DOCKETED COMPLAINT NO. 1995-02

TEXAS STATE BOARD OF VETERINARY $ § TEXAS VETERINARY MEDICAL
MEDICAL EXAMINERS $ § LICENSE NO. 3286
vs. § 1994 RENEWAL CERTIFICATE
JON E. MARKS, D.V.M. § NUMBER 3162

COMPLAINT AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for Texas, on this day personally appeared Mike Carroll, who after being duly sworn, did depose and say:

On or about March 3, 1994, Mike Carroll, being an employee of the Texas State Board of Veterinary Medical Examiners, did in the course of such employment, make certain investigations into the professional conduct of one Jon E. Marks, D.V.M., 515 Spur 100, Kerrville, Texas, 78028, Veterinary License Number 3286, 1994 Renewal Certificate Number 3162, a practitioner of veterinary medicine in the State of Texas. As an employee of the Texas Board of Veterinary Medical Examiners, I, Mike Carroll, do hereby present the following complaint against Jon E. Marks, D. V. M.

I.

On or about the morning of December 2, 1993, Stacy and Tamra Hartman took their dog "Fancy" to Dr. Jon Marks for her to be spayed and to have her baby teeth removed.
II.

On or about December 2, 1993 at approximately 4:30 pm, "Fancy" was picked up by Tamra Hartman, who observed that the dog was in an "unresponsive and comatose" state.

III.

Dr. Marks told her that "Fancy's" anesthetized condition was improving and that he was sure she would continue to recover at home.

IV.

"Fancy" did not fully recover during the night. The next morning, the Hartmans took her to another veterinary clinic where she died while being treated at that clinic.

V.

By releasing Stacy and Tamra Hartman’s dog "Fancy" to Ms. Hartman in an anesthetized condition as described in paragraphs 2 and 3, Dr. Marks violated Rule of Professional Conduct 573.22 PROFESSIONAL STANDARD of HUMANE TREATMENT.

VI.

By violating Rule of Professional Conduct 573.22, Dr. Marks has violated Section 14(a)(5), Texas Veterinary Licensing Act, Article 8890, V.A.C.S.
VII.

The Texas State Board of Veterinary Medical Examiners has grounds to take disciplinary action against Dr. Mark's veterinary license under the Texas Veterinary Licensing Act, V.A.C.S., Article 8890, (formerly Article 7465a) Section 14, which states in part:

ARTICLE 8890, SECTION 14

(a) ... the Board may revoke or suspend a license, impose a civil penalty, place a person whose license has been suspended on probation, or reprimand a licensee ... if it finds that a licensee:

(5) has engaged in practices or conduct in connection with the practice of veterinary medicine which are violative of the standards of professional conduct as duly promulgated by the Board in accordance with law;

ARTICLE 8890, SECTION 14B

(a) If a person violates this act in a manner that constitutes grounds for disciplinary action by the Board, the Board may assess an administrative penalty against that person in addition to taking action under Section 14 or 14A of this Act.
The foregoing complaint is submitted to the Secretary of the Texas Board of Veterinary Medical Examiners on this the 6TH day of OCTOBER, 1994.

Further, Affiant sayeth not.

[Signature]
Mike Carroll, Affiant

SUBSCRIBED and SWORN TO before me by the said Mike Carroll this the 6TH day of October, 1994.

[Signature]
Joseph J. Rizzo, Notary Public in and for Texas

The foregoing Complaint is hereby filed and docketed with the Texas State Board of Veterinary Medical Examiners and styled Texas State Board of Veterinary Medical Examiners vs. Joe E. Marks, D.V.M. under Docketed Number 1995-02, this the 8th day of October, 1994

[Signature]
John A. Wood, DVM, Board Secretary

Texas State Board of Veterinary Medical Examiners
DOCKET NO. 578-94-2093

IN THE MATTER OF § BEFORE THE TEXAS
§ STATE BOARD OF VETERINARY
§ MEDICAL EXAMINERS

FINAL ORDER

During open meeting at Austin, Texas, the Texas State Board of Veterinary Medical Examiners (Board) finds that after proper notice was given the above-styled case was heard by an Administrative Law Judge who made and filed a proposal for decision containing proposed findings of fact and conclusions of law. The proposal for decision was properly served, and all parties were given an opportunity to file exceptions, briefs and replies as required by the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §2001.062 (Vernon Supp. 1995).

The Board, after review and due consideration of the proposal for decision, adopts the findings of fact and conclusions of law contained in the proposal for decision and incorporates those findings of fact and conclusions of law as if fully set out and separately stated herein. All proposed findings of fact not specifically adopted herein are denied.

Based on the findings of fact and conclusions of law, it is the opinion of the Board that License No. 3286 held by Jon E. Marks, should be suspended, but that the suspension should be stayed and Dr. Marks placed on probation for two years, during which he shall: (1) file quarterly reports to the Board; and (b) take and pass the Board’s jurisprudence examination.
IT IS, THEREFORE, THE ORDER of the Texas State Board of Veterinary Medical Examiners that License No. 3286 held by Jon E. Marks is hereby SUSPENDED. However, the suspension is stayed and Dr. Marks is placed on two years probation, effective the date this order is signed, during which he shall: (1) file quarterly reports to the Board; and (b) take and pass the Board’s jurisprudence examination.

Signed and entered by the presiding officer of the Texas State Board of Veterinary Medical Examiners at Austin, Texas, on this the 24th day of June, 1995.

TEXAS STATE BOARD OF
VETERINARY MEDICAL EXAMINERS

[Signature]
Alton F. Hopkins, Jr., D.V.M.
President
DOCKET NO. 578-94-2093

TEXAS STATE BOARD OF
VETERINARY MEDICAL EXAMINERS

VS.

JON E. MARKS, D.V.M.

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This is a disciplinary action brought by staff of the Texas State Board of Veterinary Medical Examiners (Board) against Jon E. Marks, D.V.M., for releasing an animal to its owners in an anesthetized condition in violation of the Board’s rule on the professional standard of humane treatment. The Administrative Law Judge agrees with staff’s contention and recommends that: Dr. Marks’ license be suspended for two years; the suspension be probated; and, during the probationary period, Dr. Marks be required to file quarterly reports to the Board and to take and pass the Board’s jurisprudence examination.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

On February 14, 1995, a public hearing was convened before Barbara C. Marquardt, Administrative Law Judge (ALJ), in the offices of the State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, Austin, Texas. Staff was represented by Frank Knapp, Assistant Attorney General. Dr. Marks appeared and represented himself at the hearing. After legal argument and the receipt of evidence, the hearing was recessed and reconvened on February 24, 1995 for receipt of proposed findings of fact and conclusions of law. It was closed on that date.

II. DISCUSSION

A. Facts. On the morning of December 2, 1993, Tamra Monroe Hartman took her six-month old, two and one-half pound toy poodle dog, "Fancy," to Dr. Jon Marks at the Freeman-Fritts Veterinary Clinic in Kerrville, Texas, where she was to be spayed and have her baby teeth removed. The surgery took place at about 11:30 a.m. At approximately 4:30 p.m. that same day Ms. Hartman picked up the dog, which was unresponsive and in a semi-conscious state. Ms. Hartman testified that the dog’s tongue was hanging out; her eyes were closed; and there was blood all over
her face. Dr. Marks told her "Fancy’s" anesthetized condition was improving, and that he was sure she would continue to recover at home. He gave her no special instructions about caring for the dog.

During the evening, the Hartmans saw no improvement in "Fancy’s" condition. They kept her warm, turned her over and put a few drops of water on her tongue during the night. However, her glazed eyes remained partially open; she often whimpered; and, although she shivered periodically, she seemed unable to move. "Fancy" did not recover during the night. The next day the Hartmans took her to the Kerrville Veterinary Clinic, which reported that she was hypothermic and comatose, with eye pupils non-responsive to light. "Fancy" did not respond to treatment, which included heating to raise body temperature and intravenous support with glucose, "bicarb," and corticosteroids. The dog died about four hours later. The autopsy report determined that "Fancy" died of acute bacterial pneumonia.

Dr. Marks resides about 20 miles away from his clinic. He performs an average of eight to ten surgeries per day, moving each days’ animals out of the clinic on the same day of treatment, because there will be no room to keep them the next day when a new group of patients arrives for treatment. Dr. Marks testified that "Fancy" was semi-conscious, not comatose, when he released her. Since she was exhibiting periodic head movements and intermittent paddling (leg movements while lying down), he felt she was gradually recovering from the anesthesia. He thought it would be in her best interest to be at home with her family, rather than alone in his clinic overnight. There are no veterinary emergency clinics in Kerrville. The closest clinics of that type are located in north San Antonio, approximately 50 miles from Kerrville.

Ronald Stried, D.V.M., testified for staff. He has been a licensed veterinarian for 24 years in Austin. Dr. Stried’s practice includes performing surgery on small animals. In a small dog there is only a small margin of error when giving it anesthesia, because it has no reserve capacity to absorb the anesthesia. He testified that a small animal recovering from surgery should not be released unless it is ambulatory and "pretty alert," or able to respond normally when spoken to. Dr. Stried testified that the head bobbing and paddling movements "Fancy" exhibited are a stage of anesthesia and not complete recovery. The fact that "Fancy" was non-responsive five hours after surgery was a major cause for concern. Unless an animal is ambulatory (e.g., expelling the anesthetic), it needs to be kept warm and given fluids or given other treatment. He believes "Fancy" should have been placed in a warm-up case and given an intravenous catheter with fluids and medication to combat shock and stimulate respiration. If faced with an animal in "Fancy’s" state, he would only have released it for the owners to take it to a veterinary emergency facility, where the dog would have been under observation. There are several veterinary emergency clinics in Austin.

According to an affidavit signed by David L. Cardwell, D.V.M., of the Kerrville Veterinary Clinic, he does not release an animal from the clinic after it has been anesthetized until: (1) the animal is alert and aware of its surroundings; and (2) the animal is ambulatory, although mild ataxia (inability to coordinate voluntary muscular movements) is permissible.
B. **Applicable Statute and Rules.** Under Section 14(a)(5) of the Veterinary Licensing Act, TEX. REV. CIV. STAT. ANN. art. 8890 (Vernon Supp. 1995), the Board may suspend a license, impose a civil penalty, and place a person on probation, if it finds the licensee engaged in conduct violative of the standards of professional conduct promulgated by the Board.

The Board’s rule on the professional standard of humane treatment, 22 TEX. ADMIN. CODE §573.22, provides as follows:

Veterinarians shall exercise the same degree of humane care, skill, and diligence in treating patients as are ordinarily used in the same or similar circumstances by average members of the veterinary medical profession in good standing in the locality or community in which they practice, or in similar communities.

C. **Analysis.** Dr. Marks argues because there are no emergency veterinary clinics in Kerrville, the standard of treatment in his locale is different from that in Austin, where there are several emergency veterinary clinics. Therefore, Dr. Stried’s testimony about the standard of care in "Fancy’s" case is not pertinent. Dr. Marks admits that Fancy had not fully recovered from the anesthesia when released, but he insists she was "better off" in the care of her owners than she would have been if left alone in a cage at his clinic.

Staff argues that Dr. Stried, who testified he has visited veterinary clinics in Kerrville, was qualified to testify about the standard of care in that locale. Furthermore, the affidavit of Dr. Cardwell, whose clinic is located in Kerrville, establishes that Dr. Marks violated the standard of care by releasing "Fancy" in a semi-conscious state.

The ALJ finds that staff proved its case. Both Drs. Stried and Cardwell agree that the dog should not have been released to its owners. Dr. Marks should either have provided some form of overnight care for the animal, or cautioned the owners to take the dog to an emergency veterinary clinic. Although this would have required a trip of approximately 50 miles, it was possible.

There is one issue that staff failed to address at the hearing or in its pleadings - the propriety of assessing the $500 administrative penalty staff seeks in this case. Dr. Marks was given general notice that staff might seek an administrative penalty in this matter pursuant to TEX. REV. CIV. STAT. ANN. art. 8890 §14B (Ex. 4). However, staff failed to submit proof it complied with the following statutory requirements in §14B, which are written in mandatory terms:

(d) A subcommittee of the Board shall recommend the amount of the penalty based on a standardized penalty schedule. . . The penalty schedule used by the subcommittee shall be developed by the Board, through rule . . .
(e) If the subcommittee of the Board determines that a violation has occurred, it may issue to the Board a report . . .

(f) Within 14 days after the date the report is issued to the Board, the executive director shall give written notice of the subcommittee’s report to the person who committed the violation . . . The notice must include a notice of all the alleged violations and a statement of the amount of the recommended penalty and must inform the person that the person has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both . . . (emphasis added)

D. Conclusion. Staff proved by a preponderance of the evidence that Dr. Marks’ care of Fancy was not in keeping with the standard of humane treatment of small animals following surgery in the Kerrville area. Thus, the Board may suspend Dr. Marks’ license for two years, but probate that sentence and require him to file quarterly reports to the Board and to take and pass the Board’s jurisprudence examination.

However, since staff failed to adduce proof that it complied with the above-referenced mandatory requirements for assessing administrative penalties, the ALJ finds the Board cannot assess the $500 administrative penalty staff seeks from Dr. Marks.

III.

PROPOSED FINDINGS OF FACT

1. Service of proper and timely notice of the intent to take disciplinary action, and of the hearing, was effected upon Jon E. Marks, D.V.M.

2. The Texas State Board of Veterinary Medical Examiners (Board) issued Dr. Marks Texas Veterinary Medical License No. 3286.

3. On the morning of December 2, 1993, Tamra Monroe Hartman took her six-month old, two and one-half pound toy poodle dog, "Fancy," to Dr. Jon Marks at the Freeman-Fritts Veterinary Clinic in Kerrville, Texas, where she was to be spayed and have her baby teeth removed.

   a. The surgery took place at about 11:30 a.m.

   b. During the next five hours, "Fancy" exhibited periodic head movements and intermittent paddling (leg movements while lying down).

   c. At approximately 4:30 p.m. that same day Ms. Hartman picked up the dog, which was unresponsive and in a semi-conscious state.

      (1) The dog’s tongue was hanging out; her eyes were closed; and there was blood all over her face.
(2) Dr. Marks told Ms. Hartman "Fancy's" anesthetized condition was improving, and he gave her no special instructions about caring for the dog.

(3) During the evening, the Hartmans kept "Fancy" warm, turned her over and put a few drops of water on her tongue during the night, but her condition did not improve. Her glazed eyes remained partially open; she often whimpered; and, although she shivered periodically, she seemed unable to move.

4. The next day, the Hartmans took Fancy to the Kerrville Veterinary Clinic, which reported that she was hypothermic and comatose, with eye pupils non-responsive to light.

a. "Fancy" did not respond to treatment by the Kerrville Veterinary Clinic, which included heating to raise body temperature and intravenous support with glucose, "bicarb," and corticosteroids.

b. The dog died about four hours later of acute bacterial pneumonia.

5. Dr. Marks resides about 20 miles away from his clinic. He performs an average of eight to ten surgeries per day, moving each days' animals out of the clinic on the same day of treatment, because there will be no room to keep them the next day when a new group of patients arrives for treatment.

6. There are no veterinary emergency clinics in Kerrville. The closest clinics of that type are located in north San Antonio, approximately 50 miles from Kerrville.

7. The humane standard of care for an average member of the veterinary medical profession in the Kerrville, Texas, area would be to not release a small animal recovering from surgery unless it is ambulatory and alert or responsive to normal communication.

a. The head bobbing and paddling movements referenced in Finding 3b are a stage of anesthesia and not complete recovery.

b. The fact that "Fancy" was non-responsive five hours after surgery was a major cause for concern.

c. "Fancy" should have been kept warm and given an intravenous catheter with fluids and medication to combat shock and stimulate respiration.

d. The dog should have been released only if the owners were going to take it to a veterinary emergency facility.
IV.

PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to TEX. REV. CIV. STAT. ANN. art. 8890 §14 (Vernon Supp. 1995).

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(5) (Vernon Supp. 1995).


4. Dr. Marks’ treatment of "Fancy" referenced in Finding 3 violated the humane standard of care referenced in Finding 7 and 22 TEX. ADMIN. CODE §573.22. Therefore, the Board may suspend Dr. Marks’ license for two years and place him on probation, pursuant to TEX. REV. CIV. STAT. ANN. art. 8890 §14(a)(5)(Vernon Supp. 1995).

5. Since staff failed to comply with the mandatory requirements in TEX. REV. CIV. STAT. ANN. art. 8890 §14B (Vernon Supp. 1995), the Board is not authorized to assess an administrative penalty against Dr. Marks.

6. Based on the foregoing, the Board should suspend Texas Veterinary Medical License No. 3286, which is held by Dr. Jon E. Marks, for two years and probate the suspension provided that Dr. Marks complies with the following terms: (a) he must file quarterly reports to the Board; and (b) he must take and pass the Board's jurisprudence examination.

SIGNED this 16 day of May, 1995.

Barbara C. Marquardt
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS