedures performed, and copies of the history and physical, preoperative evaluation, operative report, and the discharge summary (if any) for each patient upon whom he performed surgery. Dr. Weiner shall certify that all such documents are complete and accurate. Documents submitted under this paragraph are "medical records" as defined in Section 149.43(A)(3), Ohio Revised Code, and shall not be subject to public disclosure. It is Dr. Weiner's responsibility to ensure that reports are timely submitted.

- f. Within thirty (30) days of reinstatement, Dr. Weiner shall submit for the Board's prior approval the name of a monitoring physician, who shall review Dr. Weiner's patient charts and shall submit a written report of such review to the Board on a quarterly basis. Such chart review may be done on a random basis, with the number of charts reviewed to be determined by the Board. It shall be Dr. Weiner's responsibility to ensure that the monitoring physician's quarterly reports are submitted to the Board on a timely basis. In the event that the approved monitoring physician becomes unable or unwilling to so serve, Dr. Weiner shall immediately so notify the Board in writing and shall make arrangements for another monitoring physician as soon as practicable.
 - g. In the event Dr. Weiner is found by the Secretary of the Board to have failed to comply with any provision of his probation, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period.
 - h. If any declaration or report required by this agreement is not received in the Board's offices on or before its due date, Dr. Weiner shall cease practicing beginning the day following receipt from the Board of notice of non-receipt—whether such notice is given in writing, by telephone, or by personal contact—until the declaration or report is received in the Board offices. Any practice during this time period shall be considered unlicensed practice in violation of Section 4731.41 of the Revised Code.
4. Within thirty days of the effective date of this Order, Dr. Weiner shall provide a copy of this Order to all employers or entities with which he is under contract to provide podiatric physician services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Similarly, Dr. Weiner shall provide a copy of this Order to all employers or entities with which he contracts to provide podiatric physician services, or applies for or receives training, and the chief of staff at each hospital where he applies for or obtains privileges or appointments.
5. Dr. Weiner agrees to provide a copy of this Order by certified mail, return receipt requested, at time of application to the proper licensing authority of any state in which he applies for licensure or reinstatement of licensure. Further, Dr. Weiner shall provide this Board with a copy of the return receipt as proof of notification within thirty (30) days of receiving that return receipt.
6. If Dr. Weiner violates this Order in any respect, the Board, after giving Dr. Weiner notice and the opportunity to be heard, may institute whatever

disciplinary action it deems appropriate, up to and including the permanent revocation of Dr. Weiner's certificate.

7. Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Weiner's certificate will be fully restored.

This Order shall become effective thirty days from the date of mailing of notification of approval by the State Medical Board of Ohio, except that Dr. Weiner shall immediately discontinue performing surgery. In addition, during the thirty (30) day interim, Dr. Weiner shall not undertake the care of any patient not already under his care.



R. Gregory Porter
Attorney Hearing Examiner

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REPORT AND RECOMMENDATION IN THE MATTER OF ALAN WEINER, D.P.M.

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

Dr. Stienecker advised that a request to address the Board has been timely filed on behalf of Dr. Weiner. Mr. Garson, Dr. Weiner's attorney, would be allotted approximately five minutes for his address.

Mr. Garson indicated that he had no objection to the absence of a court reporter, and understands that the Board's minutes are the official record of the Board.

Mr. Garson stated that, as the Board is well aware, this matter was tried over an extended period of time. It involves 62 selected patients treated by Dr. Weiner over a ten-year period of time from 1984 to 1993. Fifty of these patients were treated before 1990, and only 12 of the patients were treated in the last six years. Virtually all of the Examiner's findings against Dr. Weiner are recordkeeping related; even those charges that do not appear to be recordkeeping related really are. The Board need look no further than the Examiner's report for verification. For example, the findings regarding charge five, which deals with the propriety of performing certain procedures, contained the following language: "surgeries not indicated by the documented diagnosis," "the supporting diagnoses were not specific to the surgical sights," "diagnoses were not adequately supported by the documented history and physical examination." Charge six, which deals with surgery to the great toe, contained language to the effect that procedures were performed without documented indications. In connection with the steroid issue in charge ten, the findings included the following language: "Dr. Stewart acknowledged that there may have been indications for the prescribing of systemic steroids for this patient, but none were listed in the medical records." He read the following quote from the Findings, "however, no indication for such prescribing was documented in the medical records." Even in connection with the patients in charge eleven, which dealt with diabetic patients, the findings referred to recordkeeping issues.

Mr. Garson stated that this is not to say that there were not some criticisms regarding the actual procedures performed by Dr. Weiner. There were. However, in each case Dr. Weiner provided qualified expert testimony to support the manner in which he cared for and treated these patients. The fact that the Examiner chose to discount Dr. Weiner's experts' opinions, was clearly inappropriate. The evidence was overwhelming that Dr. Weiner performed full and complete physical examinations and took and considered extensive patient histories. Mr. Garson referred to his objections and quotes from four subpoenaed patients, the only individuals who testified as to the care and treatment rendered by Dr. Weiner. The only other testimony the Board had in this regard was that of Dr. Weiner.

Mr. Garson stated that, notwithstanding this compelling and completely unrefuted evidence, the Examiner inexplicably rejected Dr. Weiner's experts' testimony because they assumed what the evidence showed, that Dr. Weiner performed inadequate patient history and physical examination. As if this were not bad enough, the Examiner then went on to rely on the Board's experts, all of whom acknowledged, although some rather reluctantly, that their opinions were based on the assumption that Dr. Weiner had not performed an adequate patient history and physical examination, something directly contrary to the evidence adduced at the hearing.

The issue regarding arthrotomies and capsulotomies is one of semantics and recordkeeping. The difference between the two procedures is the intent of the surgeon, the depth of the incision, and the degree of release sought to be obtained. Only the surgeon knows what was actually performed, and Dr. Weiner so testified. The issue regarding plantar fasciotomies and whether they were appropriate and/or actually performed is also a question of semantics and recordkeeping. Although the Board's experts were quick to criticize these procedures and the rationale for performing them, they all reluctantly acknowledged that there actually is a CPT Code, "28008 fasciotomy foot and/or toe," which covers the type of procedures performed by Dr. Weiner. Additionally, the Academy of Ambulatory Foot Surgery, which was affiliated with the American Podiatric Association in the mid-1980's, when some of this treatment was being rendered, and is now affiliated with the American Academy of Pain Management, which is a recognized

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certifying board by the NCCA, recognizes the benefits of performing plantar fasciotomies at the area of the MPJ for the problems and conditions for which Dr. Weiner performed them.

Mr. Garson stated that, although he does not agree with most of what is contained in the Examiner's report, and his objections specifically address the areas in dispute, even the Examiner concluded "the evidence presented was not sufficient to support a conclusion that Dr. Weiner intended to defraud his patients or third party payers."

Mr. Garson stated that he cannot possibly comment on all the issues in the time allotted to him today; however, they were all fully addressed at the hearing. Based on all the evidence, at the worst, Dr. Weiner's recordkeeping practices, which go back 12 years, were the only area of his practice which was in any way deficient, and they have since been revised. In light of all the evidence and the circumstances surrounding this matter, he believes it would be inappropriate to suspend Dr. Weiner's license to practice.

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

Ms. Strait stated that this was not just a recordkeeping case. Granted, Dr. Weiner's records were very bad, and she thinks the Board would agree that there wasn't much in them. Ms. Strait stated that she finds it interesting that it is apparently now being conceded that the records weren't very good, since they spent a great deal of time in this rather lengthy hearing arguing about whether the records were acceptable.

Ms. Strait stated that there was a lot more here than just recordkeeping problems. What is here is a pattern of practice by a podiatrist who butchered people's feet, and for no good reason. The things that he did were not acceptable, were below minimal standards of care, and the State presented compelling expert testimony to that effect. Ms. Strait disagreed with the Hearing Examiner's statement that, although she presented evidence with regard to certain patients, she didn't present evidence with regard to other patients. The patient records were put into the record and there was expert testimony that all three experts had reviewed those records and found the same problems in those records that the experts had found with regard to the patients about whom the experts specifically testified.

Ms. Strait stated that the Board must concentrate today on the findings that the Hearing Examiner did make, because those findings more than paint the picture for the Board and more than support the permanent revocation of Dr. Weiner's license.

First of all, the Hearing Examiner did find that Dr. Weiner's records were seriously deficient, that he failed to record adequate patient histories, that he failed to record appropriate preoperative physical examinations, that he failed to do any kind of preoperative evaluation, and that, specifically with regard to the podiatric problems of these patients, he did not localize the symptoms or his physical findings to specific anatomic structures. To Dr. Weiner, an appropriate diagnosis was "pain," or "arthrotomy," or "hammer toes." Those are very, very vague. If one is going to a podiatrist, one expects the podiatrist to explain the specific problems. That never happened here. The reason why it didn't happen was because not doing so enabled Dr. Weiner to do pretty much anything he darn well pleased with regard to these patients. He did surgery, after surgery, after surgery, after surgery, after surgery on each of these patients. He did surgeries that the Hearing Examiner found, with regard to a number of these patients, were unnecessary. There was a great deal of expert testimony presented at this hearing by the State that these surgeries were unnecessary. Dr. Weiner cut on people's feet without any good reason and ended up creating a great deal of patient harm. There were patients who testified that their feet hurt worse after they saw Dr. Weiner than before. There were patients who underwent a number of unnecessary surgeries, as noted in the Findings of Fact. Any patient who undergoes an unnecessary surgery has suffered harm, per se.

Further, the Hearing Examiner found that Dr. Weiner had routinely performed those surgeries in a serial fashion, without medical or clinical justification, which resulted in increased healing time, which resulted in increased postoperative discomfort, which resulted in inconvenience to the patients, and which resulted, quite frankly, in higher reimbursement to Dr. Weiner. Again, this is a clear violation of a standard of care, resulting in patient harm. Both the unnecessary serial surgery and the unnecessary surgeries themselves were clear violations of the Code of Ethics of the American Podiatric Medical Association.

Ms. Strait continued that there was also a finding that Dr. Weiner published false, deceptive, misleading statements in his billing records with regard to his billing of arthrotomies. Ms. Strait stated that this is not just semantics. It's semantics if you don't want anybody to know what you're really doing, but the reality is that, in podiatric surgery, these mean very specific things. They don't mean what Tabor's Dictionary defines them to mean; they mean specific things, and Dr. Weiner continually denied that throughout this hearing.

Additionally the Hearing Examiner found, as was well supported by the evidence, that Dr. Weiner continually, routinely prescribed systemic steroids that were not indicated to these patients. References were made at hearing and in Dr. Weiner's objections that even the State's experts disagree on this, but they didn't cite anything. Ms. Strait stated that the State's experts didn't disagree on that issue. Prescribing systemic steroids for postoperative swelling and discomfort is not appropriate, is not medically indicated, and is below the standard of care.

The Hearing Examiner also found, and the evidence supported, that Dr. Weiner performed elective surgeries on diabetics without first ascertaining on whether their diabetes was controlled. This was improper. Two of these patients

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had very high blood sugars, which meant that their circulation was potentially impaired, which means that, until you get that under control, you don't start messing around with their extremities. You're putting the patient at risk of losing those extremities.

Ms. Strait summarized, stating that several things are clear about this case. Dr. Weiner engaged in a pattern of practice of falling below the standard of care. These were not isolated cases. What we have here through these 62 patient records is a picture of Dr. Weiner's overall practice. Furthermore, this is more than just a recordkeeping case. Recordkeeping certainly is important, as this Board has often said. And, as this Board has often said, the standard of care is that if it's not in the records, it didn't happen. This case goes beyond that. The worst things that Dr. Weiner did were his routine performance of unnecessary surgeries, his routine prescribing of systemic steroids, and his routine performance of the surgeries in a serial fashion. Ms. Strait stated that, as she pointed out earlier, there was documented patient harm.

Referring to the Hearing Examiner's Proposed Order, Ms. Strait stated that, as she said in her closing argument at the hearing and in her remarks today, the State urges this Board to permanently revoke Dr. Weiner's license. The Hearing Examiner, for reasons which she does not know, has recommended a year's suspension and retraining. Ms. Strait respectfully submitted that there was nothing in the hearing record that indicates that Dr. Weiner is even the slightest bit amenable to retraining. Indeed, there was a lengthy hearing at which Dr. Weiner and his experts contested every single point. He doesn't think he did anything wrong. This is not someone who can be retrained. The Hearing Examiner doesn't offer any explanation as to why he thought that, and there is no evidence in the record that would indicate that Dr. Weiner is amenable to that.

Dr. Stienecker asked Ms. Strait to conclude her statements.

Ms. Strait stated that she believes Dr. Weiner needs to be stopped, and it is within the power of this Board, and only within the power of this Board, to stop him from doing this to any more patients. She urged the Board to permanently revoke his license.

DR. GARG MOVED TO APPROVE AND CONFIRM MR. PORTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF ALAN WEINER, D.P.M. DR. BHATI SECONDED THE MOTION.

Dr. Stienecker asked whether there were any questions or comments concerning the proposed findings of fact, conclusions and order in the above matter.

Dr. Buchan stated that his statements today are based strictly on the record as it was received, and Board members received it a couple of months ago. When he received the boxes of information two months ago, it was clear at a quick glance that this was an extraordinary case. As soon as he pored through the different cases, it was clear that there were other words that could describe this particular case. The first that came to his mind was "shock," the second was "greed," and the third was "exploitation." It was clear, as he pored through the records, that time and time again, 240 pages and 62 patients worth, that there was indeed a failure to record adequate history essential to a diagnosis. Indeed, there was no documentation of preoperative exam and evaluation, time and time again. Records didn't reflect radiological findings. Pre-operative lab results were not evaluated in a timely fashion. Maybe the most bothersome issue, was that procedures were routinely performed regardless of presenting complaint, regardless of medical indication or justification.

The patterns were clear, and you don't have to look far to highlight those particular issues. Patient No. 2 had an initial office visit on March 10. The complaint was "feet hurt, heels hurt." There was no reference to how long there was previous care, the nature of the pain, simply that was the chief complaint. The record doesn't support what next happened. Blood work was done, but not dated until March 14, four days later. That initial visit when the patient came in to Dr. Weiner, Dr. Weiner performed plantar fasciotomy and flexor tenotomies. There was no rhyme or reason, no indication, no justification on the record. Time and time again this pattern is clear. Patient No. 56, a 14-year-old with an ingrown toenail, presented. That 14-year-old had that ingrown toenail fixed on that presenting date. In addition, tendons were cut, procedures were performed, again without adequate or complete exam. Again, there was no documented indication. Diabetic patients were seen and operated on the same day, initial visit, blood sugars of 296, absolutely grossly falling below standards of care.

Dr. Buchan continued that he felt the State's experts were well credentialed. He reviewed all of their CVs. These physicians were board certified, they were credible individuals, teachers, multi-year residency training people. Dr. Buchan stated that he thought that they presented their cases well. As he reviewed Dr. Weiner's experts, when they describe initial date surgery as being acceptable, immediately credibility was lost. They continued to show that pattern throughout their testimony.

Dr. Buchan stated that it is incumbent upon the Board to protect the citizens of this state. One of his regrets is that the Board did not summarily suspend Dr. Weiner's license immediately. He believes the evidence goes way beyond the Findings of Fact in this case. More could be written that the Board simply does not have time to do. He indicated that he is unclear how the Hearing Examiner arrived at his conclusions. Dr. Buchan stated that this case goes way beyond. There is enough, based upon the Hearing Examiner's Conclusions of Law, to revoke this license, in his opinion. The

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Board's charge is to protect the public, and this fellow should be stopped. He doesn't think one more patient should fall prey to this abuse.

Dr. Buchan asked for other Board members' opinions of this case, stating that after that he would propose a new Order.

Dr. Garg agreed with Dr. Buchan's statements and the Attorney General's summation stressing the unnecessary surgeries. He added that he may not have used terms like "butchering" or "cutting the person's feet," but they were unnecessary surgeries. There was no documented correlation of a clinical picture justifying these surgeries.

DR. GARG MOVED TO AMEND THE PROPOSED ORDER IN THE MATTER OF ALAN WEINER, D.P.M., BY SUBSTITUTING THE FOLLOWING:

It is hereby ORDERED that the certificate of Alan Weiner, D.P.M., to practice podiatric medicine and surgery in the State of Ohio shall be permanently REVOKED.

DR. STEINBERGH SECONDED THE MOTION.

Dr. Heidt stated that too many unscrupulous, unethical physicians prey upon a public with unneeded, over-priced, poorly performed surgery and medical practice. Many avoid the eyes of the Medical Board. This one did not. The investigation and hearing were exhaustive. The time involved by the Board in this case was very extensive. He complimented all for their performance and perseverance. Dr. Heidt stated that he was impressed with Dr. Van Enoo and Dr. Stewart, they seemed to be very erudite people.

Dr. Heidt stated that he went over all of the records, and he was appalled. He'd like to note just a few interesting points:

Case No. 27 - Sixty benign neoplasms for which Dr. Weiner stated he used 120 incisions. He stated that he did this all in 30 minutes.

On page 3791 of the hearing transcript, Dr. Weiner was talking about heel pain and doing arthrotomy and tendon lengthening on all toes.

The steroids were a real problem. The multiple lengths of time, for instance, in case 15, where he gave Prednisone for over a month and then Medrol for over another month. This deteriorates the adrenal glands and can be a real detriment to the patient, especially if there is surgery. Then he went ahead and did surgery on these patients.

Case No. 45 - Dr. Weiner did a lot of surgery under a quarter-inch incision. Dr. Heidt stated that he has been performing surgery on extremities for 40 years. Doing Z-plasties and arthrotomies through a quarter-inch incision is possible, but only with an arthroscope or a microscope. You can't do it by your eyes, you need special instruments. None were ever used in this case.

On this case, Dr. Weiner operated on July 7, did multiple procedures, and the bill was \$2,280. On July 14, seven days later, he did a few more procedures and the bill was \$5,640. The next week he did more multiple procedures on the toes and feet with a bill of \$2,425. The total for three weeks was \$10,345, with one quarter-inch incision that didn't make "diddlely do."

Case No. 57 - Rather minor procedures totaled \$2,095.

Dr. Heidt stated that the Board can't do anything about price. It's just a matter that these procedures themselves were inadequate, poorly done, and showed a tremendous lack of medical knowledge. Dr. Heidt spoke in support of the proposed amendment to permanently revoke Dr. Weiner's license, stating that he was 100% in favor of it. Dr. Heidt stated that the records were also abominable. He's never seen such poor records in all of his life.

Dr. Bhati stated that it looks like what the Board is seeing might be only the tip of the iceberg. The Board is looking at only 62 cases. What else goes on, the Board doesn't know. He also spoke in support of the proposed amendment.

Dr. Stienecker asked Dr. Garg when he wished the motion to become effective. Dr. Garg responded that he wants the revocation to be immediate. Dr. Steinbergh, as second, agreed.

Dr. Buchan asked that the Hearing Examiner's Conclusions of Law be amended to delete the final paragraph, following the five-stars, and that the Board let the minutes of this meeting with the comments by Board members speak for themselves, and proceed with the immediate revocation of Dr. Weiner's license.

Dr. Garg and Dr. Steinbergh agreed to accept Dr. Buchan's request as a friendly amendment. The motion was restated.

DR. GARG MOVED TO AMEND THE PROPOSED ORDER IN THE MATTER OF ALAN WEINER, D.P.M., BY SUBSTITUTING THE FOLLOWING:

December 4, 1996

It is hereby ORDERED that the certificate of Alan Weiner, D.P.M., to practice podiatric medicine and surgery in the State of Ohio shall be permanently REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the State Medical Board of Ohio.

DR. GARG FURTHER MOVED TO DELETE THE FINAL PARAGRAPH OF THE HEARING EXAMINER'S CONCLUSIONS OF LAW. DR. STEINBERGH SECONDED THE MOTION.

Dr. Steinbergh stated that she has thoroughly reviewed the Hearing Examiner's Report and Recommendation and the hearing record, and, as a primary care physician, she has a great sense of what was not available in the medical records. She is not a surgeon, but she does respect Dr. Buchan's and Dr. Heidt's assessments of the case and strongly supports the proposed amendment.

A vote was taken on Dr. Garg's motion to amend:

VOTE:	Mr. Albert	- abstain
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Gretter	- abstain
	Dr. Egner	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye
	Mr. Sinnott	- abstain
	Dr. Garg	- aye
	Dr. Steinbergh	- aye

The motion carried.

DR. BHATI MOVED TO APPROVE AND CONFIRM MR. PORTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER, AS AMENDED, IN THE MATTER OF ALAN WEINER, D.P.M. DR. HEIDT SECONDED THE MOTION. A vote was taken:

VOTE:	Mr. Albert	- abstain
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Gretter	- abstain
	Dr. Egner	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye
	Mr. Sinnott	- abstain
	Dr. Garg	- aye
	Dr. Steinbergh	- aye

The motion carried.



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 462-3934

September 14, 1994

Alan Weiner, D.P.M.
c/o CCA, Inc.
30559 Pinetree Road, Suite 214
Pepper Pike, OH 44124

Dear Doctor Weiner:

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

- (1) During the nine year period from 1984 through at least 1993, you routinely failed to perform and/or failed to adequately document the necessary preoperative examination and evaluation of your podiatric patients in that:
 - a) you failed to take and/or record an adequate patient history essential to a proper diagnosis (see, e.g., Patients (1) through (62), identified on the attached Patient Key (Key Confidential--to be withheld from public disclosure));
 - b) there was no attempts to localize symptoms to specific anatomic structure (see, e.g., Patients (1) through (62));
 - c) the palpation examination as documented was not specific to anatomic structures (see, e.g., Patients (1) through (62)).
- (2) During the nine year period from 1984 through at least 1993, you routinely ordered/performed preoperative testing not indicated by the presenting complaint, examination or evaluation, in that:
 - a) full series x-rays were taken bilaterally on new patients regardless of the presenting complaint (see, e.g., Patients (1) through (7), (9) through (13), (15) through (44), (47), (49), (50) and (52) through (62)).

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- b) blood work, usually including a complete blood count with differential and a series of 12 or 34 blood chemistry tests, was done on new patients regardless of health status, diagnoses or planned procedures (see, e.g., Patients (1) through (19), (21) through (25), (27) through (50), (52) through (55), (57), (58) and (60) through (62)).
- (3) During the nine year period from 1984 through at least 1993, even though you routinely took x-rays, your records fail to reflect clinical notes or other reports regarding any radiological findings (see, e.g., Patients (1) through (62)).
- (4) During the nine year period from 1984 through at least 1993, even though you routinely ordered/performed lab tests, you failed to evaluate preoperative laboratory test results prior to initiation of treatment, and undertook elective surgical procedures prior to receipt of those test results (see, e.g., Patients (1), (2), (4) through (10), (12) through (14), (16) through (19), (21) through (24), (26), (31), (33), (35), (36), (40), (41), (44), (45), (48), (52), (57) and (60)).
- (5) During the nine year period from 1984 through at least 1993, you routinely recommended and/or performed tenotomies (both flexor and extensor), plantar fasciotomies, capsulotomies, arthrotomies and other related procedures regardless of presenting complaint and without medical or clinical indication or justification (see, e.g., Patients (1) through (47), (49), (50), (52) through (54) and (56) through (62)).
- (6) Additionally, the procedures in paragraph (5) above were frequently being performed upon the great toes and tendons were cut inappropriately (see, e.g., Patients (3), (5) through (7), (9), (10), (12), (13), (18), (19), (23), (29), (31), (33), (34), (37), (40), (44), (45), (50), (52), (56), (57) and (60)).
- (7) Furthermore, during the nine year period from 1984 through at least 1993, you routinely performed the procedures in paragraph (5) above in a serial fashion, without medical or clinical justification, resulting in increased healing time, postoperative discomfort, and inconvenience to the patients as well as increased cost (See e.g. Patients (1) through (12), (14) through (37), (39) through (47), (49), (50), (52) through (54) and (56) through (62)).

- (8) During the nine year period from 1984 through at least 1993, you routinely prescribed, administered, and/or billed for extensive physical therapy, including whirlpool, ultrasound, electro stimulation and massage, after tenotomies, plantar fasciotomies, capsulotomies, arthrotomies and other related procedures. These modalities were not medically indicated for postoperative care following these procedures (see, e.g., Patients (1), (2), (4) through (6), (9) through (14), (17), (18), (23), (24), (27), (28), (30), (31), (33) through (38), (41) through (43), (45) through (47), (50), (52) through (54), (56) through (58), (60) and (61)).
- (9) During the nine year period from 1984 through at least 1993, you routinely billed for procedures other than those you indicated were performed on current forms, office notes or operative reports, or as shown in photographs taken at the time of surgery, in that:
 - a) you billed for performing a plantar fasciotomy when your records indicate that surgical incisions were done only at the toe level of the foot where there is no plantar fascia (see, e.g., Patients (5), (6), (10), (12), (15), (18), (22), (23), (29), (30), (31), (39), (40), (43), (44), (53), (58) through (60) and (62)).
 - b) you billed for arthrotomy MPJ when your records reflect the performance of at most a tenotomy or capsulotomy only (see, e.g., Patients (1), (4) through (6), (8), (10), (12), (13), (15), (18), (19), (22) through (24), (29) through (32), (34) through (36), (39) through (41), (43) through (45), (47), (50), (54) and (56) through (62)).
- (10) During the nine year period from 1984 through at least 1993 you frequently prescribed systemic steroids which were not medically indicated (see e.g., Patients (1), (7), (9), (10), (12) through (14), (20), (23), (25), (26), (28), (30), (33), (35), (37), (39) through (42), (45) through (48), (50), (53) through (55), (57), (58), (60) and (61)).
- (11) You performed elective podiatric surgery on known diabetics without first ascertaining whether their diabetes was controlled (see, e.g., Patients (14), (17), (24) and (31)). In fact, your record for Patient (17) indicates "BS +2" for the day of surgery; her glucose test result, which was completed three days later, was 294 mg%.

- (12) During the nine year period from 1984 through at least 1993 you routinely failed to observe, to evaluate and to prepare adequate clinical post operative evaluations of surgical wounds and patient status, and you failed to place those evaluations in patient records. During postoperative visits, you either documented nothing at all concerning the patient's postoperative course, or recorded generalized statements such as "healing well" or "patient happy" (see, e.g., Patients (1) through (12), (14) through (31) and (33) through (62)).
- (a) Further, even when postoperative complications occurred, you failed to document adequately the existence, development and treatment of such complications (see, e.g., Patients (9), (19), (38), (43) and (51)).

Your acts, conduct, and/or omissions as alleged in paragraphs (1) through (8) and (10) through (12) above, individually and/or collectively, constitute "(a) departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (9) above, individually and/or collectively, constitute "publishing a false, fraudulent, deceptive, or misleading statement," as that clause is used in Section 4731.22(B)(5), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (9) above, individually and/or collectively, constitute "(t)he obtaining of, or attempting to obtain money or anything of value by fraudulent misrepresentations in the course of practice," as that clause is used in Section 4731.22(B)(8), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraphs (2), (5), (7), (8), (9) and (10) above, individually and/or collectively, constitute "(t)he violation of any provision of a code of ethics of a national professional organization," as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: American Podiatric Medical Association Code of Ethics, Section 1. Principles of Ethics, paragraphs B., E. and G., and Section 2. Rules of Ethics, paragraphs F., I. and J.

September 14, 1994

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 (30) days of the time of mailing of this notice.

You are further advised that 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.

In the event that there is no request for such hearing received within thirty (30) 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, suspend, refuse to register or reinstate your certificate to practice podiatry or to reprimand or place you on probation.

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Carla S. O'Day, M.D.
Secretary

CSO:jmb

Enclosures:

CERTIFIED MAIL #P 348 885 415
RETURN RECEIPT REQUESTED

cc: Gary B. Garson, Esq.
CERTIFIED MAIL #P 348 885 487
RETURN RECEIPT REQUESTED

American Podiatric Medical Association Code of Ethics

1 SECTION 1. PRINCIPLES OF ETHICS

2 This Code does not purport to include the entire field of
3 podiatric medical ethics. The podiatrist is charged with
4 many duties and obligations in addition to those set forth
5 herein. Furthermore, every member of this Association shall
6 be bound by the Code of Ethics of the American Podiatric
7 Medical Association where not superseded herein.

8 The Principles of Ethics form the first part of this Code
9 of Ethics. They are aspirational and inspirational model
10 standards of exemplary professional conduct for all members
11 of the Association. These Principles should not be regarded
12 as limitations or restrictions, but as goals for which mem-
13 bers should constantly strive.

14 A. Ethics in Podiatric Medicine: Ethics are moral values.
15 An issue of ethics in podiatric medicine is resolved by the
16 determination that the best interest of the patient is served.

17 B. Providing Podiatric Medical Services: Podiatric med-
18 ical services must be provided with compassion, respect for
19 human dignity, honesty, and integrity.

20 C. Competence of the Podiatrist: A podiatrist must main-
21 tain competence by continued study. That competence
22 must be supplemented with the talents of other profession-
23 als and with consultation when indicated.

24 D. Communication with the Patient: Open communication
25 with the patient is essential. Patient confidences must be safe-
26 guarded within the constraints of the law.

27 E. Fees for Podiatric Medical Services: Fees for podiatric
28 medical services must not exploit patients or others who pay
29 for the services.

30 F. Identification of the Deficient Podiatrist: Those podi-
31 atrists who engage in fraud or deception should be identi-
32 fied to appropriate authorities.

33 G. Ethical Rules: It is the duty of a podiatrist to place the
34 patient's welfare and rights above all other considerations.
35 To this end one must subscribe to ethical rules which are for
36 the benefit of the patient.

37 SECTION 2. RULES OF ETHICS

38 The Rules of Ethics form the second part of this Code of ethics.
39 They are mandatory and direct specific standards of
40 minimally-acceptable professional conduct for all members of the
41 Association. The Rules of Ethics are enforceable for all members.

42 A. Competence: A podiatrist should perform only those
43 procedures in which the podiatrist is competent by virtue of

44 specific training or experience or is assisted by one who is.
45 A podiatrist must not misrepresent credentials, training,
46 experience, ability, or results.

47 B. Patient Consent: The performance of medical or surgical
48 procedures shall be preceded by appropriate informed consent.

49 C. Clinical Investigative Procedures: Use of clinical investi-
50 gative procedures shall be approved by adequate review
51 mechanisms. Appropriate informed consent for these proce-
52 dures must recognize their special nature and ramifications
53 A clinical investigative procedure is a method used to evalu-
54 ate the authenticity or efficacy of a procedure or technique.

55 D. Other Opinions and Referrals: Additional opinion(s)
56 shall be obtained if requested by the patient
57 Consultation(s) shall be obtained or referral(s) made when-
58 ever the welfare of the patient will be safeguarded or
59 advanced by having recourse to practitioners who have spe-
60 cial skills, knowledge, or experience.

61 E. The Impaired Podiatrist: A physically, mentally, or
62 emotionally impaired podiatrist should withdraw from
63 those aspects of practice affected by the impairment. If the
64 podiatrist does not withdraw, it is the duty of other podia-
65 trists who know of the impairment to take action to attempt
66 to prevent him from harming himself or others.

67 F. Preoperative Assessment: Surgery shall be recommend-
68 ed only after a careful consideration of the patient's phys-
69 ical, social, emotional, and occupational needs. The
70 preoperative work-up must document the indications for
71 surgery. Performance of unnecessary surgery is an extremely
72 serious ethical violation.

73 G. Postoperative Care: Medical and surgical aspects of
74 postoperative podiatric medical care, provided by a qual-
75 ified podiatrist until the patient has recovered, are an inte-
76 gral part of patient management. If necessary postoperative
77 care is not or will not be personally provided, the podiatrist
78 must make arrangements with the mutual approval of the
79 patient and of another qualified podiatrist or qualific-
80 practitioner of another branch of medicine who will pro-
81 vide postoperative care. Fees should reflect those arrange-
82 ments with advance disclosure to the patient. In making
83 those arrangements, the podiatrist must place the patient's
84 welfare above all other considerations.

85 H. Delegation of Podiatric Medical Services: When
86 podiatrist delegates aspects of medical care to auxilia-
87 ry health care personnel, the podiatrist must be assured that
88 such personnel are qualified and adequately supervised. In
89 delegating services, the podiatrist must place the patient's

CONSENT ORDER
BETWEEN
OHIO STATE MEDICAL BOARD
AND
ALAN WEINER, D.P.M.

Alan Weiner, licensed by the Ohio State Medical Board to practice podiatry and hereinafter referred to as licensee, being fully aware and cognizant of his rights and liabilities and having been notified of an adjudicatory hearing in accordance with Chapter 119 of the Ohio Revised Code, hereby admits to being convicted of a felony, to wit: giving false statements to a government agency in violation of Title 18, United States Code, Section 1001. It is understood and recognized that the Ohio State Medical Board, under the provisions of Section 4731.591, has within its discretion the power to revoke or suspend the license of the said licensee to practice podiatry in the State of Ohio for this felony conviction.

Wherefore, in consideration of all the circumstances underlying the aforementioned conviction, the State Medical Board hereby orders and decrees that said licensee, Alan Weiner, cease and desist from the practice of podiatry for (90) ninety days. Said period of suspension shall begin after a reasonable time has been allowed for said licensee to wind down and close his practice. Notwithstanding this the winding down period shall not be in excess of 30 days from the notice of the State Medical Board that this order has been approved. Additionally, the State Medical Board hereby orders that Alan Weiner be required to do the following:

1. Serve a one (1) year probationary period. Said probationary period shall begin to run immediately following the completion of the 90-day suspension of licensee's license to practice podiatry in the State of Ohio. Such probationary period shall include the 90-day suspension period.

2. That during the probationary period, Dr. Weiner report to the State Medical Board, in person, once every (90) ninety days at a regular meeting of the State Medical Board, and at that time present to the Board information concerning the recordkeeping practices in the office.

3. Lastly, that Dr. Weiner bring with him to the Board meeting a letter from a practicing podiatrist, within his area, attesting to the method and manner in which Dr. Weiner is handling his practice. Such letter should be signed by the doctor and notarized by a notary public.

Notwithstanding the conditions within this consent order, it is understood by and between the parties hereto that, if there is reason to believe that licensee has subsequently breached any condition of this agreement or continued to practice during the (90) ninety day suspension period, the license of the said licensee to practice podiatry in the State of Ohio shall be immediately suspended by the Ohio State Medical Board without further hearing, subject to the condition that upon request of licensee or his attorney within twenty days of the mailing of the notice of suspension, a hearing shall be held as soon as possible to determine if the license of the said licensee to practice podiatry shall be reinstated or restored to active status.

WHEREFORE, the parties hereto have subscribed their signatures this 53rd day of May, 1975.

Alan Weiner D.P.M.
ALAN WEINER, D.P.M.

Samuel Press M.D.
DR. SAMUEL PRESS, M.D.
Secretary of Ohio State Medical Board

Roland A. Gandy, M.D.
DR. ROLAND A. GANDY, M.D.
Hearing Officer

James M. Fisher
ATTORNEY FOR LICENSEE
(If Represented by Counsel)

Charles R. Jones
CHARLES R. JONES
Assistant Attorney General
Attorney for Ohio State Medical Board

JANUARY 9, 1975

JAMES A.
MORABITOJAMES A. MORABITO, D. C. (continued)

2. Due notice of the charge against him has been given to and received by James A. Morabito, D.C., and no request for a hearing has been made within the provisions of Chapter 119, Ohio Revised Code;
3. James A. Morabito, D.C. is guilty as charged under the provisions of Section 4731.22, Ohio Revised Code, as said charge is contained in the citation letter of September 24, 1974.

On the basis of the foregoing findings, the Ohio State Medical Board makes the following order:

Order: That the license of James A. Morabito, D.C., to practice chiropractic in the State of Ohio be and is hereby revoked."

Dr. Crawford moved to approve and confirm the Findings and Order. Dr. Press seconded the motion. Dr. Ruppertsberg called for a roll call vote:

Dr. Gandy	aye
Dr. Brumbaugh	aye
Dr. Lancione	aye
Dr. Press	aye
Dr. Crawford	aye
Dr. Timmins	aye
Dr. Cramblett	aye
Dr. Ruppertsberg	aye

The motion carried.

ALAN WEINERALAN WEINER, D.P.M.

Mr. Lee stated that a proposed citation letter had been prepared in this case. Dr. Lancione was appointed prosecuting member and Dr. Gandy was appointed hearing member. Dr. Gandy left the room. Mr. Lee read the citation letter as follows:

"Alan Weiner, D.P.M.
1661 Chagrin Boulevard
Shaker Heights, Ohio

Dear Dr. Weiner:

In accordance with Chapter 119, Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio intends to determine whether or not your license to practice chiropractic should be suspended or revoked under the provisions of Section 4731.59, Revised Code, for the following reasons:

1. On or about October 21, 1974 in the United States District for the Northern District of Ohio, Eastern Division, you were convicted of two counts of a felony, to wit, false statements to a government agency, in violation of Title 18, United States Code, Section 1001. Conviction of a felony is grounds for the revocation or suspension of a certificate to practice chiropractic, pursuant to Section 4731.591, Revised Code.

You are advised that you are entitled to a hearing in this matter if you request such a hearing within 30 days of the time of mailing of this notice.

You are further advised you are entitled to appear at such hearing, in person, or by your attorney, 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.

In the event there is no request for such hearing made within 30 days of the time of mailing of this notice, the State Medical Board may, upon consideration of this matter, revoke or suspend your license in your absence. A copy of Section 4731,591, Revised Code, is enclosed for your information."

Very truly yours,

Sanford Press, M. D.
Secretary

Dr. Crawford moved to formally cite Dr. Weiner. Dr. Cramblett seconded the motion. Dr. Ruppertsberg called for a roll call vote:

ALAN WEINER, D.P.M. (continued)

Dr. Cramblett	aye
Dr. Brumbaugh	aye
Dr. Lancione	aye
Dr. Press	aye
Dr. Crawford	aye
Dr. Timmins	aye
Dr. Roppersberg	aye

The motion carried.

CROZIER

WILLS OF RALPH W. CROZIER AND MARIE E. CROZIER

Mr. Lee stated that he had received a letter dated December 31, 1974 to the Ohio State Medical Board, which read as follows:

"Gentlemen:

Enclosed you will find a copy of a letter which I have this date mailed to the Dean of the Medical College of the University of Cincinnati which is self-explanatory. And for the uses and purposes set out in the establishment of these trusts I enclose copies of the wills creating the same."

Lester S. Reid, Attorney

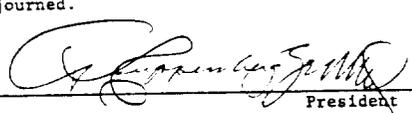
Mr. Lee stated that enclosed with this letter was a copy of a will which read, in pertinent part, as follows:

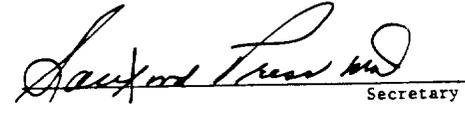
"Subject to the foregoing provisions the trust estate shall be treated as composed of three equal parts, and upon the death of my mate the trustee shall establish three scholarships" -- this is a will in the name of the husband -- "in the name of my father, J. M. Crozier, for students at the Medical College at the University of Cincinnati, at Cincinnati, Ohio. The principal of the trust estate shall be loaned to students attending the Medical College and the University of Cincinnati for furtherance of their medical education, and such students shall be selected and approved by the Ohio State Medical Board. The Ohio State Medical Board should consult with Dr. G. Howard Witt of Chillicothe, Ohio during his lifetime for his advice and assistance. Concerning the students to be selected to receive these loans, the loan shall be made by the trustee to the students so selected, approved under such terms and conditions as may be provided by the Ohio State Medical Board."

Ralph W. Crozier

Dr. Brumbaugh asked whether the Board members would be kept apprised of the proposed legislation changing the organization of the Medical Board. Mr. Lee stated that they would be. Dr. Roppersberg stated that a date would be set and Board members would be notified.

Thereupon, at 3:00 P.M. the January 9, 1975 meeting of the Ohio State Medical Board was adjourned.


 _____ President


 _____ Secretary

These are the true signatures of the secretary and president of the State Medical Board.



 Notary Public

BETTY L. ATHA
 NOTARY PUBLIC, FRANKLIN COUNTY, OHIO
 MY COMMISSION EXPIRES NOVEMBER 2, 1977